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*United States
Federal Statutes*

FEDERAL STATUTES ANNOTATED

SECOND EDITION

Containing all the Laws of the United States of a
General, Permanent and Public Nature in force
on the first day of January, 1916

COMPILED UNDER THE EDITORIAL SUPERVISION OF
WILLIAM M. McKINNEY

VOLUME III

DAIRY PRODUCTS TO INTERNAL REVENUE

EDWARD THOMPSON COMPANY
NORTHPORT, LONG ISLAND, NEW YORK
1917

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TABLE OF TITLES AND CROSS-REFERENCES

CONTAINED IN VOLUME III

[Italics indicate cross-references]

	PAGE
<i>Dairy Products</i>	1
<i>Dam Act</i>	1
<i>Dawes Act</i>	1
<i>Dead Letter Office</i>	1
<i>Debts to or by United States</i>	1
<i>Decimal System</i>	1
<i>Declaration of Independence</i>	1
<i>Decoration Day</i>	2
<i>Delegates in Congress</i>	2
<i>Denatured Alcohol</i>	2
<i>Department of Agriculture Act</i>	2
<i>Department of Labor Act</i>	2
<i>Departments</i>	2
<i>Dependent Pension Act</i>	2
<i>Deportation</i>	2
<i>Depositions</i>	2
<i>Derelicts</i>	3
<i>Deserters</i>	3
<i>Desertion Act</i>	3
<i>Desert Lands</i>	3
<i>Design Patents</i>	3
<i>Dick Act</i>	3
<i>Dingley Act</i>	3
<i>DIPLOMATIC AND CONSULAR OFFICERS</i>	4
<i>Disability Pension Act</i>	74
<i>DISCRIMINATING LAWS AND DUTIES</i>	75
<i>Discrimination</i>	82
<i>Disorderly House</i>	83
<i>Distilleries and Distilled Spirits</i>	83
<i>District Attorneys</i>	83
<i>District Courts</i>	83
<i>District of Columbia</i>	83
<i>Districts</i>	83
<i>Divorce</i>	83
<i>Dockery Act</i>	83
<i>Documents</i>	84
<i>Dower</i>	84
<i>Drawbacks and Refunds</i>	84
<i>Drugs</i>	84
<i>Drugs Act</i>	84
<i>Duties</i>	84
<i>Edmunds Act</i>	84
<i>Edmunds-Tucker Act</i>	84
<i>EDUCATION</i>	85
<i>Eight-Hour Law</i>	117
<i>ELECTIONS</i>	118

	PAGE
<i>Elective Franchise</i>	127
<i>Elkins Act</i>	127
<i>Embezzlement</i>	127
<i>Emigration</i>	127
<i>Employers' Liability Acts</i>	127
<i>Enlarged Homestead Act</i>	128
<i>Entry and Clearance of Vessels</i>	128
<i>Entry of Merchandise</i>	128
<i>Epidemic Diseases Act</i>	128
<i>Equity</i>	128
<i>Erdman Act</i>	128
<i>Error, Writ of</i>	128
<i>Escape</i>	128
<i>Esch Bill</i>	128
ESTIMATES, APPROPRIATIONS AND REPORTS	129
<i>Evarts Act (Circuit Court of Appeals Act)</i>	158
EVIDENCE	159
<i>Excise Tax</i>	228
EXECUTION	229
<i>Executive</i>	243
EXECUTIVE DEPARTMENTS	244
<i>Executive Mansion</i>	263
<i>Executors and Administrators</i>	263
<i>Exemptions</i>	264
<i>Expatriation</i>	264
<i>Expatriation Act</i>	264
<i>Expediting Acts</i>	264
<i>Experiment Stations</i>	264
<i>Exports</i>	264
<i>Extension Work</i>	264
<i>Extortion</i>	264
EXTRADITION	265
<i>False Accounts and Reports</i>	315
<i>False Personation</i>	315
FALSE STAMPING	316
<i>Federal Reserve Act</i>	320
<i>Federal Reserve Banks</i>	320
<i>Federal Trade Commission Act</i>	320
<i>Fencing Act</i>	321
<i>Formented Liquors</i>	321
<i>Filled Cheese Act</i>	321
<i>Films</i>	321
<i>Fine Arts Commission Act</i>	321
FINES, PENALTIES AND FORFEITURES	322
FISH AND FISHERIES	342
FLAGS	349
FOOD AND DRUGS	352
<i>Foraker Act</i>	407
<i>Force Act</i>	407
<i>Foreign Coins</i>	407
<i>Foreign Relations</i>	407
<i>Forest Reservations</i>	408
<i>Forest Transfer Act</i>	408
<i>Forfeiture Act (Railroad Land Grants)</i>	408
<i>Forgery</i>	408

TABLE OF TITLES AND CROSS-REFERENCES

v

	PAGE
<i>Fraud</i>	408
<i>Free Coinage of Gold Act</i>	408
<i>FREEDMEN</i>	409
<i>Free Homestead Act</i>	412
<i>French Spoliation Claims Act</i>	412
<i>GAME ANIMALS AND BIRDS</i>	412
<i>GARNISHMENT</i>	417
<i>Geary Act</i>	417
<i>General Allotment Act</i>	417
<i>General Land Office</i>	418
<i>Geodetic Survey</i>	418
<i>GEOLOGICAL SURVEY</i>	418
<i>Glacier National Park Act</i>	422
<i>Government Employers' Liability Act</i>	422
<i>Government Hospital for the Insane</i>	422
<i>Government Printing Office</i>	422
<i>GUANO ISLANDS</i>	423
<i>HABEAS CORPUS</i>	427
<i>Hall-Mark Act</i>	482
<i>Harbors</i>	482
<i>Harrison Act (Opium)</i>	482
<i>Harter Act</i>	482
<i>Hatch Act</i>	482
<i>HAWAIIAN ISLANDS</i>	483
<i>HEALTH AND QUARANTINE</i>	532
<i>Hepburn Act</i>	558
<i>Heyburn Act</i>	558
<i>HOLIDAYS</i>	559
<i>Homesteads</i>	560
<i>Homicide</i>	560
<i>Horticultural Board</i>	560
<i>HOSPITALS AND ASYLUMS</i>	561
<i>Hours of Service Acts</i>	624
<i>House of Representatives</i>	624
<i>Howard University</i>	624
<i>Hydraulic Mining</i>	624
<i>Hydrographic Office</i>	624
<i>IMMIGRATION</i>	625
<i>Immunity Acts</i>	705
<i>IMPORTS AND EXPORTS</i>	705
<i>Impure Tea Importation Act</i>	731
<i>Incest</i>	731
<i>Income Tax</i>	731
<i>Indian Depredations Acts</i>	731
<i>INDIANS</i>	732
<i>Indictments and Informations</i>	924
<i>INDUSTRIAL PEACE FOUNDATION</i>	925
<i>Industrial Relations</i>	927
<i>Infringement</i>	927
<i>Insane Persons</i>	927
<i>Insecticide Act</i>	928
<i>Insolvency</i>	928
<i>Inspection</i>	928
<i>INSURRECTION</i>	928
<i>INTERIOR DEPARTMENT</i>	944
<i>INTERNAL REVENUE (part)</i>	954

FEDERAL STATUTES ANNOTATED

SECOND EDITION

VOLUME III

DAIRY PRODUCTS

See **ANIMALS; FOOD AND DRUGS; INTERNAL REVENUE**

DAM ACT

See **RIVERS, HARBORS AND CANALS**

DAWES ACT

See **INDIANS**

DEAD LETTER OFFICE

See **POSTAL SERVICE**

DEBTS TO OR BY UNITED STATES

See **CLAIMS; EXECUTIONS; LEGAL TENDER; MONEYS PAYABLE TO OR BY
OR RECEIVABLE BY UNITED STATES**

DECIMAL SYSTEM

See **COINAGE, MINTS AND ASSAY OFFICES**

DECLARATION OF INDEPENDENCE

The Declaration of Independence is given at the close of this work

DECORATION DAY

See **HOLIDAYS**

DELEGATES IN CONGRESS

See **CONGRESS**

DENATURED ALCOHOL

See **INTERNAL REVENUE**

DEPARTMENT OF AGRICULTURE ACT

See **AGRICULTURE**

DEPARTMENT OF LABOR ACT

See **LABOR DEPARTMENT**

DEPARTMENTS

See **EXECUTIVE DEPARTMENTS** and the various departmental titles

DEPENDENT PENSION ACT

See **PENSIONS**

DEPORTATION

See **CHINESE EXCLUSION; IMMIGRATION**

DEPOSITIONS

See EVIDENCE, and consult the General Index

DERELICTS

See WRECKS AND WRECKERS

DESERTERS

See NAVY; PENSIONS; SEAMEN; WAR DEPARTMENT AND MILITARY ESTABLISHMENT; and consult the General Index

DESERTION ACT

See NAVY

DESERT LANDS

See PUBLIC LANDS

DESIGN PATENTS

See PATENTS

DICK ACT

See MILITIA

DINGLEY ACT

See CUSTOMS DUTIES

DIPLOMATIC AND CONSULAR OFFICERS

- I. DIPLOMATIC OFFICERS, 9.
 - II. CONSULAR OFFICERS, 18.
 - III. PROVISIONS COMMON TO DIPLOMATIC AND CONSULAR OFFICERS, 45.
 - IV. FOREIGN RELATIONS, 55.
-

I. Diplomatic Officers, 9.

- R. S. 1674. *Definition of Official Designations Employed in This Title*, 9.
- R. S. 1675. *Salaries*, 10.
- R. S. 1676. *Agent and Consul-general at Cairo*, 12.
- R. S. 1677. *Secretary of Legation to Turkey*, 12.
- R. S. 1678. *Interpreter of Legation to Turkey*, 13.
- R. S. 1679. *Interpreter of Legation to Japan*, 13.
- R. S. 1682. *Minister to Guatemala, Costa Rica, Honduras, Salvador, and Nicaragua*, 13.
- R. S. 1683. *Representatives to Hayti, Liberia, etc.*, 14.
- R. S. 1684. *Condition of Compensation of Chargé d'Affaires or Secretary*, 14.
- R. S. 1685. *Compensation of Secretary of Legation or Vice-consul Temporarily Occupying Higher Office*, 14.
- R. S. 1686. *Compensation of Persons Filling Two Offices*, 15.
- R. S. 1687. *Fees at Legation to Be Accounted For*, 15.
- R. S. 1688. *Uniforms and Official Costumes*, 16.
- Res. of Jan. 8, 1874, No. 1*, 16.
 - Agent and Counsel-general at Cairo, Title of*, 16.
- Act of June 11, 1874, ch. 275*, 16.
 - Sec. 1. Allowance to Secretaries of Legation and Messenger at Paris*, 16.
- Act of March 3, 1875, ch. 130*, 16.
 - Sec. 1. Buildings at Peking for Legation*, 16.
- Act of Aug. 5, 1882, ch. 399*, 16.
 - Chargé d'Affaires and Consul-general at Teheran*, 16.
- Act of March 2, 1909, ch. 235*, 17.
 - Sec. 1. Creation of New Ambassadorships*, 17.
- Act of Sept. 4, 1913, ch. 10*, 17.
 - Ambassador to Spain*, 17.
- Act of Dec. 6, 1913, ch. 1*, 17.
 - Sec. 1. Minister to Paraguay*, 17.
 - 2. Minister to Uruguay*, 17.
- Act of May 16, 1914, ch. 91*, 18.
 - Ambassador to Argentina*, 18.
- Act of May 16, 1914, ch. 92*, 18.
 - Ambassador to Chile*, 18.

Act of Feb. 5, 1915, ch. 23, 18.

Sec. 2. Secretaries — Classification and Salaries, 18.

Act of March 4, 1915, ch. 145, 18.

Sec. 1. Citizenship of Clerks at Embassies and Legations, 19.

II. Consular Officers, 18.

R. S. 1689. *Application of General Provision in This Title, 18.*

Act of April 5, 1906, ch. 1366 ("Lodge Act" or the "Consular Reorganization Act"), 19.

Sec. 1. Consular Service Reorganized, 19.

2. Classification of Consuls-general and Consuls — Salaries, 19.

3. Vice and Deputy Officers — Temporary Service of Consuls — Time Limit — Commercial Agencies Abolished, 21.

4. Inspectors of Consulates — Appointment of Consuls-general at Large Authorized — Salaries — Duties — Powers — Bonds, 21.

5. Citizenship of Consular Clerks, 22.

7. Notarial Acts Required — Fees, 22.

8. Fees, Official and Unofficial, to Be Paid into the Treasury — Consular Agents Allowed Fees — Maximum Amount — Additional Compensation of Vice-consular Officers, 22.

9. Invoice Fees to Be Prescribed by the President, 23.

10. Consulates to Be Supplied with Documentary Stamps — to Be Affixed to Documents Requiring Notarial, etc., Acts — Invalidity of Unstamped Documents, 23.

11. Effect, 23.

12. Repeal, 23.

R. S. 1691. *Consuls, etc., Not to Hold Office at Different Consulates, 23.*

R. S. 1693. *Salary of Interpreter at Bangkok, 24.*

R. S. 1694. *Consul at Trinidad de Cuba, 24.*

R. S. 1695. *Extent of Consulates, and Appointment of Vice-consular Officers, 24.*

R. S. 1696. *Expenses of Vice-consulates and Consular Agencies, 25.*

R. S. 1697. *Bonds of Consular Officers to Be Furnished and Deposited with Secretary of the Treasury, 25.*

R. S. 1698. *Bonds of Vice-consuls, 26.*

R. S. 1699. *Consular Officers Not to Transact Business, 27.*

R. S. 1700. *Extension of Prohibition upon Transacting Business, 28.*

R. S. 1701. *Penalty for Illegally Transacting Business, 28.*

R. S. 1704. *Appointment of Consular Clerks, 29.*

R. S. 1705. *Examination and Removal of Consular Clerks, 29.*

R. S. 1706. *Actual Expenses May Be Allowed to Consuls-general, etc., Who Are Not Allowed to Trade, 30.*

R. S. 1707. *Protests, 30.*

R. S. 1708. *Lists and Returns of Seamen, Vessels, etc., 30.*

R. S. 1709. *Estates of Decedents — Auditor for State or Other Department as Conservator, 30.*

R. S. 1710. *Notification of Death, 31.*

R. S. 1711. *Decedent's Directions to Be Followed, 31.*

R. S. 1712. *Commercial and Agricultural Information to Be Procured, 32.*

R. S. 1713. *Prices Current, 32.*

- R. S. 1714. *Construction of Powers*, 38.
- R. S. 1715. *Certifying Invoices*, 33.
- R. S. 1716. *Exacting Excessive Fees for Verifying Invoices*, 33.
- R. S. 1717. *Certificate for Goods from Countries Adjacent to United States*, 34.
- R. S. 1718. *Fees Allowed for Official Service — Retention of Vessel's Papers*, 34.
- R. S. 1719. *No Profit from Discharged Seamen*, 34.
- R. S. 1722. *Tonnage Fees in Canada*, 35.
- R. S. 1723. *Exacting Excessive Fees*, 35.
- R. S. 1724. *Penalty for Omission to Collect Fees*, 36.
- R. S. 1725. *Returns of Fees*, 36.
- R. S. 1726. *Receipts for Fees*, 36.
- R. S. 1727. *Registering Receipts for Fees*, 37.
- R. S. 1728. *Verification of Account of Fees*, 37.
- R. S. 1731. *Rates of Fees to Be Posted Up*, 37.
- R. S. 1732. *Excess of Fees above \$2,500*, 38.
- R. S. 1733. *Excess of Fees above \$1,000*, 38.
- R. S. 1734. *Embezzlement*, 38.
- R. S. 1735. *Neglect of Duty, etc.*, 39.
- R. S. 1736. *Neglect of Duty to Seamen; Corrupt Conduct*, 39.
- R. S. 1737. *False Certificate of Property*, 40.
- R. S. 1738. *When Consular Officers May Perform Diplomatic Functions*, 40.
- R. S. 1739. *Compensation of Consular Officer Performing Diplomatic Functions*, 40.

- Act of June 11, 1874, ch. 275*, 40.
 - Sec. 3. Interpreters to Consulates in China and Japan*, 40.
 - 6. Vice-consuls Acting as Consuls to Receive Compensation Though Aliens*, 41.

- Act of Jan. 27, 1879, ch. 28*, 41.
 - Sec. 1. Statements as to Exports, Imports, Rates of Wages, etc.*, 41.

- Act of June 26, 1884, ch. 121*, 42.
 - Sec. 12. Consular Fees for Services to American Vessels and Seamen Not Permitted*, 42.

- Act of Feb. 25, 1885, ch. 150*, 42.
 - Sec. 1. Consuls, etc., Not to Receive Salary of Secretary or Interpreter*, 42.

- Act of July 31, 1894, ch. 174*, 42.
 - Sec. 5. Returns to Be Prescribed by Comptroller of Treasury*, 42.

- Act of June 30, 1902, ch. 1331*, 42.
 - Sec. 1. Consular Officers Accepting Positions of Trust — Bond, etc.*, 42.
 - 2. Breach of Trust — Embezzlement — Penalty*, 43.

- Act of March 12, 1904, ch. 543*, 43.
 - Sec. 1. Payment to Consular Officers Not Citizens*, 43.

- Act of Feb. 22, 1907, ch. 1184*, 44.
 - Sec. 1. Consular Clerks — Increased Compensation — No Reduction of Salary*, 44.

- Act of May 21, 1908, ch. 183*, 44.
 - Sec. 1. Consular Assistants — Number*, 44.

Act of March 2, 1909, ch. 235, 44.

Sec. 1. Consular Assistants — Number, 44.

Act of March 4, 1915, ch. 145, 44.

Sec. 1. Judicial Authority of Vice-consul at Shanghai, China, 44.

Act of Feb. 5, 1915, ch. 23, 45.

Sec. 2. Salaries of Consuls-general and Consuls, 45.

6. Vice-consul-general, Deputy Consul-general, Deputy Consul — Offices Abolished, 45.

III. Provisions Common to Diplomatic and Consular Officers, 45.

R. S. 1740. Term During Which Salary Is Payable, 45.

R. S. 1741. Absence, 46.

R. S. 1742. Salary in Case of Absence, 47.

R. S. 1743. Extra Compensation Prohibited, 47.

R. S. 1744. Compensation to Citizens Only, 47.

R. S. 1745. President to Regulate Fees, 48.

R. S. 1746. Fees to Be Collected in Coin, 49.

R. S. 1747. Officers to Account for Fees, 49.

R. S. 1748. Expenses of Legations, Consulates, etc., 49.

R. S. 1749. Allowance to Widow of Consular Officer Deceased in a Foreign Country, 49.

R. S. 1750. Depositions — Penalty for Perjury — Evidence of Taking the Oath — Penalty for Forging Certificate of Oath, 49.

R. S. 1751. Certain Correspondence by Officers Prohibited, 51.

R. S. 1752. Regulations, 51.

Act of June 11, 1874, ch. 275, 52.

Sec. 4. Time of Transit Allowed to Diplomatic and Consular Officers to Be Established by Secretary of State, etc., 52.

Act of June 17, 1874, ch. 294, 52.

Absence without Leave — Correspondence on Public Affairs — Recommending Persons for Employment — Accepting Presents 52.

Act of July 1, 1882, ch. 262, 53.

Sec. 1. Estimates of Annual Expenditures, 53.

Act of March 3, 1905, ch. 1484, 53.

Sec. 1. Estimates for Rent and Expenses, 53.

Act of Feb. 17, 1911, ch. 105, 53.

Buildings for Diplomatic and Consular Establishments, 53.

Act of Feb. 5, 1915, ch. 23 (Consular Reorganization Act of 1915), 54.

Sec. 1. Regulation of Appointments — Secretaries and Consuls — Assignment for Duty in Department of State — Promotions, 54.

4. Expenses — Secretary or Consul Detailed for Special Duty, 54.

5. Recommendations for Promotions, 54.

7. Diplomatic Officers Prohibited from Transacting Private Business, 55.

8. Effect — Repeal, 55.

IV. Foreign Relations, 55.

R. S. 4062. Penalty for Violating Safe-conduct or Assaulting Public Minister, 55.

R. S. 4063. Process against Ministers and Their Domestics Void, 56.

- R. S. 4064. *Penalty for Suing Out or Executing Such Process*, 57.
- R. S. 4065. *When Process May Be Issued against Persons in Service of Ministers*, 57.
- R. S. 4066. *Public Access to List of Names of Ministers' Servants*, 57.
- R. S. 4079. *Powers of Foreign Consuls Over Disputes between Seamen*, 57.
- R. S. 4080. *Arrest of Seamen on Application of Consul*, 58.
- R. S. 4081. *Commitment and Discharge*, 59.
- R. S. 4082. *Power of United States Consular Officers to Solemnize Marriages*, 59.
- R. S. 4083. *Judicial Authority of United States Ministers and Consuls in Certain Countries*, 60.
- R. S. 4084. *Their Jurisdiction of Crimes*, 60.
- R. S. 4085. *Jurisdiction in Civil Cases*, 61.
- R. S. 4086. *Jurisdiction, How Exercised and Enforced*, 61.
- R. S. 4087. *Arrest, Trial, and Sentence of Criminals*, 62.
- R. S. 4088. *Powers of Consular Officers in Uncivilized Countries*, 62.
- R. S. 4089. *Decisions of Consuls; Appeal to Minister*, 63.
- R. S. 4090. *Jurisdiction of Ministers Over Certain Offenses Against Foreign Governments*, 63.
- R. S. 4091. *Appellate Jurisdiction of Ministers in Certain Countries*, 63.
- R. S. 4097. *Evidence in Consular Courts, How Taken*, 63.
- R. S. 4098. *Compromise or Reference of Civil Cases, to Be Encouraged*, 64.
- R. S. 4099. *Certain Criminal Cases May Be Settled*, 64.
- R. S. 4100. *Aid of Local Authorities May Be Invoked*, 64.
- R. S. 4101. *Punishments by Fine or Imprisonment*, 64.
- R. S. 4102. *For Murder, Insurrection, or Rebellion*, 65.
- R. S. 4103. *Execution of Criminals*, 65.
- R. S. 4104. *Punishment of Contempts*, 65.
- R. S. 4105. *Decisions of Consul Sitting Alone in Criminal Cases*, 65.
- R. S. 4106. *Associates May Be Called by Consul in Criminal Trials*, 65.
- R. S. 4107. *Associates in Civil Cases*, 66.
- R. S. 4108. *Where Jurisdiction of Ministers May Be Exercised*, 66.
- R. S. 4109. *Jurisdiction of Minister, When Appellate and When Original*, 67.
- R. S. 4110. *Responsibility of Diplomatic and Consular Officers*, 67.
- R. S. 4111. *Marshals of Consular Courts*, 67.
- R. S. 4112. *Execution and Return of Process*, 67.
- R. S. 4113. *Marshal's Bond*, 68.
- R. S. 4114. *Suits on Marshal's Bond*, 68.
- R. S. 4115. *Production of Original Bond*, 68.
- R. S. 4116. *Process against Marshal, How Executed*, 68.
- R. S. 4117. *Ministers to Make Regulations for Consular Courts*, 68.
- R. S. 4118. *Publication of Regulations*, 69.
- R. S. 4119. *Transmission to Secretary of State*, 69.
- R. S. 4120. *Fees for Judicial Services*, 69.
- R. S. 4121. *Expenses of Prisons in Foreign Countries*, 70.
- R. S. 4122. *In China*, 70.
- R. S. 4123. *In Japan*, 70.
- R. S. 4124. *Court-house and Jail in Jeddo*, 71.
- R. S. 4125. *Provisions of Title Extended to Turkey*, 71.
- R. S. 4126. *To Persia*, 71.
- R. S. 4127. *Foreign Relations; Laws Extended to Tripoli, Tunis, Morocco, Muscat, and Navigator Islands*, 72.

R. S. 4128. *Judicial Duties, When to Devolve on Secretary of State*, 72.

R. S. 4129. *Provisions of Title Extended to Other Countries*, 73.

R. S. 4130. *Definition of Words "Minister" and "Consul,"* 73.

Act of March 23, 1874, ch. 62, 73.

Sec. 1. Jurisdiction of Courts of Ottoman Government and Egypt Over Citizens of United States May Be Accepted, and That of Consular Courts Suspended, 73.

2. Right to Hold Property in Turkey — Acceptance of Turkish Law by President, 74.

Act of March 22, 1902, ch. 272, 74.

Sec. 1. Keeping and Feeding of Prisoners in China, Korea, Siam, Turkey, 74.

CROSS-REFERENCES

Applicability of Chinese Exclusion Acts to, see CHINESE EXCLUSION. Commercial Attachés, see COMMERCE DEPARTMENT.

Duties as to Infected Ports and Bills of Health, see HEALTH AND QUARANTINE.

Issuance and Verification of Passports, see PASSPORTS.

Acknowledgment of Assignment of Patents, see PATENTS.

Offenses by Consular Officers, see PENAL LAWS.

Printing and Distribution of Documents and Reports, see PUBLIC DOCUMENTS; PUBLIC PRINTING.

See generally JUDICIARY; SEAMEN; SHIPPING AND NAVIGATION; STATE DEPARTMENT; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

I. DIPLOMATIC OFFICERS

Sec. 1674. [Definition of official designations employed in this Title.]
That the official designations employed throughout this title shall be deemed to have the following meanings, respectively:

First. "Consul general" and "consul" shall be deemed to denote full, principal, and permanent consular officers as distinguished from subordinates and substitutes.

Second. "Consular agent" shall be deemed to denote consular officers subordinate to such principals exercising the powers vested in them and performing the duties prescribed for them by regulation of the President at posts or places different from those at which such principals are located, respectively.

Third. "Vice consuls" shall be deemed to denote consular officers subordinate to such principals exercising and performing the duties within the limits of their consulates at the same or at different points and places from those at which the principals are located, except that when vice consuls take charge of consulates general or consulates when the principal officers shall be temporarily absent or relieved from duty they shall be deemed to denote consular officers who shall be substituted, temporarily, to fill the places of said consuls general or consuls.

Fourth. "Consular officer" shall be deemed to include consuls general, consuls, vice consuls, interpreters in consular offices, student interpreters, and consular agents, and none others.

Fifth. "Diplomatic officer" shall be deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, counselors, agents, secretaries of embassy and legation, and secretaries in the Diplomatic Service, and none others. [R. S.]

This section was amended by section 6 of an Act of Feb. 5, 1915, ch. 23, 38 Stat. L. 806, entitled "An Act for the improvement of the foreign service." "This title" referred to in the text is title XVIII. "Diplomatic and Consular Officers," and comprises sections 1674 to 1752 of the Revised Statutes. This section was again amended by a provision of the Diplomatic and Consular Appropriation Act of July 1, 1916 (see Fed. Stat. Ann. Pamph. Supp. No. 8, p. 60; 1918 Supp. Fed. Stat. Ann.); the amendment consisted of including in the fifth paragraph after the words "*chargés d'affaires*" the word "counselors," making the section to read as given in the text. As originally enacted it was as follows:

"The official designations employed throughout this Title shall be deemed to have the following meanings, respectively:

"First. 'Consul-general,' 'consul,' and 'commercial agent,' shall be deemed to denote full, principal, and permanent consular officers, as distinguished from subordinates and substitutes.

"Second. 'Deputy consul' and 'consular agent' shall be deemed to denote consular officers subordinate to such principals, exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively, the former at the same ports or places, and the latter at ports or places different from those at which such principals are located respectively.

"Third. 'Vice-consuls' and 'vice-commercial agents' shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty.

"Fourth. 'Consular officer' shall be deemed to include consuls-general, consuls, commercial agents, deputy consuls, vice-consuls, vice-commercial agents, and consular agents, and none others.

"Fifth. 'Diplomatic officer' shall be deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, agents, and secretaries of legation, and none others."

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 64; Act of June 20, 1864, ch. 136, 13 Stat. L. 138; Act of July 25, 1866, ch. 233, 14 Stat. L. 225.

When representative not a diplomatic officer.—The envoy extraordinary and minister plenipotentiary to the Republic of Guatemala appointed Mr. Baiz, a citizen of the United States and consul-general of that republic at the city of New York, to represent him during a leave of absence, informed the state department of his proposed departure, and asked that Mr. Baiz be permitted "to communicate to the department of state any information connected with the peace of Central America that may be of sufficient importance to be brought without delay" to the notice of the secretary. Such permission was

granted, and communications passed between the department and Mr. Baiz, who was recognized as being "in charge of the business of the legations of Guatemala, Salvador, and Honduras." "We are of opinion that Mr. Baiz was not . . . *chargé d'affaires ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a 'diplomatic officer.' He was not a public minister within the intent and meaning of section 687." See note to R. S. sec. 4063. *infra*, p. 56. *In re Baiz*, (1890) 135 U. S. 403, 10 S. Ct. 854, 34 U. S. (L. ed.) 222.

Sec. 1675. [Salaries.] Ambassadors and envoys extraordinary and ministers plenipotentiary shall be entitled to compensation at the rates following, per annum, namely:

Those to France, Germany, Great Britain, and Russia, each, seventeen thousand five hundred dollars.

Those to Austria, Brazil, China, Italy, Japan, Mexico, and Spain, each, twelve thousand dollars.

Those to all other countries, unless where a different compensation is prescribed by law, each, ten thousand dollars.

And, unless when otherwise provided by law, ministers resident and commissioners shall be entitled to compensation at the rate of seventy-five per centum, *chargés d'affaires* at rate of fifty per centum, and secretaries of legation at the rate fifteen per centum, of the amounts allowed to ambassadors, envoys extraordinary, and ministers plenipotentiary to the said countries respectively; except that the secretary of legation to Japan shall be entitled to compensation at the rate of twenty-five hundred dollars per annum.

The second secretaries of the legations to France, Germany, and Great Britain shall be entitled to compensation at the rate of two thousand dollars each per annum. [R. S.]

This section was amended so as to read as above given by the Act of March 3, 1875, ch. 153, 18 Stat. L. 483.

Originally this section was as follows:

"Sec. 1675. Ambassadors, envoys extraordinary, and ministers plenipotentiary, ministers resident, agents, and secretaries, and second secretaries of legation, shall be entitled to salaries as hereinafter provided.

"Envoys extraordinary and ministers plenipotentiary to France, Germany, Great Britain, and Russia, seventeen thousand five hundred dollars each; to Austria, Brazil, China, Italy, Japan, Mexico, and Spain, twelve thousand dollars each; to Chili and Peru, ten thousand dollars each.

"Minister resident accredited to Guatemala, Costa Rica, Honduras, Salvador, and Nicaragua, ten thousand dollars.

"Minister resident at Uruguay, ten thousand dollars.

"Ministers resident at Portugal, Switzerland, Greece, Belgium, Netherlands, Denmark, Sweden and Norway, Turkey, Ecuador, Colombia, Bolivia, Venezuela, Hawaiian Islands, and the Argentine Republic, seven thousand five hundred dollars each.

"Minister resident and consul-general at Hayti, seven thousand five hundred dollars.

"Minister resident and consul-general at Liberia, four thousand dollars.

"Agent and consul-general at Alexandria, three thousand five hundred dollars.

"Secretaries of legation to London, Paris, Berlin, and St. Petersburg, two thousand six hundred and twenty-five dollars each.

"Secretary of legation to Japan, two thousand five hundred dollars.

"Secretaries of legation to Austria, Brazil, Italy, Mexico, and Spain, one thousand eight hundred dollars each.

"The second secretaries of the legations to France, Great Britain, and Germany, two thousand dollars each."

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 52; Act of June 16, 1860, ch. 135, 12 Stat. L. 40; Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 471, 472.

By an Act of Aug. 5, 1882, ch. 399, given *infra*, p. 16, the section given in the text was purported to be amended by inserting a clause after the words "Liberia, four thousand dollars." While these words were contained in the original section, they do not appear in the amended section as given above. Provisions for a minister to Liberia are made by R. S. sec. 1683, *infra*, p. 14.

The sums named in the Appropriation Acts for the various years do not always correspond with the amounts fixed by the above schedule. That for the fiscal year ending June 30, 1916, is contained in the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1116.

The salaries of secretaries in the diplomatic service were fixed by the first part of section 2 of an Act of Feb. 5, 1915, ch. 23, given *infra*, p. 18, and this schedule was followed in the Appropriation Act for 1916, above cited.

Different amounts appropriated.—The office of envoy extraordinary and minister plenipotentiary to Turkey did not exist prior to July 1, 1882. Before that time the diplomatic representative of the United States to Turkey was of the rank of minister resident and consul-general, and the claimant held that office at an annual salary of \$7,500 when he was appointed envoy extraordinary and minister

plenipotentiary. Congress, by the Act of July 1, 1882, made an appropriation of \$7,500 to pay the salary of an envoy extraordinary and minister plenipotentiary to Turkey, and thus left it to the President to fill such office if he chose to do so under his constitutional power, which power the President exercised by appointing the claimant on July 13, 1882. The claimant is not entitled to a salary of

\$10,000 per annum under this section, as the salary fixed by the Act of 1882 constituted the exception "where a different compensation is prescribed by law." The Langston case, noted under R. S. sec. 1683, *infra*, p. 14, is distinguished. In that case a prior statute had fixed the annual salary of a diplomatic officer at a designated sum, without limitation as to time, and a subsequent statute appropriated a less amount for the service of the officer for a particular fiscal year, but contained no words which expressly or by implication modified or repealed the prior statute. *Wallace v. U. S.*, (1890) 133 U. S. 180, 10 S. Ct. 251, 33 U. S. (L. ed.) 571.

From 1876 to 1882 the office of chargé d'affaires to Portugal existed. By the Appropriation Act of 1882 there was appropriated "for ministers resident and consuls-general to Liberia and Hayti, Switzerland, Denmark, and Portugal at \$5,000 each." The executive conformed to the wishes indicated by Congress and appointed the claimant minister resident and consul-general to Portugal, where he was then holding the office as chargé d'affaires. He accepted the new appointment and gave bonds, and his former office ceased to exist. The claimant was only entitled to the salary of \$5,000 as such minister resident and consul-general, and not to the salary of \$7,500 under the provisions of this section, as the provisions of the Appropriation Act of 1882 were within the exception "unless when otherwise provided by law." *Francis v. U. S.*, (1887) 22 Ct. Cl. 403.

Neither the secretary of state nor the President has authority to fix the salary of an envoy extraordinary and minister plenipotentiary. The annual Appropriation Act of Feb. 26, 1883, contained the following: "Section 2. For the purpose of enabling the President to extend diplo-

matic relations with the governments of Eastern Asia, \$5,000." The claimant was immediately nominated as envoy extraordinary and minister plenipotentiary to Corea; the Senate consented thereto and he was the next day so commissioned. The claimant was entitled to a salary of \$10,000 under this section, as the provision in the Appropriation Act of 1883 cannot be held to bring the case within the exception, "unless where a different compensation is prescribed by law." *Foots v. U. S.*, (1888) 23 Ct. Cl. 443.

Rate of exchange on foreign bills.—On the question at what rate the Bolivian money paid to the claimant for his salary as minister to Peru should be reckoned in settlement of his accounts, the court said: "It is clear that if the Government resort to the commercial usage of paying a minister abroad by means of bills of exchange drawn on its bankers in London, to be negotiated by him at his station, the foreign money in which he is paid should be reckoned at its current commercial value at the time and place of payment in the coin of the United States. He is entitled to receive his salary in the money of the United States, or in its actual market equivalent. The supposed value of the foreign coin in the market or in the mints of the United States does not furnish a standard, for the minister cannot avail himself of it, but must resort to the market of the place where he is. In the absence of a current commercial value of American coin at the place of payment, the payments must be deemed to have been made on the one side and received on the other at the real or intrinsic value of the coin used. The mint value of the coin of the United States does not furnish a standard, because it is a distant and arbitrary value, of which the payee cannot avail himself." *Clay's Case*, (1872) 8 Ct. Cl. 209.

Sec. 1676. [Agent and consul-general at Cairo.] The agent and consul-general at Cairo shall be entitled to compensation at the rate of three thousand five hundred dollars per annum. [*R. S.*]

This section was amended to read as above given by the Act of March 3, 1875, ch. 153. Originally this section was as follows: "A commissioner appointed to any of the countries mentioned in the preceding section shall be entitled to receive seventy-five per centum of the salary therein provided for the envoy extraordinary and minister plenipotentiary or the minister resident to such country; and a chargé d'affaires so appointed shall be entitled to receive fifty per centum of such salary."

The title and designation of the officer was changed by a Resolution of Jan. 8, 1874, No. 1, given *infra*, p. 16. By the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1117, there was appropriated for the agent and consul-general at Cairo, \$6,500.

Sec. 1677. [Secretary of legation to Turkey.] The consul-general at Constantinople shall be the secretary of the legation to Turkey, but shall receive compensation only as consul-general. [*R. S.*]

Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 472.

The later Appropriation Acts supersede so much of this section as relates to the secretary of the legation at Turkey by recognizing such a position as a distinct office. The Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 141, § 1, 38 Stat. L. 1117, provides for a Turkish secretary of embassy to Turkey, and an assistant secretary of embassy.

Sec. 1678. [Interpreter of legation to Turkey.] The interpreter to the legation to Turkey shall be entitled to receive three thousand dollars, and such salary may be paid to an interpreter, notwithstanding he may not be a citizen of the United States. [R. S.]

Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 472.

Provisions for student interpreters at the embassy at Turkey, who should be citizens of the United States, were made by the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1118. See the note to R. S. sec. 1680, *infra*, this page.

Sec. 1679. [Interpreter of legation to Japan.] The interpreter to the legation to Japan shall receive a salary of two thousand five hundred dollars. [R. S.]

Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 472.

The Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, provides for a Japanese secretary of embassy and an assistant Japanese secretary of embassy to Japan and for six student interpreters, who shall be citizens of the United States. 38 Stat. L. 1117, 1118. See the note to R. S. sec. 1680, immediately following.

Sec. 1680. This section was repealed by the Consular and Diplomatic Appropriation Act of Feb. 25, 1885, ch. 150. It read as follows:

"Sec. 1680. The compensation of the secretary of the legation to China, if acting as interpreter, shall be at the rate of five thousand dollars a year, and if not acting as such, at the rate of three thousand dollars a year. And the President may appoint for the legation to China an interpreter, when the secretary of legation does not act as such, who shall be entitled to compensation at the rate of five thousand dollars a year."

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 52.

The Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1117, 1118, provides for a Chinese secretary of legation and an assistant Chinese secretary of legation to China, and for ten student interpreters at the legation to China, who shall be citizens of the United States. By this Act the student interpreters at the legations of China, Japan, and Turkey are required to sign an agreement to continue in the service as interpreters, in the countries to which they are appointed, for so long as their services may be required within a period of five years. This Act likewise contains a provision that no person drawing the salary of interpreter as therein provided shall be allowed any part of the salary appropriated for any secretary of legation or other officer. Provisions similar to the two last stated here have occurred in similar Appropriation Acts for many years. The rental of a building for the legation of China is authorized by an Act of March 3, 1875, ch. 130, *infra*, p. 16.

R. S. sec. 1680 was construed in (1900) 23 Op. Atty-Gen. 136.

Sec. 1681. This section was repealed by the Consular and Diplomatic Appropriation Act of Feb. 25, 1885, ch. 150, 23 Stat. L. 322. Originally it was as follows:

"Sec. 1681. The minister at Uruguay is also accredited to Paraguay."

By the Act of March 3, 1875, ch. 153, 18 Stat. L. 483, it was amended to read as follows:

"Sec. 1681. The minister resident to Uruguay, when also accredited to Paraguay, shall be entitled to compensation at the rate of ten thousand dollars per annum."

But this amended section, as above noted, has been directly repealed.

The appointment of an envoy extraordinary and minister plenipotentiary to each of these points was authorized by an Act of Dec. 6, 1913, ch. 1, *infra*, p. 17.

Sec. 1682. [Minister to Guatemala, Costa Rica, Honduras, Salvador, and Nicaragua.] There shall be but one minister resident accredited to Guatemala, Costa Rica, Honduras, Salvador, and Nicaragua; and the President may select the place of residence for the minister in any one of those

States. And he shall receive compensation at the rate of ten thousand dollars per annum. [*R. S.*]

Act of May 22, 1872, ch. 194, 17 Stat. L. 142.

This section was amended to read as above given by the Act of March 3, 1875, ch. 153, 18 Stat. L. 483. The amendment consisted in the addition of the last sentence.

Sec. 1683. [Representatives to Hayti, Liberia, etc.] There shall be a diplomatic representative of the United States to each of the republics of Hayti and Liberia, who shall be appointed by the President, by and with the advice and consent of the Senate; and shall be accredited as minister resident and consul-general. The representative at Hayti shall be entitled to a salary of seven thousand five hundred dollars a year; and the representative at Liberia to a salary not exceeding four thousand dollars a year. [*R. S.*]

Act of June 5, 1862, ch. 96, 12 Stat. L. 421; Act of July 25, 1866, ch. 33, 14 Stat. L. 225.

Envoys extraordinary and ministers plenipotentiary at the Dominican Republic and Hayti at a salary of \$10,000 each, and a minister resident and consul-general at Liberia at \$5,000 were provided for by the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1116.

Different amount appropriated.—The salary of the claimant as minister to Hayti was fixed by law at \$7,500 at the time of his appointment in 1877, which sum was annually appropriated until the year 1883. For each of the years 1883, 1884, and 1885 there was appropriated only the sum of \$5,000, which was the only amount paid to him for those years. He brought suit to recover the difference between these amounts, and his claim was sustained in the Court of Claims, and judgment was properly rendered in his behalf. "According to the settled rules

of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law." See cases under *R. S. sec. 1675, supra*, p. 10. *U. S. v. Langston*, (1886) 118 U. S. 389, 6 S. Ct. 1185, 30 U. S. (L. ed.) 164.

Sec. 1684. [Condition of compensation of chargé d'affaires or secretary.] To entitle any chargé d'affaires, or secretary of any legation or embassy to any foreign country, or secretary of any minister plenipotentiary, to compensation, they shall respectively be appointed by the President, by and with the advice and consent of the Senate; but in the recess of the Senate the President is authorized to make such appointments, which shall be submitted to the Senate at the next session thereafter, for their advice and consent; and no compensation shall be allowed to any chargé d'affaires, or any of the secretaries hereinbefore described, who shall not be so appointed. [*R. S.*]

Act of May 1, 1810, ch. 44, 2 Stat. L. 608.

Sec. 1685. [Compensation of secretary of legation or vice consul temporarily occupying higher office.] That for such time as any secretary of embassy or legation shall be lawfully authorized to act as chargé d'affaires ad interim at the post to which he shall have been appointed or assigned, he shall be entitled to receive, in addition to his salary as secretary of embassy or legation, compensation equal to the difference between such salary and fifty per centum of the salary provided by law for the ambassador or minister at such post; and for such time as any vice consul shall be

lawfully authorized to assume charge of a consulate general or consulate during the absence of the principal officer at the post to which he shall have been appointed or assigned, he shall be entitled to receive, in addition to his regular salary or compensation as a subordinate consular officer or employee, compensation equal to the difference between such salary or compensation and fifty per centum of the salary provided by law for the principal consular officer at such post. [R. S.]

This section was amended to read as above given by section 3 of an Act of Feb. 5, 1915, ch. 23, 38 Stat. L. 805, entitled "An Act for the improvement of the foreign service." Prior to its amendment this section was as follows:

"For such time as any secretary of embassy or legation shall be lawfully authorized to act as chargé d'affaires ad interim at the post to which he shall have been appointed, he shall be entitled to receive, in addition to his salary as secretary of embassy or legation, compensation equal to the difference between such salary and fifty per centum of the salary provided by law for the ambassador or minister at such post." [35 Stat. L. 673.]

This section was amended to read in this manner by a provision of the Diplomatic and Consular Appropriation Act of March 2, 1909, ch. 235, § 1. The original section of which the foregoing were amendments was in this form:

"For such time as any secretary of legation shall be lawfully authorized to act as chargé d'affaires ad interim at the post to which he shall have been appointed, he shall be entitled to receive compensation at the rate allowed by law for a chargé d'affaires at such post; but he shall not be entitled to receive, for such time, the compensation allowed for his services as secretary of legation." Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 56.

The provision given as amended in the text supersedes the following provision from the Consular and Diplomatic Appropriation Act of Feb. 25, 1885, ch. 150, § 1:

"And hereafter no secretary or second secretary of any legation shall be entitled to or receive any compensation over and above his salary as such secretary for acting as chargé d'affaires during the temporary or other absence without leave of the minister to whose duties he may succeed." [23 Stat. L. 323.]

Sec. 1686. [Compensation of persons filling two offices.] When to any diplomatic office held by any person there is superadded another, such person shall be allowed additional compensation for his services, in such superadded office, at the rate of fifty per centum of the amount allowed by law for such superadded office, and for such time as shall be actually and necessarily occupied in making the transit between the two posts of duty, at the commencement and termination of the period of such superadded office, and no longer; and such superadded office shall be deemed to continue during the time to which it is limited by the terms thereof. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 56.

The appointment of a consul-general, to discharge the duties of a secretary of legation and dragoman, does not entitle him to compensation for discharging the additional duties under this statute, which provides for the case "when to any diplo-

matic office held by any person there is superadded another," because the office of consul-general which he had held was not a diplomatic one. Brown's Case, (1860) 9 Op. Atty.-Gen. 507.

Sec. 1687. [Fees at legations to be accounted for.] All fees collected at any of the legations shall be accounted for to the Secretary of the Treasury, and held subject to his draft, or other directions. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.

By R. S. sec. 1747, *infra*, p. 49, a similar provision is made with respect to consular offices.

Sec. 1688. [Uniforms and official costumes.] No person in the diplomatic service of the United States shall wear any uniform or official costume not previously authorized by Congress. [*R. S.*]

Res. No. 15 of March 27, 1867, 15 Stat. L. 23.

Joint resolution providing for a change in the name and title of the agent and consul-general of the United States at Alexandria.

[*Res. of Jan. 8, 1874, No. 1, 18 Stat. L. 285.*]

[Agent and consul-general at Cairo, title of.] That the name and title of the agent and consul-general of the United States at Alexandria shall, from the passage of this joint resolution, be "agent and consul-general of the United States at Cairo." [*18 Stat. L. 285.*]

See *R. S. sec. 1676, supra*, p. 12.

[SEC. 1.] [Allowance to secretaries of legation and messenger at Paris.] * * * And the Secretary of State is authorized to allow and pay to the secretary of legation and to the second secretary of legation and to the messenger of the legation in Paris, from the moneys collected at the legation for the transmission of consular invoices, an amount not to exceed in the aggregate six hundred dollars in any one year, to be divided and distributed as the Secretary of State may direct, provided that the surplus receipts are sufficient for that purpose. [*18 Stat. L. 66.*]

This is from the Consular and Diplomatic Appropriation Act of June 11, 1874, ch. 275.

[SEC. 1.] [Buildings at Peking for legation.] That the Secretary of State be, and he is hereby, authorized to rent, furnish, and keep suitable buildings, with grounds appurtenant, at Peking, for the use of the legation in China, at an annual cost not exceeding five thousand dollars; that the period of such lease shall be for two or more years, and with renewals, as the Secretary of State shall determine. * * * [*18 Stat. L. 377.*]

This is from the Sundry Civil Appropriation Act of March 3, 1875, ch. 136.
See the note to *R. S. sec. 1680, supra*, p. 13.

An Act To establish diplomatic relations with Persia.

[*Act of Aug. 5, 1882, ch. 399, 22 Stat. L. 301.*]

[Chargé d'affaires and consul-general at Teheran.] That section sixteen hundred and seventy-five of the Revised Statutes of the United States be, and the same is hereby, amended by inserting after the words "Liberia,

four thousand dollars," the words "chargé d'affaires and consul-general at Teheran, Persia, five thousand dollars," and the sum necessary therefor is hereby appropriated out of any money in the Treasury not otherwise appropriated. [22 Stat. L. 301.]

Section 1675 of the Revised Statutes here referred to was repealed and a substitute enacted by the Act of March 3, 1875, ch. 153, *supra*, p. 10, in which "Liberia" is not mentioned.

An appropriation of \$10,000 for the salary of an envoy extraordinary and minister plenipotentiary to Persia was made by the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1116.

[SEC. 1.] **[Creation of new ambassadorships.]** And hereafter no new ambassadorship shall be created unless the same shall be provided for by Act of Congress. [35 Stat. L. 672.]

This is from the Diplomatic and Consular Appropriation Act of March 2, 1909, ch. 235. A provision immediately preceding that above given specifically repealed a provision from the Diplomatic and Consular Appropriation Act of March 1, 1893, ch. 182, § 1, which was as follows:

"Whenever the President shall be advised that any foreign government is represented, or is about to be represented, in United States by an ambassador, envoy extraordinary, minister plenipotentiary, minister resident, special envoy, or chargé d'affaires, he is authorized, in his discretion, to direct that the representative of United States to such government shall bear the same designation. This provision shall in nowise affect the duties, powers, or salary of such representative." [27 Stat. L. 496.]

An Act Authorizing the appointment of an ambassador to Spain.

[Act of September 4, 1913, ch. 10, 38 Stat. L. 110.]

[Ambassador to Spain.] That the President is hereby authorized to appoint, as the representative of the United States, an ambassador to Spain, who shall receive as his compensation the sum of \$17,500 per annum. [38 Stat. L. 110.]

An Act Authorizing the appointment of envoys extraordinary and ministers plenipotentiary to each Paraguay and Uruguay.

[Act of Dec. 6, 1913, ch. 1, 38 Stat. L. 241.]

[SEC. 1.] **[Minister to Paraguay.]** That the President is hereby authorized to appoint, as the representative of the United States, an envoy extraordinary and minister plenipotentiary to Paraguay, who shall receive as his compensation the sum of \$10,000 per annum. [38 Stat. L. 241.]

SEC. 2. [Minister to Uruguay.] That the President is hereby further authorized to appoint, as the representative of the United States, an envoy extraordinary and minister plenipotentiary to Uruguay, who shall receive as his compensation the sum of \$10,000 per annum. [38 Stat. L. 241.]

An Act To authorize the appointment of an ambassador to Argentina.[*Act of May 16, 1914, ch. 91, 38 Stat. L. 378.*]

[Ambassador to Argentina.] That the President is hereby authorized to appoint, as the representative of the United States, an ambassador to Argentina who shall receive as his compensation the sum of \$17,500 per annum. [*38 Stat. L. 378.*]

An Act Authorizing the appointment of an ambassador to the Republic of Chile.[*Act of May 16, 1914, ch. 92, 38 Stat. L. 378.*]

[Ambassador to Chile.] That the President is hereby authorized to appoint, as the representative of the United States, an ambassador to the Republic of Chile, who shall receive as his compensation the sum of \$17,500 per annum. [*38 Stat. L. 378.*]

SEC. 2. [Secretaries — classification and salaries.] That secretaries in the Diplomatic Service * * * shall hereafter be graded and classified as follows, with the salaries of each class herein affixed thereto.

SECRETARIES

Secretary of class one \$3,000

Secretary of class two \$2,625

Secretary of class three \$2,000

Secretary of class four \$1,500

Secretary of class five \$1,200 * * * [*38 Stat. L. 805.*]

This is the first part of section 2 of an Act of Feb. 5, 1915, ch. 23. The latter part of this section, relating to the salaries of consuls-general and consuls, is given *infra*, p. 45.

[SEC. 1.] [Citizenship of clerks at embassies and legations.] * * * For the employment of necessary clerks at the embassies and legations, who, whenever hereafter appointed, shall be citizens of the United States. [*38 Stat. L. 1117.*]

This is from the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1. Similar provisions have occurred in the Appropriation Acts for previous years.

II. CONSULAR OFFICERS

Sec. 1689. [Application of general provision in this Title.] The various provisions of this Title which are expressed in terms of general application to any particular classes of consular officers, shall be deemed to apply as well to all other classes of such officers, so far as may be consistent

with the subject-matter of the same, and with the treaties of the United States. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 64.

Sec. 1690. Superseded. This section as originally enacted was drawn from the following acts:

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 52; Act of Feb. 28, 1861, ch. 58, 12 Stat. L. 171; Act of Feb. 4, 1862, ch. 17, 12 Stat. L. 335, 336; Act of June 20, 1864, ch. 136, 13 Stat. L. 137, 138, 139; Act of July 25, 1866, ch. 233, 14 Stat. L. 225; Act of Feb. 28, 1867, ch. 99, 14 Stat. L. 414; Act of March 30, 1868, ch. 38, 15 Stat. L. 57; Act of March 3, 1869, ch. 125, 15 Stat. L. 322; Act of May 17, 1872, ch. 169, 17 Stat. L. 120; Act of May 22, 1872, ch. 194, 17 Stat. L. 144; Act of June 8, 1872, ch. 332, 17 Stat. L. 282; Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 472; Act of June 11, 1874, ch. 275, 18 Stat. L. 67-69.

As originally enacted, the first part of this section was divided into "Schedule B," which was subdivided as follows: I, Consul-general; II, Consuls; III, Commercial Agents; and "Schedule C," which was subdivided into I, Consuls, and II, Commercial Agents. By a provision of the Consular and Diplomatic Appropriation Act of June 11, 1874, ch. 275, § 1, 18 Stat. L. 67-69, schedules B and C as originally enacted were amended. The said section as amended was superseded by the Consular Reorganization Act of April 5, 1906, ch. 1366, which with its amendments is given below. This last cited Act likewise superseded the Act of March 3, 1875, ch. 175, 18 Stat. L. 486, relating to certain consulates in Russia; the Act of Feb. 18, 1876, ch. 12, 19 Stat. L. 4, relating to consulates at Aix-la-Chapelle and at Omoa and Truxillo; and the Act of Feb. 11, 1878, ch. 14, 20 Stat. L. 24, relating likewise to the consulate at Omoa and Truxillo.

An Act To provide for the reorganization of the consular service of the United States.

[Act of April 5, 1906, ch. 1366, 34 Stat. L. 99.]

[SEC. 1.] **[Consular service reorganized.]** That the consular system of the United States be reorganized in the manner hereinafter provided in this act. [34 Stat. L. 99.]

This is the first section of the "Lodge Act," or the "Consular Reorganization Act," and supersedes R. S. sec. 1690 and the Acts based thereon. See the note to that section immediately preceding.

SEC. 2. **[Classification of consuls-general and consuls — salaries.]** That the consuls-general and the consuls of the United States shall hereafter be classified and graded as hereinafter specified, with the salaries of each class herein affixed thereto.

CONSULS-GENERAL.

Class one, twelve thousand dollars: London, Paris.

Class two, eight thousand dollars: Berlin, Habana, Hongkong, Hamburg, Rio de Janeiro, Shanghai.

Class three, six thousand dollars: Calcutta, Cape Town, Constantinople, Mexico City, Montreal, Ottawa, Vienna, Yokohama.

Class four, five thousand five hundred dollars: Antwerp, Barcelona, Brussels, Canton, Frankfort, Marseilles, Moscow, Panama, Rotterdam, Seoul, Sydney (Australia), Tientsin.

Class five, four thousand five hundred dollars: Auckland, Beirut, Boma, Buenos Ayres, Callao, Coburg, Dresden, Genoa, Guayaquil, Halifax, Hankau, Mukden, Munich, Singapore, Vancouver, Winnipeg, Zurich.

Class six, three thousand five hundred dollars: Adis, Ababa, Bogota,

Budapest, Guatemala, Lisbon, Monterey, San Salvador, Smyrna, Stockholm, Tangier.

Class seven, three thousand dollars: Athens, Christiania, Copenhagen.

CONSULS.

Class one, eight thousand dollars: Liverpool.

Class two, six thousand dollars: Manchester.

Class three, five thousand dollars: Amsterdam, Bremen, Dawson, Belfast, Havre, Johannesburg, Kobe, Lourenco, Marquez, Lyon.

Class four, four thousand five hundred dollars: Amoy, Birmingham, Chefoo, Cienfuegos, Fuchau, Glasgow, Kingston (Jamaica), Newchwang, Nottingham, Saint Gall, Santiago, Southampton, Veracruz, Valparaiso.

Class five, four thousand dollars: Bahia, Bombay, Bordeaux, Colon, Dublin, Dundee, Harbin, Leipzig, Milan, Nanking, Naples, Nuremberg, Para, Pernambuco, Paluen, Reichenberg, Santos, Stuttgart, Toronto, Tsingtau, Victoria, Warsaw.

Class six, three thousand five hundred dollars: Alexandria, Apia, Bar-men, Barranquilla, Basel, Berne, Bluefields, Bradford, Chemnitz, Chunking, Cologne, Dalny, Durban, Edinburgh, Fiume, Geneva, Georgtown, Guadelajara, Mannheim, Montevideo, Nagasaki, Odessa, Palermo, Port Elizabeth, Prague, Quebec, Rangoon, Rheims, Rimouski, Rome, Saint Petersburg, Saloniki, Sherbrooke, Vladivostok.

Class seven, three thousand dollars: Aix la Chapelle, Aleppo, Barbados, Batavia, Belgrade, Burslem, Calais, Calgary, Carlsbad, Catania, Colombo, Corinto, Dunfermline, Florence, Frontera, Ghent, Hamilton (Ontario), Hanover, Harput, Huddersfield, Iquitos, Iquique, Jerusalem, Karachi, Kehl, La Guaira, Leghorn, Liege, Madras, Malaga, Managua, Melbourne, Nantes, Nassau, Newcastle (New South Wales), Newcastle (England), Port Antonio, Punta Arenas, Port au Prince, Riga, Sandakan, Progreso, Seville, Saint John (New Brunswick), Saint Michaels, Saint Thomas (West Indies), San Jose, Sheffield, Swansea, Sydney (Nova Scotia), Tabriz, Tampico, Tamsui, Trieste, Trinidad.

Class eight, two thousand five hundred dollars: Acapulco, Aden, Algiers, Antung, Batum, Belize, Bergen, Breslau, Brunswick, Cardiff, Chihuahua, Ciudad Juarez, Ciudad Porfirio Diaz, Cognac, Cork, Curaçao, Erfurt, Gibraltar, Gothenburg, Hamilton (Bermuda), Hull, Jerez de la Frontera, Kingston (Ontario), Leeds, Limoges, Madrid, Magdeburg, Malta, Maracaibo, Martinique, Matamoros, Mazatlan, Mersine, Nice, Nogales, Nuevo Laredo, Orillia, Owen Sound, Plymouth, Port Limon, Prescott, Puerto Cortez, Rosario, Roubaix, Saint Johns (Newfoundland), Saint Etienne, San Luis Potosi, Sarnia, Sault Sainte Marie, Stettin, Swatow, Tamatave, Tegucigalpa, Teneriffe, Trebizond, Tripoli, Valencia, Windsor (Ontario), Yarmouth, Zanzibar.

Class nine, two thousand dollars: Aguascalientes, Asuncion, Bagdad, Bristol, Campbellton, Cape Gracias, Cape Haitien, Cartagena, Ceiba, Charlottetown, Cornwall, Durango, Ensenada, Fernie, Fort Erie, Gorée-Dakar, Grenoble, Guadeloupe, Hermosillo, Hobart, La Paz, Manzanillo, Maskat, Moncton, Niagara Falls, Patras, Port Louis, Puerto Cabello, Puerto Plata, Rouen, Saigon, Saint Johns (Quebec), Saint Pierre, Saint Stephen, Salina Cruz, Saltillo, Sierra Leone, Sivas, Stavanger, Suva, Tahita, Tapachula,

Turin, Turks Island, Venice. [34 Stat. L. 99, as amended by 35 Stat. L. 101, 35 Stat. L. 593.]

The classification of consuls and consuls-general was amended "to read as" above given by the Act of May 11, 1908, ch. 161, 35 Stat. L. 101, entitled "An Act to amend an act entitled 'An Act to provide for the reorganization of the consular service of the United States,' approved April 5, 1906."

This section was further amended by the Act of Feb. 3, 1909, ch. 60, 35 Stat. L. 593. The amendments consisted in striking out "Messina" in class nine, consuls, and adding the word "Catania" in class seven, consuls.

The salaries of consuls-general and consuls were fixed in accordance with the foregoing provisions by the latter part of section 2 of an Act of Feb. 5, 1915, ch. 23, given *infra*, p. 45.

Change in the classification.—When an appropriation act places a consul in a given class at the salary of that class, so much of previous enactments, including that of June 11, 1874, which included the consul in a different class, are repealed by necessary implication. *Matthews v. U. S.*, (1887) 123 U. S. 182, 8 S. Ct. 80, 31 U. S. (L. ed.) 127. See *Mahoney v. U. S.*, (1869) 10 Wall. 62, 19 U. S. (L. ed.) 864.

From 1876 to 1882 the salary of the consul at Turk's Island was omitted from the appropriation acts and no consul was

appointed for that place. The Act making appropriations for the year ending June 30, 1882, included the consulate at Turk's Island in class seven, and appropriated the salary of \$1,000 a year for each consul of that class. An appointment to that consulate, made subsequent to the Act of 1882, was evidently made with reference to and in consequence of the new classification, and the incumbent is only entitled to the salary of \$1,000. *Sawyer v. U. S.*, (1887) 22 Ct. Cl. 326. See *Byers v. U. S.*, (1887) 22 Ct. Cl. 59.

SEC. 3. [Vice and deputy officers — temporary service of consuls — time limit — commercial agencies abolished.] That the offices of vice-consuls-general, deputy consuls-general, vice-consuls, and deputy consuls shall be filled by appointment, as heretofore, except that whenever, in his judgment, the good of the service requires it, consuls may be designated by the President without thereby changing their classification to act for a period not to exceed one year as vice-consuls-general, deputy consuls-general, vice-consuls, and deputy consuls; and when so acting they shall not be deemed to have vacated their offices as consuls. Consular agents may be appointed, when necessary, as heretofore. The grade of commercial agent is abolished. [34 Stat. L. 100.]

The offices of vice-consul-general, deputy consul-general and deputy consul were abolished by section 6 of the Act of Feb. 5, 1915, ch. 23, *infra*, p. 45.

SEC. 4. [Inspectors of consulates — appointment of consuls-general at large authorized — salaries — duties — powers — bonds.] That there shall be five inspectors of consulates, to be designated and commissioned as consuls-general at large, who shall receive an annual salary of five thousand dollars each, and shall be paid their actual and necessary traveling and subsistence expenses while traveling and inspecting under instructions from the Secretary of State. They shall be appointed by the President, with the advice and consent of the Senate, from the members of the consular force possessing the requisite qualifications of experience and ability. They shall make such inspections of consular offices as the Secretary of State shall direct, and shall report to him. Each consular office shall be inspected at least once in every two years. Whenever the President has reason to believe that the business of a consulate or a consulate-general is not being properly conducted and that it is necessary for the public interest, he may authorize any consul-general at large to suspend the consul or consul-general, and administer the office in his stead for a period not exceeding

ninety days. In such case the consul-general at large so authorized shall have power to suspend any vice or deputy consular officer or clerk in said office during the period aforesaid. The provisions of law relating to the official bonds of consuls-general, and the provisions of sections seventeen hundred and thirty-four, seventeen hundred and thirty-five, and seventeen hundred and thirty-six, Revised Statutes of the United States, shall apply to consuls-general at large. [34 Stat. L. 100.]

The provisions above mentioned relating to official bonds are contained in R. S. sec. 1697, *infra*, p. 25. R. S. secs. 1734, 1735, and 1736 mentioned in the text are set out *infra*, pp. 38, 39.

SEC. 5. [Citizenship of consular clerks.] No person who is not an American citizen shall be appointed hereafter in any consulate-general or consulate to any clerical position the salary of which is one thousand dollars a year or more. [34 Stat. L. 101.]

Section 6 of this Act amended R. S. secs. 1699 and 1700, given *infra*, pp. 27, 28. R. S. sec. 1704, *infra*, p. 29, authorized the appointment of consular clerks.

SEC. 7. [Notarial acts required — fees.] That every consular officer of the United States is hereby required, whenever application is made to him therefor, within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit, or deposition, and to perform any other notarial act which any notary public is required or authorized by law to do within the United States; and for every such notarial act performed he shall charge in each instance the appropriate fee prescribed by the President under section seventeen hundred and forty-five, Revised Statutes. [34 Stat. L. 101.]

R. S. sec. 1745 mentioned in the text is given *infra*, p. 48. And see R. S. sec. 1750, *infra*, p. 49.

SEC. 8. [Fees, official and unofficial, to be paid into the Treasury — consular agents allowed fees — maximum amount — additional compensation of vice-consular officers.] That all fees, official or unofficial, received by any officer in the consular service for services rendered in connection with the duties of his office or as a consular officer, including fees for notarial services, and fees for taking depositions, executing commissions or letters rogatory, settling estates, receiving or paying out moneys, caring for or disposing of property, shall be accounted for and paid into the Treasury of the United States, and the sole and only compensation of such officers shall be by salaries fixed by law; but this shall not apply to consular agents, who shall be paid by one half of the fees received in their offices, up to a maximum sum of one thousand dollars in any one year, the other half being accounted for and paid into the Treasury of the United States. And vice-consuls-general, deputy consuls-general, vice-consuls, and deputy consuls, in addition to such compensation as they may be entitled to receive as consuls or clerks, may receive such portion of the salaries of the consul-general or consuls for whom they act as shall be provided by regulation. [34 Stat. L. 101.]

The offices of vice-consul-general, deputy consul-general, and deputy consul were abolished by the Act of Feb. 5, 1915, ch. 23, § 6, *infra*, p. 45.

This section superseded R. S. secs. 1702 and 1703 noted *infra*, pp. 28, 29, and R. S. secs. 1729 and 1730 noted *infra*, p. 37. See the notes to said sections.

A provision of the Deficiencies Appropriation Act of July 7, 1884, ch. 334, 23 Stat. L. 237, was as follows: "And hereafter it shall not be lawful for any consular officer to appropriate to his own use or expend from the amount received from the fees of his office any sum in excess of the allowance of salary and fees directly authorized by law, and consular officers paid exclusively by fees and consuls paid in part by salary and in part by fees, shall only appropriate to their own use or expend such portion of the fees as is authorized by law."

SEC. 9. [Invoice fees to be prescribed by the President.] That fees for the consular certification of invoices shall be, and they hereby are, included with the fees for official services for which the President is authorized by section seventeen hundred and forty-five of the Revised Statutes to prescribe rates or tariffs; and sections twenty-eight hundred and fifty-one and seventeen hundred and twenty-one of the Revised Statutes are hereby repealed. [34 Stat. L. 101.]

R. S. sec. 1745 mentioned in the text is given *infra*, p. 48. R. S. sec. 1721 repealed by the text is noted *infra*, p. 35, and R. S. sec. 2851, likewise repealed, is noted under the title CUSTOMS DUTIES, vol. 2, p. 998.

SEC. 10. [Consulates to be supplied with documentary stamps — to be affixed to documents requiring notarial, etc., acts — invalidity of unstamped documents.] That every consular officer shall be provided and kept supplied with adhesive official stamps, on which shall be printed the equivalent money value of denominations and to amounts to be determined by the Department of State, and shall account quarterly to the Department of State for the use of such stamps and for such of them as shall remain in his hands. Whenever a consular officer is required or finds it necessary to perform any consular or notarial act he shall prepare and deliver to the party or parties at whose instance such act is performed a suitable and appropriate document as prescribed in the consular regulations and affix thereto and duly cancel an adhesive stamp or stamps of the denomination or denominations equivalent to the fee prescribed for such consular or notarial act, and no such act shall be legally valid within the jurisdiction of the Government of the United States unless such stamp or stamps is or are affixed and canceled. [34 Stat. L. 102.]

As to receipts for fees, see R. S. sec. 1726, *infra*, p. 36.

SEC. 11. [Effect.] That this Act shall take effect on the thirtieth day of June, nineteen hundred and six. [34 Stat. L. 102.]

SEC. 12. [Repeal.] That all Acts or parts of Acts inconsistent with this Act are hereby repealed. [34 Stat. L. 102.]

Sec. 1691. [Consuls, etc., not to hold office at different consulates.] No consul-general or consul shall be permitted to hold the office of consul-general or consul at any other consulate, or exercise the duties thereof. [R. S.]

Act of March 3, 1869, ch. 125, 15 Stat. L. 322.

Sec. 1692. This section was as follows:

"The President is authorized to appoint three interpreters of the Chinese language, who shall be entitled to compensation for their services, respectively, at a rate not to exceed fifteen hundred dollars a year, to be determined by the President, and to assign such interpreters, from time to time, to such consulates in China and with such duties as he may think proper." Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 55.

This section is repealed by the Consular and Diplomatic Appropriation Act of June 11, 1874, ch. 275, § 3, 18 Stat. L. 70, given *infra*, p. 40. Section 6 of the Act of 1856, ch. 127, there mentioned, forms section 1692 of the Revised Statutes given above.

Sec. 1693. [Salary of interpreter at Bangkok.] The salary of the interpreter at the consulate of Bangkok, in Siam, shall not exceed the sum of five hundred dollars a year; and no salary shall be allowed the marshal at that consulate. [R. S.]

Act of March 3, 1869, ch. 125, 15 Stat. L. 322.

By the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1117, an appropriation of \$1,500 is made for an interpreter to legation and consulate-general to Bangkok, Siam.

Sec. 1694. [Consul at Trinidad de Cuba.] The President is authorized whenever in his judgment the public interest may so require, to discontinue the consulate of the United States at Trinidad de Cuba, and to appoint at Cienfuegos, in that island, a consul with the same salary and emoluments as those now allowed by law to the consul at Trinidad de Cuba. [R. S.]

Act of March 3, 1863, ch. 79, 12 Stat. L. 754.

This section is evidently superseded by the Act of April 5, 1906, ch. 1366, § 2, given *supra*, p. 19.

Sec. 1695. [Extent of consulates, and appointment of vice-consular officers.] The President is authorized to define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice-consuls, vice-commercial agents, deputy consuls, and consular agents, therein, in such manner and under such regulations as he shall deem proper; but no compensation shall be allowed for the services of any such vice-consul, or vice-commercial agent, beyond nor except out of the allowance made by law for the principal consular officer in whose place such appointment shall be made. No vice-consul, vice-commercial agent, deputy consul, or consular agent, shall be appointed otherwise than under such regulations as have been or may be prescribed by the President. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 57.

The provisions of this section relating to commercial agencies and vice-commercial agents were superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21. The office of deputy consul was abolished by an Act of Feb. 5, 1915, ch. 23, § 6, *infra*, p. 45.

"The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution. Although article II, section 2, of the Constitution requires consuls to be appointed by the President 'by and with the advice and consent of the Senate,' the word 'consul' therein does not embrace a subordinate and temporary officer like that of vice-consul as defined in the statute. The appointment of such an officer is within the

grant of power expressed in the same section, saying 'but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the heads of departments.'" U. S. v. Eaton, (1898) 169 U. S. 331, 18 S. Ct. 374, 42 U. S. (L. ed.) 767.

Vice-consul acting as consul-general and minister resident.—Upon the appointment of a vice-consul to perform temporarily the functions of the office during the absence of a consul-general, who also held the office of minister resident, the allowance to the vice-consul should be computed

on the salary received by the principal as minister resident and consul-general. "As the duties of the two offices have thus been inseparably blended by Congress, and presumably the performance of the function of one office embraced of necessity the discharge of the duties of the other, we do not think the accounting officers erred in treating the salary fixed for the joint service as indivisible, and in not attempting an apportionment, when Congress had failed to direct that such division be made, or to furnish the method of making it." *U. S. v. Eaton*, (1898) 169 U. S. 331, 18 S. Ct. 374, 42 U. S. (L. ed.) 767.

An emergency appointment as acting vice-consul was properly made by a minis-

ter resident consul-general, under consular regulations promulgated with the approval of the President, where the minister resident and consul-general, being seriously ill, was granted by the President a leave of absence, and before leaving his post appointed one as acting vice-consul, and administered to him an oath faithfully to discharge the duties of the office of vice-consul, who executed official bonds which were approved by the department, and the department acknowledged his communications and acted upon them as communications from a person authorized to perform the duties of minister resident and consul-general in the emergency then existing. *U. S. v. Eaton*, (1898) 169 U. S. 331, 18 S. Ct. 374, 42 U. S. (L. ed.) 767.

Sec. 1696. [Expenses of vice-consulates and consular agencies.] The only allowance to any vice-consulate or consular agency for expenses shall be an amount sufficient to pay for stationery and postage on official letters. [*R. S.*]

Act of March 3, 1869, ch. 125, 15 Stat. L. 322.

Compensation of clerk.—This section does not make a consul liable for the compensation of a clerk at a consular agency, who was appointed by the President un-

der his authority to appoint consular clerks and to fix their compensation. *U. S. v. Owen*, (1891) 47 Fed. 797.

Sec. 1697. [Bonds of consular officers to be furnished and deposited with Secretary of the Treasury.] Every consul-general, consul, and commercial agent, before he receives his commission, or enters upon the duties of his office, shall give a bond to the United States, with such sureties, who shall be permanent residents of the United States, as the Secretary of State shall approve, in a penal sum not less than one thousand dollars, and in no case less than the annual compensation allowed to such officer, and not more than ten thousand dollars, and in such form as the President shall prescribe, conditioned for the true and faithful accounting for, paying over, and delivering up of all fees, moneys, goods, effects, books, records, papers, and other property which shall come to his hands, or to the hands of any other person, to his use as such consul-general, consul, or commercial agent under any law, now or hereafter enacted, or by virtue of his office; and for the true and faithful performance of all other duties, now or hereafter lawfully imposed upon him as such consul-general, consul, or commercial agent. The bond herein mentioned shall be deposited with the Secretary of the Treasury. In case of a breach of any such bond, any person thereby injured may institute, in his own name and for his sole use, a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form; but if such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant, and the United States shall, in no case, be liable for the same. The said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by a breach of the condition

of the same until the whole penalty has been recovered; and the proceeding shall always be as directed in this section. [R. S.]

This section was "amended to read as" above given by section 1 of the Act of Dec. 21, 1898, ch. 36, 30 Stat. L. 770. Originally it was as follows:

"SEC. 1697. Every consul-general, consul, and commercial agent, before he receives his commission or enters upon the duties of his office, shall give a bond to the United States, with such sureties, who shall be permanent residents of the United States, as the Secretary of State shall approve, in a penal sum not less than one thousand dollars, and in no case less than the annual compensation allowed to such officer, and not more than ten thousand dollars, and in such form as the President shall prescribe, conditioned for the true and faithful accounting for, paying over, and delivering up of all fees, moneys, goods, effects, books, records, papers, and other property which shall come to his hands, or to the hands of any other person to his use as such consul-general, consul, or commercial agent, under any law now or hereafter enacted; and for the true and faithful performance of all other duties now or hereafter lawfully imposed upon him as such consul-general, consul, or commercial agent. The bonds herein mentioned shall be deposited with the Secretary of the Treasury." Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 56.

The provisions of this section relating to commercial agents were superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21, which abolished this office.

By a provision of section 1 of the Consular and Diplomatic Appropriation Act of June 11, 1874, ch. 275, it was provided that:

"The bonds which consular officers who are not compensated by salaries are required by the thirteenth section of the act of August eighteenth, eighteen hundred and fifty-six, to enter into, shall hereafter be made with such sureties as the Secretary of State shall approve." [18 Stat. L. 67.]

This provision was superseded by a provision contained in the Act of April 5, 1906, ch. 1366, § 8, given *supra*, p. 22, relating to the salaries of consular officers. The Act of Aug. 18, 1856, ch. 127, § 13, mentioned in the superseded provisions above given, was embodied in R. S. sec. 1697, given in the text section.

Failure to give bond.—A person was appointed minister resident and consul-general to Hayti. He took the oath of office, but as he failed to give the official bond the President determined not to deliver the commission to him. The attorney-general advised that as he had not given the bond, he never became entitled even to demand a commission, let alone enter upon the duties of the office, from which it followed that he could not claim any of the emoluments. (1885) 18 Op. Atty.-Gen. 157.

It was so held, on the same facts, in *Williams v. U. S.*, (1888) 23 Ct. Cl. 46, and the court said: "The question does not arise here whether such an officer under some circumstances, and to some extent, might not be held to have been in office and entitled to its salary from the date of his commission or from the date of his taking the oath, if within a reasonable or proper time his bond should be tendered, because the claimant never tendered a bond at any time." See *Eaton's Case*, under R. S. sec. 1698, following.

Overpayments on salary.—A bond undertaking that the principal should "truly and faithfully discharge the duties of his said office according to law, and truly and

faithfully pay over and deliver up all moneys, etc., which shall come into his hands," makes the sureties liable for moneys that the government might overpay the principal for salary. *U. S. v. Bee*, (C. C. A. 1893) 54 Fed. 112, 7 U. S. App. 459, 4 C. C. A. 219.

But for purposes and objects not comprehended within his consular duties, the sureties on the bond of a consul cannot be called upon to account for moneys received by him. *U. S. v. Bell*, (1829) Gilp. 41, 24 Fed. Cas. No. 14,565.

Negligence of the Treasury Department does not release the sureties. "All the property of the United States is held in trust for the people, and it is now well settled upon grounds of public policy that the public interests shall not be prejudiced by the neglect of the officers or agents to whose care they are confided." *U. S. v. Bee*, (C. C. A. 1893) 54 Fed. 112, 7 U. S. App. 459, 4 C. C. A. 219.

Surety companies.—The secretary of state may accept as sureties upon official bond of consular officers corporations organized under state or United States laws known as surety companies. (1891) 20 Op. Atty.-Gen. 16.

Sec. 1698. [Bonds of vice-consuls.] Every vice-consul-general or vice-consul shall, before he enters on the execution of his trust, give bonds, with such sureties, who shall be permanent residents of the United States, as shall be approved by the Secretary of State, in a sum not less than two thousand dollars nor more than ten thousand dollars, conditioned for the

true and faithful discharge of the duties of his office according to law, and for truly accounting for all moneys, goods, and effects which may come into his possession by virtue of his office. The bond shall be lodged in the office of the Secretary of the Treasury. In case of a breach of any such bond, any person thereby injured may institute, in his own name, and for his sole use, a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue for him in due form; but if such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant, and the United States shall in no case be liable for the same. The said bond shall remain after any judgment rendered thereon as a security for the benefit of any person injured by a breach of the condition of the same until the whole penalty has been recovered; and the proceedings shall always be as directed in this section. That when suit is brought upon the bond prescribed in this or the preceding section, if the principal in the bond resides in a foreign country, the summons, or other process, may be served upon him by filing a certified copy of the same with the Secretary of the Treasury, which service shall be deemed sufficient to give the court jurisdiction over the person and property of the defendant; and the bond prescribed in this and the preceding section shall contain a condition to accept such service as sufficient to give the court jurisdiction as aforesaid. The principal shall have ninety days from the time of such service in which to enter his appearance in the action. When a copy of such summons or other process has been filed with the Secretary of the Treasury, he shall at once mail a copy thereof to the principal at his last known place of residence. [R. S.]

This section was amended to read as above given by section 2 of the Act of Dec. 21, 1898, ch. 36, 30 Stat. L. 770. Originally it was as follows:

"SEC. 1698. Every vice-consul shall, before he enters on the execution of his trust, give bond, with such sureties as shall be approved by the Secretary of State, in a sum of not less than two thousand nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office according to law, and for truly accounting for all moneys, goods, and effects which may come into his possession by virtue of his office. The bond shall be lodged in the office of the Secretary of the Treasury." Act of April 14, 1792, ch. 24, 1 Stat. L. 256.

The office of vice-consul-general was abolished by a provision of section 6 of the Act of Feb. 5, 1915, ch. 23, *infra*, p. 45.

Statutory provisions as to bonds of officers are directory and not mandatory, and there is no error in allowing one, who performs the duties of vice-consul, compensation for a period prior to the approval of

his bond by the secretary of state. *U. S. v. Eaton*, (1898) 169 U. S. 331, 18 S. Ct. 374, 42 U. S. (L. ed.) 767. But see *Dainese's Case*, (1879) 15 Ct. Cl. 64.

Sec. 1699. [Consular officers not to transact business.] No consul-general, consul, or consular agent receiving a salary of more than one thousand dollars a year shall, while he holds his office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as a clerk or other agent for any such person to, from, or within the port, place, or limits of his jurisdiction, directly or indirectly, either in his own name or in the name or through the agency of any other person; nor shall he practice as a lawyer for compensation or be interested in the fees or compensation of any lawyer; and he shall in his official bond stipulate as a condition thereof not to violate this prohibition. [R. S.]

This section was amended to read as above given by an Act of April 5, 1906, ch. 1366, § 6, 34 Stat. L. 101. The original provision was as follows:

"Sec. 1699. No consul-general, consul, or commercial agent, embraced in Schedule B, shall, while he holds his office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as a clerk or other agent for any such person to, from, or within the port, place, or limits of his consulate or commercial agency, directly or indirectly, either in his own name, or in the name or through the agency of any other person; and he shall, in his official bond, stipulate, as a condition thereof, not to violate this prohibition."

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 55.

And see the Act of Feb. 5, 1915, ch. 23, § 7, *infra*, p. 55.

Sec. 1700. [Extension of prohibition upon transacting business.] All consular officers whose respective salaries exceed one thousand dollars a year shall be subject to the prohibition against transacting business, practicing as a lawyer, or being interested in the fees or compensation of any lawyer contained in the preceding section. And the President may extend the prohibition to any consul-general, consul, or consular agent whose salary does not exceed one thousand dollars a year or who may be compensated by fees, and to any vice or deputy consular officer or consular agent, and may require such officer to give a bond not to violate the prohibition. [R. S.]

This section was amended to read as above given by an Act of April 5, 1906, ch. 1366, § 6, 34 Stat. L. 101. Originally it was as follows:

"SEC. 1700. All consular officers whose respective salaries exceed one thousand dollars a year, shall be subject to the prohibition against transacting business contained in the preceding section. And the President may extend the prohibition to any consul or commercial agent not embraced in Schedules B and C, and to any vice-consul, vice-commercial agent, deputy consul, or consular agent, and may require such officer to give a bond not to violate the same."

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 57; Act of Feb. 4, 1862, ch. 17, 12 Stat. L. 335, 336.

See the Act of Feb. 5, 1915, ch. 23, § 7, *infra*, p. 55.

Sec. 1701. [Penalty for illegally transacting business.] Every consul-general, consul, or commercial agent who violates the prohibition against transacting business, required to be inserted in his official bond, shall be liable to a penalty therefor, for the use of the United States, equal in amount to the annual compensation specified for him in Schedule B, which may be recovered in an action of debt at the suit of the United States, either directly for the penalty, as such, against such consul-general, or consul, or commercial agent, or upon his official bond, as liquidated damages, for the breach of such condition against such consul-general, consul, or commercial agent, and his sureties, or any one or more of them; and in every such case all such actions shall be open to the United States for the collection of such penalty till the same shall be collected in some one of such actions; and every such penalty, when collected, shall be paid into the Treasury of the United States. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 55.

The office of commercial agent was abolished by section 3 of the Act of April 5, 1906, ch. 1366, *supra*, p. 21, and the same Act, by reclassifying consular officers in section 2 thereof, superseded the words "in Schedule B" in the text above. See further the Act of Feb. 5, 1915, ch. 23, § 7, *infra*, p. 55.

Sec. 1702. This section was as follows:

"SEC. 1702. The compensation of consuls whose annual salaries do not, under existing law, exceed one thousand five hundred dollars, shall, when the fees collected at the consulates where they are located and paid into the Treasury of the United States amount to three thousand dollars, be two thousand dollars a year."

Act of March 30, 1868, ch. 38, 15 Stat. L. 57.

This section 1702, as well as the following section 1703, were superseded by the Act of April 5, 1906, § 8, *supra*, p. 22, which made different provisions with respect of compensation of consular officers.

Sec. 1703. This section was as follows:

"SEC. 1703. Every vice-consul and vice-commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed, as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer; and every consular agent shall be entitled, as compensation for his services, to such fees as he may collect under the regulations prescribed by the President governing the subject of fees, or to so much thereof as shall be determined by the President; and the principal officer of the consulate or commercial agency within the limits of which such consular agent shall be appointed shall be entitled to the residue, if any, in addition to any other compensation allowed him by law for his services therein."

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 57.

See the note to the preceding section 1702, and see R. S. sec. 1733, *infra*, p. 38. The grade of commercial agent was abolished by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

Pro rata for part of year.—An action was brought against an ex-consul at Malaga, on his official bond, for money collected and not accounted for, from July 1, 1890, the beginning of the fiscal year, to Oct. 26, 1890, when he was removed by the appointment of a successor. It appeared that there was a commercial agency at Aimeria, at which place there was collected within the time stated the sum of \$1,665. Under the provisions of R. S. sec. 1703, and regulations prescribed by the President, the consular agent was "not authorized in any event to retain more than \$1,000, in any fiscal year," for his compensation; and for all the moneys received by the consul from the consular agent in excess of \$1,000 in the aggregate, he was required to account to the secre-

tary of the treasury. The consular agent remained in office during the entire fiscal year, and the settlement with the consul was made on the basis of \$1,665 collected, so that the amount paid over to the consul was \$665. The consul being chargeable with \$665, and being entitled to retain \$322.22 for his three months and twenty-six days of service, judgment was rendered for the balance. *Marston v. U. S.*, (C. C. A. 1896) 71 Fed. 496, 34 U. S. App. 461, 18 C. C. A. 216.

The provisions of R. S. sec. 2687 (see CUSTOMS DUTIES, vol. 2, p. 968), declaring a pro rata division of the year of all fees received by all officers of the government, apply to consuls and consular agents. *Marston v. U. S.*, (C. C. A. 1896) 71 Fed. 496; 34 U. S. App. 461, 18 C. C. A. 216.

Sec. 1704. [Appointment of consular clerks.] The President is authorized, whenever he shall think the public good will be promoted thereby, to appoint consular clerks, not exceeding thirteen in number at any one time, who shall be citizens of the United States, and over eighteen years of age at the time of their appointment, and shall be entitled to compensation for their services respectively at a rate not exceeding one thousand dollars a year each, to be determined by the President; and to assign such clerks, from time to time, to such consulates and with such duties as he shall direct. [*R. S.*]

Act of June 20, 1864, ch. 136, 13 Stat. L. 139.

The provision relating to salaries was amended by a provision of the Consular and Diplomatic Appropriation Act of June 11, 1874, ch. 275, § 5, in the following terms: "That from and after the first day of July next, the annual salary of consular clerks who shall have remained continuously in service as such for the period of five years and upward shall be one thousand two hundred dollars." [18 Stat. L. 70.]

This amendatory provision, and with it the provision amended by it in the text above, were amended by a part of section 1 of the Act of Feb. 22, 1907, ch. 1184, *infra*, p. 44.

By section 1 of the Act of May 21, 1908, ch. 183, given *infra*, p. 44, the designation of clerks was altered, thereby superseding the word "clerks" in the above section. By the Act last cited, as well as by section 1 of the Act of March 2, 1909, ch. 235, given *infra*, p. 44, the number of consular assistants is increased.

Sec. 1705. [Examination and removal of consular clerks.] Before the appointment of any such consular clerk shall be made, it shall be satisfactorily shown to the Secretary of State, after due examination and report by

an examining board, that the applicant is qualified and fit for the duties to which he shall be assigned; and such report shall be laid before the President. And no clerk so appointed shall be removed from office, except for cause stated in writing, which shall be submitted to Congress at the session first following such removal. [R. S.]

Act of June 20, 1864, ch. 136, 13 Stat. L. 139.

With respect of clerks, see the note to R. S. sec. 1704, immediately preceding.

Sec. 1706. [Actual expenses may be allowed to consuls-general, etc., who are not allowed to trade.] The President may allow consuls-general, consuls, and commercial agents, who are not allowed to trade, actual expenses of office-rent, not to exceed, in any case, twenty per centum of the amount of the annual compensation allowed to such officer, whenever he shall think there is sufficient reason therefor. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 60; Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 473.

The office of commercial agent was abolished by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

Sec. 1707. [Protests.] Consuls and vice-consuls shall have the right, in the ports or places to which they are severally appointed, of receiving the protests or declarations which captains, masters, crews, passengers, or merchants, who are citizens of the United States, may respectively choose to make there; and also such as any foreigner may choose to make before them relative to the personal interest of any citizen of the United States. Copies of such acts duly authenticated by consuls or vice-consuls, under the seal of their consulates, respectively, shall be received in evidence equally with their originals in all courts in the United States. [R. S.]

Act of April 14, 1792, ch. 24, 1 Stat. L. 255.

The authenticating, noting, etc., of marine protests are official consular services. (1888) 19 Op. Atty-Gen. 196.

Sec. 1708. [Lists and returns of seamen, vessels, etc.] Every consular officer shall keep a detailed list of all seamen and mariners shipped and discharged by him, specifying their names and the names of the vessels on which they are shipped and from which they are discharged, and the payments, if any, made on account of each so discharged; also of the number of the vessels arrived and departed, the amounts of their registered tonnage, and the number of their seamen and mariners, and of those who are protected, and whether citizens of the United States or not, and as nearly as possible the nature and value of their cargoes, and where produced, and shall make returns of the same, with their accounts and other returns, to the Secretary of the Treasury. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 62.

Sec. 1709. [Estates of decedents — Auditor for State or other Department as conservator.] It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die

within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings.

Sixth. The Auditor for the State and other Departments shall act as conservator of such part of these estates as may be received at the Treasury, and for their protection the Secretary of the Treasury may order such effects to be sold as may consist of jewelry or other articles which have heretofore or may hereafter be received at the Treasury, and pay the expenses of such sale out of the proceeds, provided application for these effects shall not have been made by the legal claimant within two years after their receipt. The Auditor is authorized to indorse all bills of exchange, promissory notes, and other evidences of indebtedness due to such estates, and to take such steps as may be necessary for their collection. The proceeds of such sales, together with such other moneys as may be collected by him, shall be deposited into the Treasury in trust for the legal claimant, and be reported to the Secretary of State. [R. S.]

Act of April 14, 1792, ch. 24, 1 Stat. L. 255; Act of March 3, 1911, ch. 223, 36 Stat. L. 1083.

This section was amended by adding thereto the sixth paragraph by an Act of March 3, 1911, ch. 223, 36 Stat. L. 1083, entitled "An Act amending section seventeen hundred and nine of the Revised Statutes of the United States."

As to consular officers as administrators, guardians, etc., see the Act of June 30, 1902, ch. 1331, given *infra*, p. 42.

Sec. 1710. [Notification of death.] For the information of the representative of the deceased, the consul or vice-consul, in the settlement of his estate, shall immediately notify his death in one of the gazettes published in the consulate, and also to the Secretary of State, that the same may be notified in the State to which the deceased belonged; and he shall, as soon as may be, transmit to the Secretary of State an inventory of the effects of the deceased, taken as before directed. [R. S.]

Act of April 14, 1792, ch. 24, 1 Stat. L. 255.

Sec. 1711. [Decedent's directions to be followed.] When any citizen of the United States, dying abroad, leaves, by any lawful testamentary disposition, special directions for the custody and management, by the consular officer of the port or place where he dies, of the personal property of which he dies possessed in such country, such officer shall, so far as the laws of the country permit, strictly observe such directions. When any

such citizen so dying, appoints, by any lawful testamentary disposition, any other person than such officer to take charge of and manage such property, it shall be the duty of the officer, whenever required by the person so appointed, to give his official aid in whatever way may be necessary to facilitate the proceedings of such person in the lawful execution of his trust, and, so far as the laws of the country permit, to protect the property of the deceased from any interference of the local authorities of the country where such citizen dies; and to this end it shall be the duty of such consular officer to place his official seal upon all of the personal property or effects of the deceased, and to break and remove such seal as may be required by such person, and not otherwise. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 63.

Sec. 1712. [Commercial and agricultural information to be procured.]

Consuls and commercial agents of the United States in foreign countries shall procure and transmit to the Department of State authentic commercial information respecting such countries, of such character and in such manner and form and at such times as the Department may from time to time prescribe. And they shall also procure and transmit to the Department of State, for the use of the Agricultural Department, monthly reports relative to the character, condition, and prospective yields of the agricultural and horticultural industries and other fruiteries of the country in which they are respectively stationed; and the Commissioner of Agriculture is hereby required and directed to embody the information thus obtained, or so much thereof as he may deem material and important, in his monthly bulletin of crop reports. [R. S.]

This section was amended to read as above given by the Act of June 18, 1888, ch. 393, 25 Stat. L. 186, "An act to promote agriculture and for other purposes."

Originally this section was as follows:

"Sec. 1712. Consuls and commercial agents of the United States in foreign countries shall procure and transmit to the Department of State authentic commercial information respecting such countries, of such character, and in such manner and form, and at such times as the Department may from time to time prescribe." Act of Aug. 18, 1856, ch. 170, 11 Stat. L. 139.

The provisions of this section relating to commercial agents were superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

The words "Commissioner of Agriculture" were superseded by the Act of Feb. 9, 1889, ch. 122, 25 Stat. L. 659, establishing the Department of Agriculture as an Executive Department under the authority of a Secretary of Agriculture, and the transfer to the latter, by a provision of the Act of July 14, 1890, ch. 707, 26 Stat. L. 288, of the duties formerly resting upon the Commissioner of Agriculture. See AGRICULTURE, vol. 1, p. 191.

Sec. 1713. [Prices current.] Every consular officer shall furnish to the Secretary of the Treasury, as often as shall be required, the prices current of all articles of merchandise usually exported to the United States from the port or place in which he is situated; and he shall also furnish to the Secretary of the Treasury, at least once in twelve months, the prices current of all articles of merchandise, including those of the farm, the garden, and the orchard, that are imported through the port or place in which he is stationed. And he shall also report as to the character of agricultural implements in use, and whether they are imported to or manufactured in that county [country?]; as to the character and extent of agricultural and horticultural pursuits there. That part of the information

thus obtained which pertains to agriculture shall be transmitted by the Secretary of the Treasury, as soon as the same shall have been received by him, to the Commissioner of Agriculture, who shall include the same, or so much thereof as he may deem material and important, in his annual reports, stating the said prices in dollars and cents, and rendering tables of foreign weights and measures into their American equivalents. [R. S.]

This section was amended to read as above given by the Act of June 18, 1888, ch. 393, 25 Stat. L. 186.

Originally this section was as follows:

"SEC. 1713. Every consular officer shall furnish to the Secretary of the Treasury, as often as shall be required, the prices current of all articles of merchandise usually exported to the United States from the port or place in which he is stationed." Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 62.

A provision somewhat similar is contained in the Consular and Diplomatic Appropriation Act of June 4, 1878, ch. 155, 20 Stat. L. 98. It reads as follows:

"Every consular officer shall furnish to the Secretary of the Treasury, or to such officers of the customs as he may direct, as often as may be required, the prices current of all articles of merchandise usually exported to the United States from the port or place in which he is stationed; and authority is hereby vested in the Secretary of the Treasury to require a compliance with this provision; but this provision shall not have the effect to impair the provisions of section seventeen hundred and twelve of the Revised Statutes."

As to the Commissioner of Agriculture above mentioned, see the note to the preceding R. S. sec. 1712. And see the Act of Jan. 27, 1879, ch. 28, § 1. *infra*, p. 41.

Sec. 1714. [Construction of powers.] The specification in this Title of certain powers to be exercised and duties to be performed by consuls and vice-consuls, shall not be construed as implying the exclusion of others resulting from the nature of their appointments, or prescribed by any treaty or convention under which they may act. [R. S.]

Act of April 14, 1792, ch. 24, 1 Stat. L. 257.

A survey of a vessel is a matter of admiralty and maritime jurisdiction, but not exclusively so. "A survey may be made upon the mere private application of the master directly to the surveyors; and there does not seem any good reason why, if an American consul should inter-

pose in behalf of the master, and with a view to assist him, should appoint the surveyors at his request, and thereby sanction their competency to the task, such an appointment should be deemed objectionable." *Potter v. Ocean Ins. Co.*, (1837) 3 Sumn. 27, 19 Fed. Cas. No. 11,335.

Sec. 1715. [Certifying invoices.] No consular officer shall certify any invoice unless he is satisfied that the person making oath thereto is the person he represents himself to be, that he is a credible person, and that the statements made under such oath are true; and he shall, thereupon, by his certificate, state that he was so satisfied. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 62.

Presence of affiant.—There is no legal objection to a consul issuing a certificate to an invoice when the person who makes the declaration and takes the oath does not in person present it to him for authentication. "I see nothing in the law which requires that the person making the declaration should be actually present before the consul, vice-consul, or commercial agent. . . . But if the consular officer

before whom the invoice is produced with a declaration indorsed should have doubts as to the identity of the person making the declaration, as to his credibility, or as to the truthfulness of the statements set forth in the declaration, he would have the right, if necessary, to require the declarant to come personally before him." (1897) 21 Op. Atty-Gen. 571.

Sec. 1716. [Exacting excessive fees for verifying invoices.] The fee provided by law for the verification of invoices by consular officers shall,

when paid, he held to [be] a full payment for furnishing blank forms of declaration to be signed by the shipper, and for making, signing, and sealing the certificate of the consular officer thereto; and any consular officer who, under pretense of charging for blank forms, advice, or clerical services in the preparation of such declaration or certificate, charges or receives any fee greater in amount than that provided by law for the verification of invoices, or who demands or receives for any official services, or who allows any clerk or subordinate to receive for any such service any fee or reward other than the fee provided by law for such service, shall be punishable by imprisonment for not more than one year, or by a fine of not more than two thousand dollars; and shall be removed from his office. [R. S.]

Act of March 3, 1869, ch. 125, 15 Stat. L. 321.

Sec. 1717. [Certificate for goods from countries adjacent to United States.] That no consular officer of the United States shall hereafter grant a certificate for goods, wares, or merchandise shipped from countries adjacent to the United States, which have passed a consulate after purchase for shipment. [R. S.]

Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 474.

Similar provisions were made by R. S. sec. 2861, given under the title CUSTOMS DUTIES, vol. 2, p. 1001.

Sec. 1718. [Fees allowed for official service—retention of vessels' papers.] Whenever any master or commander of a vessel of the United States has occasion for any consular or other official service, which any consular officer of the United States is authorized by law or usage officially to perform, and for which any fees are allowed by the rates or tariffs of fees, he shall apply to the consular officer at the consulate or commercial agency where such service is required to perform such service, and shall pay to such officer the fees allowed for such service by the rates or tariffs of fees. And every such master or commander who omits so to do shall be liable to the United States for the amount of the fees lawfully chargeable for such services when actually performed. All consular officers are authorized and required to retain in their possession all the papers of such vessels, which shall be deposited with them as directed by law, till payment shall be made of all demands and wages on account of such vessels. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 63.

The first part of this section relating to fees from masters or commanders of vessels of the United States was superseded by the Act of June 26, 1884, ch. 121, § 12, *infra*, p. 42.

The right "to retain in their possession all the papers of such vessels" confers upon the consul no new jurisdiction, but simply provides a means of enforcing that which he already had, that is, to compel the payment of wages in certain cases and consular fees. It does not confer upon him a general power of deciding upon all manner of disputed claims and demands against American vessels. "After

a vessel has been attached by a creditor, and has been released on bond, he cannot demand that the consul shall detain it." Nor can the papers be detained by him in a case where by law he is directed to recover, in his own name, for the benefit of the United States, a penalty incurred by the master of a vessel. (1859) 9 Op. Atty.-Gen. 384.

Sec. 1719. [No profit from discharged seamen.] No consular officer, nor any person under any consular officer shall make any charge or receive,

directly or indirectly, any compensation, by way of commission or otherwise, for receiving or disbursing the wages or extra wages to which any seaman or mariner is entitled who is discharged in any foreign country, or for any money advanced to any such seaman or mariner who seeks relief from any consulate or commercial agency; nor shall any consular officer, or any person under any consular officer, be interested, directly or indirectly, in any profit derived from clothing, boarding, or otherwise supplying or sending home any such seaman or mariner. Such prohibition as to profit, however, shall not be construed to relieve or prevent any such officer who is the owner of or otherwise interested in any vessel of the United States, from transporting in such vessel any such seaman or mariner, or from receiving or being interested in such reasonable allowance as may be made for such transportation by law. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 59.

The provisions of section 8 of the Act of April 5, 1906, ch. 1366, *supra*, p. 22, superseded the following provisions from the Consular and Diplomatic Appropriation Act of Jan. 27, 1879, ch. 28, 20 Stat. L. 273:

"Liverpool, London, Cardiff, Belfast, and Hamburg. . . . That the fees collected at these ports for shipping and discharging seamen shall be paid into the Treasury as required by law. And the President is requested to revise the tariff of consular fees and prescribe such rates as will make them conform, as nearly as may be, to the fees charged by other commercial nations for similar services."

See generally SEAMEN.

Sec. 1720. This section was as follows:

"SEC. 1720. American vessels running regularly by weekly or monthly trips, or otherwise, to or between foreign ports, shall not be required to pay fees to consuls for more than four trips in a year."

. Act of Aug. 5, 1861, ch. 49, 12 Stat. L. 315.

It was superseded by the provisions of the Act of June 26, 1884, ch. 121, § 12, *infra*, p. 42.

Duty to deposit papers.—This statute did not change, nor in any respect affect, the duties of the masters of American vessels to comply with the duties imposed upon them by law, as, under the Act of 1803, on the occasion of every "arrival," to deposit their vessels' registers with the consuls of our government at the for-

eign ports. The statute simply limited, in the case of the vessels indicated, the number of occasions on which the consuls are entitled to charge the prescribed fee for receiving and delivering the papers of the vessels. (1866) 11 Op. Atty.-Gen. 72; (1865) 11 Op. Atty.-Gen. 237.

Sec. 1721. This section was repealed by the Act of April 5, 1906, ch. 1366, § 9, *supra*, p. 23. Its provisions were as follows:

"SEC. 1721. The fee for certifying invoices to be charged by the consul-general for the British North American Provinces, and his subordinate consular officers and agents, for goods not exceeding one hundred dollars in value, shall be one dollar."

Act of June 20, 1864, ch. 136, 13 Stat. L. 140.

Sec. 1722. [Tonnage fees in Canada.] No consul, vice-consul, or consular agent in the Dominion of Canada, shall be allowed tonnage fees for any services, actual or constructive, rendered any vessel owned and registered in the United States that may touch at a Canadian port; and in the collection of official fees they shall receive foreign moneys at the rate given in the Treasury schedule of the value of foreign coins. [R. S.]

Act of March 3, 1869, ch. 125, 15 Stat. L. 321.

See the note to R. S. sec. 1718, *supra*, p. 34.

Sec. 1723. [Exacting excessive fees.] Whenever any consular officer collects, or knowingly allows to be collected for any service, any other or greater fees than are allowed by law for such service, he shall, besides his

liability to refund the same, be liable to pay to the person by whom or in whose behalf the same are paid, treble the amount of the unlawful charge so collected, as a penalty, to be recovered with costs, in any proper form of action, by such person for his own use. And in any such case the Secretary of the Treasury may retain out of the compensation of such officer, the amount of such overcharge, and of such penalty, and charge the same to such officer in account, and may thereupon refund such unlawful charge, and pay such penalty to the person entitled to the same if he shall think proper so to do. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.

The penal provisions of section 17 of the Act of Aug. 18, 1856, from which this section was taken, were considered by Attorney-General Black only applicable to the taking of greater fees than were allowed by the Act itself. If a consul received greater fees than were allowed by a prior act, he might be permitted in self-defense to return the excess over the legal amounts to the proper parties, "but beyond this the question of his liability is a personal one, upon which it is not the

duty of the government to give him advice." (1860) 9 Op. Atty.-Gen. 500.

Liability of surety for overcharge of fees.—The surety on the bond of a consular officer cannot be held liable for the statutory penalty incurred by the principal under this section for charging excessive fees, where such fees, including the excess, have been charged against him in his account, and paid to the Treasury Department. *U. S. v. Ballantine*, (C. C. A. 1905) 138 Fed. 312, 70 C. C. A. 602.

Sec. 1724. [Penalty for omission to collect fees.] Every consul-general, consul, or commercial agent, mentioned in Schedules B and C, or vice-consul, or vice-commercial agent, appointed to perform the duty of any such officer mentioned in Schedules B and C, who omits to collect any fees which he is entitled to charge for any official service, shall be liable to the United States therefor, as if he had collected the same; unless, upon good cause shown therefor, the Secretary of the Treasury shall think proper to remit the same. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.

The words "commercial agent" and "vice-commercial agent" contained in the text were superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21, and the words "Schedules B and C" were superseded by section 2 of the last cited Act, *supra*, p. 19.

Sec. 1725. [Returns of fees.] All such consuls-general, consuls, commercial agents, and consular agents, as are allowed for their compensation the whole or any part of the fees which they may collect, and all such vice-consuls and vice-commercial agents appointed to perform the duties of such consuls-general, consuls, and commercial agents as are allowed for their compensation the whole or any part of such fees, shall make returns in such manner as the Secretary of State shall prescribe, of all such fees as they or any person in their behalf so collect. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.

As to "commercial agents" and "vice-commercial agents" see the note to the preceding R. S. sec. 1724. As to the returns of fees here mentioned see the Act of July 31, 1894, ch. 174, § 5, *infra*, p. 42.

Sec. 1726. [Receipts for fees.] Every consular officer shall give receipts for all fees collected for his official services, expressing the particular services for which the same were collected. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.

Sec. 1727. [Registering receipts for fees.] Every consular officer shall number all receipts given by him for fees received for official services, in the order of their dates, beginning with number one at the commencement of the period of his service, and on the first day of January in every year thereafter. He shall also register in a book to be kept by him for that purpose all fees so received by him, in the order in which they are received, specifying each item of service and the amount received therefor, from whom, and the dates when received, and if for any service connected with any vessel, the name thereof, and indicating what items and amounts are embraced in each receipt given by him therefor, and numbering the same according to the number of the receipts respectively, so that the receipts and register shall correspond with each other; and he shall, in such register, specify the name of the person for whom, and the date when he shall grant, issue, or verify any passport, certify any invoice, or perform any other official service in the entry of the receipt of the fees therefor, and also number each consular act so receipted for with the number of such receipt, and as shown by such register. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.
See the note to R. S. sec. 1718, *supra*, p. 34.

Sec. 1728. [Verification of account of fees.] Every consular officer, in rendering his account of fees received shall furnish a full transcript of the register which he is required to keep, and make oath that, to the best of his knowledge, the same is true, and contains a full and accurate statement of all fees received by him, or for his use, for his official services as such consular officer, during the period for which it purports to be rendered. Such oath may be taken before any person having authority to administer oaths at the port or place where the consular officer is located. If any such consular officer willfully and corruptly commits perjury, in any such oath, within the intent and meaning of any act of Congress now or hereafter made, he may be charged, proceeded against, tried, and convicted, and dealt with in the same manner, in all respects, as if such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, and shall be subject to the same punishment and disability therefor as are or shall be prescribed for such offense. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.

Sec. 1729. This section was superseded by the Act of April 5, 1906, ch. 1366, §§ 2, 3, and 8, *supra*, p. 19 *et seq.* Its provisions were as follows:

"SEC. 1729. All fees collected by any consul or commercial agent not mentioned in Schedule B or C, or by any vice-consul or commercial agent appointed to perform their duties, or by any other person in their behalf, shall be accounted for to the Secretary of the Treasury in the manner prescribed by the five preceding sections."

Act of July 25, 1866, ch. 233, 14 Stat. L. 226.

Sec. 1730. This section was superseded by the Act of April 5, 1906, ch. 1366, §§ 2, 3, and 8, *supra*, p. 19 *et seq.* Its provisions were as follows:

"SEC. 1730. Consuls-general, consuls, and commercial agents, not embraced in Schedules B and C, shall be entitled, as compensation for their services, to such fees as they may collect under the regulations prescribed by the President governing the subject of fees."

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 55.

Sec. 1731. [Rates of fees to be posted up.] It shall be the duty of all consular officers at all times to keep posted up in their offices, respectively,

in a conspicuous place, and subject to the examination of all persons interested therein, a copy of such rates or tariffs as shall be in force. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 57.

Sec. 1732. [Excess of fees above \$2,500.] Whenever the fees collected by or in behalf of any consul or commercial agent, not mentioned in Schedule B or C, amount to more than twenty-five hundred dollars in any one year, over and above such expenses of office-rent and clerk-hire as are approved by the Secretary of State, of which return shall be made to the Secretary of the Treasury, the excess for that year shall be held subject to the draft or other directions of the Secretary of the Treasury. [R. S.]

Act of July 25, 1866, ch. 233, 14 Stat. L. 226.

The references to commercial agents and Schedules B and C contained in the above section were superseded by the Act of April 5, 1906, ch. 1366, §§ 2 and 3, *supra*, pp. 19-21, and further provisions with respect to fees were made by section 8 of that Act, *supra*, p. 22.

Provisions similar to those of the text were made by R. S. sec. 1747, *infra*, p. 49.

The "residue" of the fees, under R. S. sec. 1703 (noted as repealed, *supra*, p. 29), which the consular agent is required to pay to the principal officer of the consulate or commercial agency, is returnable in the

principal's account to the secretary of the treasury, and constitutes a part of the fund out of which the maximum of \$2,500 is allowed. (1866) 12 Op. Atty-Gen. 97.

Sec. 1733. [Excess of fees above \$1,000.] All moneys received for fees at any vice-consulates or consular agencies of the United States, beyond the sum of one thousand dollars in any one year, and all moneys received by any consul or consul-general from consular agencies or vice-consulates in excess of one thousand dollars in the aggregate from all such agencies or vice-consulates, shall be accounted for to the Secretary of the Treasury, and held subject to his draft or other directions. [R. S.]

Act of March 30, 1868, ch. 38, 15 Stat. L. 57.

See the note to the preceding R. S. sec. 1732.

Resort to departmental construction.—With reference to this section, the attorney-general said: "The construction of the statute, therefore, being one of doubt, it is proper to resort to the construction which has been placed upon these provisions of law by the state department and by the department of the treasury. I am advised that the uniform method of settling the accounts of consuls and consular agents, ever since the adoption of section 1733 in its original form in the Act of 1868, has been to allow the agent to retain

a sum not to exceed \$1,000 a year out of fees received by him, and to allow the principal consul to receive the residue, provided such residue did not, together with similar fees received from other consular agencies or vice-consulates in his territory, exceed \$1,000 a year. In view of this uniform construction, prevailing now for thirty years, I am unable to say that the law has been erroneously interpreted by the departments." (1898) 22 Op. Atty-Gen. 167. See also (1868) 12 Op. Atty-Gen. 528.

Sec. 1734. [Embezzlement.] Every consular officer who willfully neglects to render true and just quarterly accounts and returns of the business of his office, and of moneys received by him for the use of the United States, or who neglects to pay over any balance of said moneys due to the United States at the expiration of any quarter, before the expiration of the next succeeding quarter, or who shall receive money, property, or effects belonging to a citizen of the United States and shall not within a reasonable time after demand made upon him by the Secretary of State or by such citizen, his executor, administrator, or legal representative, account for and pay

over all moneys, property, and effects, less his lawful fees, due to such citizen, shall be deemed guilty of embezzlement, and shall be punishable by imprisonment for not more than five years, and by a fine of not more than two thousand dollars. [R. S.]

This section was amended to read as above given by the Act of Dec. 21, 1898, ch. 36, § 3, 30 Stat. L. 771.

Originally this section was as follows:

"SEC. 1734. Every consular officer who willfully neglects to render true and just quarterly accounts and returns of the business of his office, and of moneys received by him for the use of the United States, or who neglects to pay over any balance of such moneys due to the United States at the expiration of any quarter, before the expiration of the next succeeding quarter, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprisonment for not more than one year and by a fine of not more than two thousand dollars, and shall be forever disqualified from holding any office of trust or profit under the United States." Act of March 3, 1869, ch. 125, 15 Stat. L. 322.

For general provisions relating to embezzlement by public officers see PENAL LAWS.

Sec. 1735. [Neglect of duty, etc.] Whenever any consular officer willfully neglects or omits to perform seasonably any duty imposed upon him by law, or by any order or instruction made or given in pursuance of law, or is guilty of any willful malfeasance or abuse of power, or of any corrupt conduct in his office, he shall be liable to all persons injured by any such neglect, or omission, malfeasance, abuse, or corrupt conduct, for all damages occasioned thereby; and for all such damages, he and his sureties upon his official bond shall be responsible thereon to the full amount of the penalty thereof, to be sued in the name of the United States for the use of the person injured. Such suit, however, shall in no case prejudice, but shall be held in entire subordination to the interests, claims, and demands of the United States, as against any officer, under such bond, for every willful act of malfeasance or corrupt conduct in his office. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 64.

Defense of official character.—An action was brought against the consul-general of Egypt to recover the value of certain goods and credits which the defendant caused to be attached, in which action the declaration alleged usurpation and abuse of power. A plea by the defendant, asking the court to take judicial notice that his official character gave him the jurisdiction which he assumed to exercise, was held to

be defective. While it is usual for ministers and consuls in pagan and Mohammedan countries to exercise judicial functions as between their fellow-subjects or citizens, the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction, of which the court cannot take judicial notice. *Dainese v. Hale*, (1875) 91 U. S. 13, 23 U. S. (L. ed.) 190.

Sec. 1736. [Neglect of duty to seamen; corrupt conduct.] If any consul or commercial agent neglects or omits to perform, seasonably, the duties imposed upon him by the laws regulating the shipment and discharge of seamen, and the reclamation of deserters on board or from vessels in foreign ports, or is guilty of any malversation or abuse of power, he shall be liable to any injured person for all damage occasioned thereby; and for all malversation and corrupt conduct in office, he shall be punishable by imprisonment for not more than five years and not less than one, and by a fine of not more than ten thousand dollars and not less than one thousand. [R. S.]

Act of July 20, 1840, ch. 48, 5 Stat. L. 397.

The words "commercial agent" in the text were superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21, abolishing the office of commercial agent.

Government not liable.—By this and the preceding section, Congress addressed itself with some care to the subject of providing security against the unfaithfulness of persons holding consular offices, and this legislation accords with the well-settled principle that the United States is not liable to its citizens for the consequences of the wrongs or shortcomings of its officers. For the action of the collector

in collecting from the master the wages due to destitute seamen to pay for the necessary clothing supplied, whereas they were entitled, under R. S. sec. 4577 (see SEAMEN), to have their necessities supplied and to be sent home at the expense of the United States, the remedy, if any, would be against the consul on his bond, and not against the United States. (1887) 19 Op. Atty.-Gen. 22.

Sec. 1737. [False certificate of property.] If any consul, vice-consul, commercial agent, or vice-commercial agent falsely and knowingly certifies that property belonging to foreigners is property belonging to citizens of the United States, he shall be punishable by imprisonment for not more than three years and by a fine of not more than ten thousand dollars. [R. S.]

Act of Feb. 28, 1803, ch. 9, 2 Stat. L. 204.

As to "commercial agents" and "vice-commercial agents" see the note to the preceding R. S. sec. 1736.

By R. S. sec. 5442, which was embodied in Penal Laws, § 70, and repealed by section 341 thereof, a penalty was provided for the false certification of any invoice or document by a consular officer. See PENAL LAWS.

Sec. 1738. [When consular officers may perform diplomatic functions.] No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 56.

"When a consul is appointed *chargé d'affaires*, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as *chargé d'affaires* and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister." *In re Baiz*, (1890) 135 U. S. 424.

Authority of retiring minister to appoint.—A retiring minister, a secretary of legation and *chargé d'affaires*, has no authority to appoint a consul to act as minister and "consul in charge of legation," and the appointee cannot recover the salary of *chargé d'affaires* while so acting. *Otterbourg's Case*, (1869) 5 Ct. Cl. 430.

Sec. 1739. [Compensation of consular officer performing diplomatic functions.] For such time as any consular officer shall be authorized to perform diplomatic functions, in the absence of the regular diplomatic officer in the country to which he shall be appointed, he shall be entitled, in addition to his compensation as such consular officer, to receive compensation for his services while so authorized, at the rate which would be allowed for a secretary of legation in such country. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 56.

SEC. 3. [Interpreters to consulates in China and Japan.] That the President shall be, and is hereby, authorized to appoint interpreters to the

consulates at Shanghai, Tien Tsin, Fowchow and Kanagawa, and to allow them salaries not to exceed, in either case, the rate of two thousand dollars a year; and to appoint interpreters to the consulates at Hankow, Amoy, Canton, and Hong-Kong, and to allow them salaries not to exceed, in either case, the rate of seven hundred and fifty dollars a year; and also to allow, at his discretion, a sum not exceeding the rate of five hundred dollars for any one year to any one consulate in China or Japan, respectively, not herein named, for expenses of interpretation; and that section six of the act entitled "An act to regulate the diplomatic and consular systems of the United States," approved August eighteenth, eighteen hundred and fifty-six, is hereby repealed. [18 Stat. L. 70.]

The above section 3 and the following section 6 are from the Consular and Diplomatic Appropriation Act of June 11, 1874, ch. 275. Section 6 of the Act of Aug. 18, 1856, ch. 127, here mentioned, was carried in R. S. sec. 1692, noted *supra*, p. 24.

The appropriation for interpreters to be employed at the consulates at these and other points for the fiscal year ending June 30, 1916, was made by the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1125.

SEC. 6. [Vice-consuls acting as consuls to receive compensation though aliens.] That any vice-consul who may be temporarily acting as consul during the absence of such consul may receive compensation, notwithstanding that he is not a citizen of the United States. * * * [18 Stat. L. 70.]

See the note to the preceding section 3 of this Act.

"The provision of this section seems to have reference to that part of section 21 of the Act of 1856, ch. 127 (11 Stat. L. 60), which provided that compensation to officers mentioned in schedules B and C should not apply to the payment of any such officer who shall not be a citizen of the United States, but which was omitted from the Revised Statutes as the section was incorporated therein in section 1744." *Compilers' note, 1 Supp. R. S. 14.*

See the Act of March 12, 1904, ch. 543, § 1, *infra*, p. 43.

[SEC. 1.] [Statements as to exports, imports, rates of wages, etc.]
* * * And it shall be the duty of consuls to make to the Secretary of State a quarterly statement of exports from, and imports to, the different places to which they are accredited, giving, as near as may be, the market price of the various articles of exports and imports, the duty and port charges, if any, on articles imported and exported, together with such general information as they may be able to obtain as to how, where, and through what channels a market may be opened for American products and manufactures. In addition to the duties now imposed by law, it shall be the duty of consuls and commercial agents of the United States, annually, to procure and transmit to the Department of State, as far as practicable, information respecting the rate of wages paid for skilled and unskilled labor within their respective jurisdictions. [20 Stat. L. 273.]

This is from the Consular and Diplomatic Appropriation Act of Jan. 27, 1879, ch. 28.

The grade of commercial agent was abolished by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

Other requirements of a somewhat similar character are contained in R. S. secs. 1712 and 1713, *supra*, p. 32.

SEC. 12. [Consular fees for services to American vessels and seamen not permitted.] That on and after July first, eighteen hundred and eighty-four, no fees named in the tariff of consular fees prescribed by order of the President shall be charged or collected by consular officers for the official services to American vessels and seamen. Consular officers shall furnish the master of every such vessel with an itemized statement of such services performed on account of said vessel, with the fee so prescribed for each service, and make a detailed report to the Secretary of the Treasury for such services and fees, under such regulations as the Secretary of State may prescribe; and the Secretary of the Treasury shall allow consular officers who are paid in whole or in part by fees such compensation for said services as they would have received prior to the passage of this act: *Provided*, That such services, in the opinion of the Secretary of the Treasury have been necessarily rendered; and a sum sufficient for the payment of such compensation, when thus adjusted by the Secretary of the Treasury, is hereby appropriated out of any money in the Treasury not otherwise appropriated. [23 Stat. L. 56.]

The above section 12 is from the Act of June 26, 1884, ch. 121, "to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes."

This section superseded R. S. sec. 1720, noted *supra*, p. 35, and in part R. S. sec. 1718, *supra*, p. 34.

The expression "American vessels" 4131, but includes as well "foreign-built does not intend only "vessels of the registered American vessels." (1885) 18 United States" as defined by R. S. sec. Op. Atty.-Gen. 99.

[SEC. 1.] [Consuls, etc., not to receive salary of secretary or interpreter.] * * * And hereafter no consul or consul-general shall be entitled to or allowed any part of any salary appropriated for payment of a secretary or second secretary of legation or interpreter. [23 Stat. L. 329.]

This is from the Consular and Diplomatic Appropriation Act of Feb. 25, 1885, ch. 150.

SEC. 5. [Returns to be prescribed by Comptroller of Treasury.] The returns of fees mentioned in section seventeen hundred and twenty-five of the Revised Statutes shall be made as prescribed by the Comptroller of the Treasury. [28 Stat. L. 206.]

This is the latter part of section 5 of the Legislative, Executive and Judicial Appropriation Act of July 31, 1894, ch. 174. R. S. sec. 1725 above mentioned is given *supra*, p. 36.

An Act To prevent any consular officer of the United States from accepting any appointment from any foreign state as administrator, guardian, or to any other office of trust, without first executing a bond, with security, to be approved by the Secretary of State.

[Act of June 30, 1902, ch. 1331, 32 Stat. L. 546.]

[SEC. 1.] [Consular officers accepting positions of trust — bond, etc.] That no consular officer of the United States shall accept an appointment

from any foreign state as administrator, guardian, or to any other office of trust for the settlement or conservation of estates of deceased persons or of their heirs or of persons under legal disabilities, without executing a bond, with security, to be approved by the Secretary of State, and in a penal sum to be fixed by him and in such form as he may prescribe, conditioned for the true and faithful performance of all his duties according to law and for the true and faithful accounting for, delivering, and paying over to the persons thereto entitled of all moneys, goods, effects, and other property which shall come to his hands or to the hands of any other person to his use as such administrator, guardian, or in other fiduciary capacity. Said bond shall be deposited with the Secretary of the Treasury. In case of a breach of any such bond, any person injured by the failure of such officer faithfully to discharge the duties of his said trust according to law, may institute, in his own name and for his sole use, a suit upon said bond and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue in due form; but if such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant; and the United States shall in no case be liable for the same. The said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by a breach of the condition of the same until the whole penalty has been recovered. [32 Stat. L. 546.]

Previous provisions with respect to bonds were made by R. S. secs. 1697 and 1698, *supra*, pp. 25, 26.

SEC. 2. [Breach of trust, embezzlement — penalty.] That every consular officer who accepts any appointment to any office of trust mentioned in the preceding section without first having complied with the provisions thereof by due execution of a bond as therein required, or who shall willfully fail or neglect to account for, pay over, and deliver any money, property, or effects so received to any person lawfully entitled thereto, after having been requested by the latter, his representative or agent so to do, shall be deemed guilty of embezzlement and shall be punishable by imprisonment for not more than five years and by a fine of not more than five thousand dollars. [32 Stat. L. 547.]

[SEC. 1.] [Payment to consular officers not citizens.] The salary of a consular officer not a citizen of the United States shall be paid out of the amount specifically appropriated for salary at the consular office to which the alien officer is attached or appointed. [33 Stat. L. 78.]

This is from the Diplomatic and Consular Appropriation Act of Feb. 22, 1907, ch. 1184, ch. 543. The same provision has occurred in former years. See 32 Stat. L. 818; 32 Stat. L. 86; 31 Stat. L. 892; 31 Stat. L. 69; 30 Stat. L. 831; 29 Stat. L. 588; 28 Stat. L. 823; 27 Stat. L. 504. But apparently it has not been repeated in recent Appropriation Acts.

See the Act of June 11, 1874, ch. 275, § 6, *supra*, p. 41.

[SEC. 1.] **[Consular clerks — increased compensation — no reduction of salary.]** * * * From and after the first day of July, nineteen hundred and seven, the salaries of consular clerks shall be at the rate of one thousand dollars a year for the first three years of continuous service as such, and shall be increased two hundred dollars a year for each succeeding year of continuous service until a maximum compensation of one thousand eight hundred dollars a year shall be reached, and section seventeen hundred and four, Revised Statutes, and its amendatory Act of June eleventh, eighteen hundred and seventy-four, are hereby so amended: *Provided*, That the salary of no consular clerk herein provided for, and now in the service, shall be reduced by this Act. [34 Stat. L. 923.]

This is from the Diplomatic and Consular Appropriation Act of Feb. 22, 1907, ch. 1184.

R. S. sec. 1704 is given *supra*, p. 29, and the amendatory Act of June 11, 1874, above referred to is given in the notes to said R. S. sec. 1704.

The designation of consular "clerks" was changed to consular assistants by the Act of May 21, 1908, ch. 183, § 1, immediately following.

[SEC. 1.] **[Consular assistants — number.]** * * * The consular clerks heretofore provided for by law shall, from and after the first day of July, nineteen hundred and eight, be styled consular assistants.

For thirteen consular assistants as provided for by law, * * * seven additional consular assistants, subject to the same provisions of law as the above thirteen. [35 Stat. L. 180.]

This is from the Diplomatic and Consular Appropriation Act of May 21, 1908, ch. 183.

Thirteen consular clerks were authorized to be appointed by R. S. sec. 1704, *supra*, p. 29. This was increased by the provisions given in the text above and again increased by the Act of March 2, 1909, ch. 235, § 1, immediately following. The Diplomatic and Consular Appropriation Act for the fiscal year ending June 30, 1916, Act of March 4, 1915, ch. 145, 38 Stat. L. 1124, provides for forty consular assistants.

[SEC. 1.] **[Consular assistants — number.]** * * * For thirteen consular assistants as provided for by law, twelve additional consular assistants, subject to the same provisions of law as the above thirteen. [35 Stat. L. 681.]

This is from the Diplomatic and Consular Appropriation Act of March 2, 1909, ch. 235. See the note to the Act of May 21, 1908, ch. 183, given in the preceding paragraph of the text.

[SEC. 1.] **[Judicial authority of vice consul at Shanghai, China.]** * * * The judicial authority and jurisdiction in civil and criminal cases vested in and reserved to the consul general of the United States at Shanghai, China, by the Act of June thirtieth, nineteen hundred and six, entitled "An Act creating a United States Court for China, and prescribing the jurisdiction thereof," and vested by the diplomatic and consular appropriation Act approved March second, nineteen hundred and nine, in the vice consul general of the United States to be designated from time to time by the Secretary of State, shall subsequent to the approval of this

Act be vested in and exercised by a vice consul of the United States at Shanghai, China. [38 Stat. L. 1123.]

This is from the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145.

For the Act of June 30, 1906, ch. 3934, above mentioned, see JUDICIARY. The provision of the Act of March 2, 1909, ch. 235, superseded by the text was as follows:

"The judicial authority and jurisdiction in civil and criminal cases now vested in and reserved to the consul-general of the United States at Shanghai, China, by the Act of June thirtieth, nineteen hundred and six, entitled 'An Act creating a United States court for China and prescribing the jurisdiction thereof,' shall, subsequent to June thirtieth, nineteen hundred and nine, be vested in and exercised by a vice-consul-general of the United States to be designated from time to time by the Secretary of State, and the consul-general at Shanghai shall thereafter be relieved of his judicial functions." [35 Stat. L. 679.]

The office of vice-consul-general was abolished by section 6 of an Act of Feb. 5, 1915, ch. 23, *supra*, p. 45.

SEC. 2. [Salaries of consuls general and consuls.] That * * * consuls general and consuls shall hereafter be graded and classified as follows, with the salaries of each class herein affixed thereto. * * *

CONSULS GENERAL.

Consul general of class one, \$12,000.

Consul general of class two, \$8,000.

Consul general of class three, \$6,000.

Consul general of class four, \$5,500.

Consul general of class five, \$4,500.

CONSULS.

Consul of class one, \$8,000.

Consul of class two, \$6,000.

Consul of class three, \$5,000.

Consul of class four, \$4,500.

Consul of class five, \$4,000.

Consul of class six, \$3,500.

Consul of class seven, \$3,000.

Consul of class eight, \$2,500.

Consul of class nine, \$2,000. [38 Stat. L. 805.]

The following section 6 and the foregoing section 2 are from an Act of Feb. 5, 1915, ch. 23. The first part of this section, relating to the salaries of secretaries in the Diplomatic Service, is given *supra*, p. 18. The remainder of the Act, with certain exceptions noted, is given *infra*, p. 54.

SEC. 6. [Vice-consul-general, deputy consul-general, deputy consul — offices abolished.] * * * The offices of vice consul general, deputy consul general, and deputy consul are abolished. [38 Stat. L. 806.]

See the note to the preceding section 2 of this Act. The first part of this section amends R. S. sec. 1674, given *supra*, p. 9.

III. PROVISIONS COMMON TO DIPLOMATIC AND CONSULAR OFFICERS

Sec. 1740. [Term during which salary is payable.] No ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, chargé d'affaires, secretary of legation, assistant secretary of legation, interpreter to any legation or consulate, or consul-general, consul, or

commercial agent, mentioned in Schedules B and C, shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of his residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned. And no person shall be deemed to hold any such office after his successor is appointed and actually enters upon the duties of his office at his post of duty, nor after his official residence at such post has terminated if not so relieved. But no such allowance or payment shall be made to any consul-general, consul, or commercial agent, not embraced in Schedules B and C, or to any vice-consul, vice-commercial agent, deputy consul, or consular agent, for the time so occupied in receiving instructions, or in such transit as aforesaid; nor shall any such officer as is referred to in this section be allowed compensation for the time so occupied in such transit, at the termination of the period of his official service, if he has resigned or been recalled therefrom for any malfeasance in his office. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 55.

The provisions of this section relating to "commercial agents," "vice-commercial agents" and "Schedules B and C" were superseded by the Act of April 5, 1906, ch. 1366, §§ 2 and 3, *supra*, pp. 19-21.

The office of deputy consul was abolished by section 6 of the Act of Feb. 5, 1915, ch. 23, *supra*, p. 45.

A minister's salary begins when he enters upon his official duty.—When the grade of a foreign representative is raised from a *chargé d'affaires* to that of a minister, and the salary correspondingly increased, and the *chargé d'affaires* is appointed minister, the increase in salary should date from the time of receiving his commission and taking the oath of office, and not from the time of his appointment. (1889) 19 Op. Atty.-Gen. 219.

Time prior to qualification.—A resident of Apia, in the Friendly and Navigators' Islands, received notice from the department of state to proceed to San Francisco and there await instructions and commission as consul at Apia. He left Apia on July 3, 1874, arrived at San Francisco Aug. 21, 1874, received notice of his appointment on Sept. 14, 1874, and took the oath of office and executed his bond on the following day. His salary began on Sept. 15, 1874, and not at the time of his leaving Apia, July 3, 1874. U. S. v. Bee, (C. C. A. 1893) 54 Fed. 112, 7 U. S. App. 459, 4 C. C. A. 219.

The holder of a foreign mission is not displaced until the successor enters upon

his duties. "On account of the distance of his post from the seat of Government, any other rule would often cause serious embarrassment, notwithstanding the means of speedy communication which we owe to modern science." (1870) 13 Op. Atty.-Gen. 302.

The words "**malfeasance in his office**," in the last clause in this section, qualify the word "resigned" as well as "recalled." "A consul cannot be relieved from the duties of his office except by a resignation or recall. If they be terminated in either of these ways, but without any official guilt or delinquency, he may get what the law says a meritorious officer shall have—namely, his full pay, to be counted down to the time when he reaches his own residence. But if he violates his obligations to the public in such a manner that the Government on that account is obliged to recall him, or if he resigns merely to escape a recall which he is conscious of deserving, then he shall suffer the penalty of coming home at his own expense." (1857) 9 Op. Atty.-Gen. 89.

Sec. 1741. [Absence.] No ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, *chargé d'affaires*, secretary of legation, assistant secretary of legation, interpreter for any legation or consulate, or consul-general, consul, or commercial agent, mentioned in

Schedules B and C, or consular agent, shall be absent from his post, or the performance of his duties, for a longer period than ten days at any one time, without the permission previously obtained of the President. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 59.

This section was practically superseded by the re-enactment of its provisions in the Act of June 17, 1874, ch. 294, *infra*, p. 52.

As to "commercial agents" and Schedules B and C here mentioned see the note to the preceding R. S. sec. 1740.

Absence of a minister from July 7, 1856, to June 11, 1857, where leave of absence was granted and extended from time to time, was not an offense for which his

salary during the time of the absence could be withheld from him. (1858) 9 Op. Atty.-Gen. 138.

Sec. 1742. [Salary in case of absence.] No diplomatic or consular officer shall receive salary for the time during which he may be absent from his post, by leave or otherwise, beyond the term of sixty days in any one year; but the time equal to that usually occupied in going to and from the United States in case of the return, on leave, of such diplomatic or consular officer to the United States may be allowed in addition to such sixty days. [R. S.]

Act of March 3, 1869, ch. 125, 15 Stat. L. 321.

Time occupied in going to and from United States, see section 4 of the Act of June 11, 1874, ch. 275, given *infra*, p. 52.

The Act of March 3, 1869, ch. 125, from which R. S. sec. 1742 was drawn, contained provisions similar to those of the Act of March 30, 1868, ch. 38, sec. 3, 15 Stat. L. 58, which it repealed. With reference to the Act of 1868 the attorney-general said: "I am of opinion that its true intent and meaning are to disallow the salary in all cases of absence, including cases of sickness as well as cases of leave, where, in any one year, the officer shall already have enjoyed absence with salary equal to sixty days of time, whether that maximum be

composed of several intervals of absence, or be a part or the whole of a continuous absence; but that the existing laws and practice are unchanged in respect to absence with or without leave, and to compensation during the same, except that whenever it comes to pass that the aggregate amount of absence during any one year's time of official incumbency exceeds sixty days a proportion of salary corresponding to the excess over that aggregate of time for said year shall be withheld." (1868) 12 Op. Atty.-Gen. 410.

Sec. 1743. [Extra compensation prohibited.] The compensation allowed by law to the various diplomatic and consular officers shall be in full for all the services rendered and personal expenses incurred by the persons respectively for whom such compensation is provided, of whatever kind such services or personal expenses may be, or by whatever treaty, law, or instructions they are required; and no allowance, other than such as is so provided, shall be made in any case for the outfit or return home of any such officer or person. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 59.

With respect of salaries see the Act of April 5, 1906, ch. 1366, § 8, *supra*, p. 22.

Sec. 1744. [Compensation to citizens only.] No compensation provided for any officer mentioned in section sixteen hundred and seventy-five, or for any assistant secretary of legation, or any appropriation therefor, shall be applicable to the payment of the compensation of any person appointed to or holding any such office who shall not be a citizen of the United States; nor shall any other compensation be allowed in any such case. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 60.

For R. S. sec. 1675, above mentioned, see *supra*, p. 16.

The compensation of vice-consuls not citizens was provided for by the Act of June 11, 1874, ch. 275, § 6, *supra*, p. 41.

"The officers thus mentioned range from ambassadors down to second secretaries of legation, and do not include marshals, interpreters, or other subordinate officers." (1902) 23 Op. Atty.-Gen. 612.

Sec. 1745. [President to regulate fees.] The President is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services, besides such as are expressly declared by law, in the business of the several legations, consulates, and commercial agencies, and to adapt the same, by such differences as may be necessary or proper, to each legation, consulate, or commercial agency; and it shall be the duty of all officers and persons connected with such legations, consulates, or commercial agencies to collect for such official services such and only such fees as may be prescribed for their respective legations, consulates, and commercial agencies, and such rates or tariffs shall be reported annually to Congress. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 57.

The references in the text to commercial agencies were superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21, which abolished the grade of commercial agent. Sections 7 to 10 inclusive of the same Act, *supra*, pp. 22, 23, made further regulations as to fees.

Scope of President's authority.—There seem to be but two limitations upon the power of the President—one (expressed) which prevents him from declaring a fee to be unofficial which the law declares official; and one (implied) which prevents him from prescribing a fee for service which the law declares shall be rendered gratuitously. Subject to these limitations, the President may at any time transfer a fee from the unofficial to the official schedule or *vice versa*; or he may increase, diminish, or abolish a fee, and his directions in this regard are binding upon the officers of the consular service. *Stahel v. U. S.*, (1891) 26 Ct. Cl. 193.

Official and unofficial services.—This section concerns itself wholly with "official services." The statutes and regulations make a distinction between the official and unofficial services rendered by a consul. The inhibition on consular officers, as to the collection of fees, is only against the collection, for "such official services," of other fees than the prescribed fees. Fees received for performing services not required by law or by the regulations, nor specified in any tariff fees, being paid voluntarily to the consul by the person to whom they were rendered, become private property of the consul and not the money of the United States. "This view is not varied by the fact that the person employed the consul to render the service because he was consul, or by the fact that the consul attached his seal as evidence of his official character; because he was not required by any law or regulation to use either his seal or his title of office officially, nor was any fee prescribed for the service in any tariff of fees." *U. S. v. Mosby*, (1890) 133 U. S. 273, 10 S. Ct.

327, 33 U. S. (L. ed.) 625. See *U. S. v. Eaton*, (1898) 169 U. S. 331, 18 S. Ct. 374, 42 U. S. (L. ed.) 767; (1889) 19 Op. Atty.-Gen. 196; (1889) 19 Op. Atty.-Gen. 225.

This section, and R. S. secs. 1746 and 1750, *infra*, and the consular regulations, are all to be construed as referring to those subjects which belong to the jurisdiction, to the business, and to the interests of the United States. They concern federal relations and not relations which are exclusively individual or state, and which have no reference to the United States business or to the United States interests: so that when a consul does an act purely by virtue of an independent sovereignty, purely by virtue of state law, an act which has no force or validity except under a state law, that act is not official in its relation to the United States, because it has no relation whatever to the United States. *U. S. v. Badeau*, (1886) 33 Fed. 572, *affirmed* (1887) 31 Fed. 697.

The President may prescribe a fee, as provided by this section, for the services of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United States, as required by the quarantine regulations of April 1, 1903, but he has no authority to declare such a fee unofficial and to permit the consul to retain it as such. (1903) 24 Op. Atty.-Gen. 672.

Fees illegally collected, under regulations the resident had no authority to prescribe, cannot be claimed by the consul as a personal emolument, but the owner may perhaps have a right of recovery against the government which directed their collection. *Stahel v. U. S.*, (1891) 26 Ct. Cl. 193.

Sec. 1746. [Fees to be collected in coin.] All fees collected by diplomatic and consular officers for and in behalf of the United States shall be collected in the coin of the United States, or at its representative value in exchange. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 63.

See R. S. sec. 1722, *supra*, p. 35.

Sec. 1747. [Officers to account for fees.] All fees collected by the consuls general, consuls, and commercial agents mentioned in Schedules B and C, and by vice-consuls and vice-commercial agents appointed to perform their duties, or by any other persons in their behalf, shall be accounted for to the Secretary of the Treasury, and held subject to his draft, or other directions. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 58.

The references to commercial agents and vice-commercial agents and Schedules B and C were superseded by the Act of April 5, 1906, ch. 1366. Sections 2 and 3, *supra*, pp. 19-21, and section 8 of the same Act, *supra*, p. 22, provided for accounting for fees.

Sec. 1748. [Expenses of legations, consulates, etc.] The President is authorized to provide at the public expense all such stationery, blanks, record and other books, seals, presses, flags, and signs, as he shall think necessary for the several legations, consulates, and commercial agencies in the transaction of their business. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 60.

The words "commercial agencies" were superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

Each year appropriations are made to meet the contingent expenses of the various embassies, legations, consulates, and consular agencies. Those for the fiscal year ending June 30, 1916, are contained in the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1118, 1125.

Sec. 1749. [Allowance to widow of consular officer deceased in a foreign country.] Whenever any diplomatic or consular officer of the United States dies in a foreign country in the discharge of his duty, there shall be paid to his widow, or, if no widow survive him, then to his heirs at law, a sum of money equal to the allowance now made to such officer for the time necessarily occupied in making the transit from his post of duty to his residence in the United States. [R. S.]

Act of Feb. 22, 1873, ch. 184, 17 Stat. L. 474.

Appropriations for carrying out the provisions of this section are made each year. Those for the fiscal year ending June 30, 1916, are contained in the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1119. The same Act, as do those of previous years, provides a fund to defray the expense of transporting the remains of diplomatic officers, consuls, and consular assistants to their former homes for interment.

Sec. 1750. [Depositions — penalty for perjury — evidence of taking the oath — penalty for forging certificate of oath.] Every secretary of legation and consular officer is hereby authorized, whenever he is required or deems it necessary or proper so to do, at the post, port, place, or within the limits of his legation, consulate, or commercial agency, to administer to or take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States. Every such oath, affirmation,

affidavit, deposition, and notarial act administered, sworn, affirmed, taken, had, or done, by or before any such officer, when certified under his hand and seal of office, shall be as valid, and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken, had, or done, by or before any other person within the United States duly authorized and competent thereto. If any person shall willfully and corruptly commit perjury, or by any means procure any person to commit perjury in any such oath, affirmation, affidavit, or deposition, within the intent and meaning of any act of Congress now or hereafter made, such offender may be charged, proceeded against, tried, convicted, and dealt with in any district of the United States, in the same manner, in all respects, as if such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, affirmation, affidavit, or deposition, and shall be subject to the same punishment and disability therefor as are or shall be prescribed by any such act for such offense; and any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal and signature of the officer administering or taking the same in testimony thereof, shall be admitted in evidence without proof of any such seal or signature being genuine or of the official character of such person; and if any person shall forge any such seal or signature, or shall tender in evidence any such document with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be deemed and taken to be guilty of a misdemeanor, and on conviction shall be imprisoned not exceeding three years nor less than one year, and fined in a sum not to exceed three thousand dollars, and may be charged, proceeded against, tried, convicted, and dealt with, therefore, in the district where he may be arrested or in custody. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 61.

The reference in this section to any "commercial agency" was superseded by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21, section 7 of said Act, *supra*, p. 22, making further provisions regarding notarial acts.

"Depositions *de bene esse* in civil causes may be taken in a foreign country by any secretary of legation or consular officer," under this section and R. S. sec. 863 (see EVIDENCE). *Bischoffsheim v. Baltzer*, (1882) 10 Fed. 1.

But in *The Alexandra*, (1900) 104 Fed. 904, the court said that R. S. sec. 863 relates to the depositions of witnesses residing within the United States and designates officials before whom they may be taken, and must be strictly construed. "Among those named in section 863 as authorized to take such depositions are notaries public, and it is contended that by section 1750 secretaries of legation and consular officers are authorized to take oaths, affirmations, affidavits, and depositions. There is no doubt that ordinary depositions may be lawfully taken before them, but depositions *de bene esse* are not ordinary notarial acts, such as a notary public could perform simply by virtue of his office."

"An assignment [of a patent], which purports to have been executed before the consul-general of the United States of

Frankfort-on-the-Main, Germany, is sufficiently proved by the signature of said consul-general and the United States consulate-general seal." *Matheson v. Campbell*, (1895) 69 Fed. 597.

Instrument acknowledged before foreign notary.—A power of attorney, executed at Liverpool and acknowledged before a notary public there, was presented to the consul at Liverpool for his official certificate that the notary public was duly authorized, admitted, and sworn, and that full faith and credit were due to his notarial acts. The attorney-general advised that such certificate does not fall within the functions of a notary, and besides, if it were a notarial act, the duty is not imperative. (1866) 12 Op. Atty-Gen. 1.

Congress has the power to punish offenses committed by American citizens abroad. *U. S. v. Craig*, (1886) 28 Fed. 795.

State practice.—"Section 1750 does not intend to authorize the consul to perform notarial acts in regard to matters of state practice or state law only, and which are governed by state law; and, in saying

what shall be the force and effect of a consul's notarial act in London, it cannot mean its force in regard to business and subject-matter which belong to the states exclusively to regulate, since that would be usurpation. The construction given to such acts, drawn in general language, is that they relate to subjects that are within the province of the United States government, i. e., to subjects only that are within its jurisdiction." *U. S. v. Badeau*, (1886) 33 Fed. 57, *affirmed* (1897) 31 Fed. 697.

Georgia.—"Construing the section of the Civil Code which authorizes a consul to attest a deed in connection with the section of the Revised Statutes which defines the powers of a consul, it is clear that it was not intended that a consul could act, in relation to the matter of attesting deeds, at any other place than that at which the laws of the United States authorize him to perform such acts. Therefore, if a consul of the United States attest a deed in any other place than his consulate, such attestation would not be sufficient to authorize the record of the deed." *McCandless v. Yorkshire Guarantee, etc., Corp.*, (1897) 101 Ga. 180, 28 S. E. 663.

Massachusetts.—"A consul is a magistrate within the meaning of a state statute which requires that a deed be "acknowledged by the grantor, before a justice of peace in this state, or before a justice of peace or magistrate of some other of the United States, or in any other state or kingdom wherein the grantor or vendor may reside, at the time of making and executing the deed." *Scanlon v. Wright*, (1833) 13 Pick. (Mass.) 523, 25 Am. Dec. 344. See also *Savage v. Birckhead*, (1838) 20 Pick. (Mass.) 167.

Nebraska.—"An officer who may perform any notarial act which a notary pub-

lic may do is certainly invested with all the powers possessed by a notary under our statute, or under the statute of any of our sister states; and one who performs the duties of a notary, and who is invested by statute with power and authority so to do, falls within the meaning of our statute as such official as fully as though his warrant of appointment gave him that name, instead of some other official title. We conclude, therefore, that a United States consul, duly accredited by the federal government to a foreign power, may, under our statute, take affidavits or depositions for use in our courts." *Browne v. Palmer*, (1902) 66 Neb. 287, 92 N. W. 315.

New York.—"Under the state statute, it was held that a power of attorney to commence a suit in the state court was properly proved before a consul residing in a foreign country. *St. John v. Croel*, (1843) 5 Hill (N. Y.) 573.

Pennsylvania.—"It was held that a United States commercial agent had authority to take the acknowledgment of a married woman in the execution of a letter of attorney. *Moore v. Miller*, (1892) 147 Pa. St. 378, 23 Atl. 601.

Wisconsin.—"Consuls of the United States are authorized to take depositions without a commission, and a commission is needless. . . . And it is questionable whether the strict rules of taking depositions by commissioners ought to be applied in such a case, where the proper notice, as in this case, was given of the examination of certain witnesses whose residence is given in the notice before a consul of the United States in one of the provinces of Canada, and the time and place are also given in the notice." *Semmens v. Walters*, (1882) 55 Wis. 675, 13 N. W. 889.

Sec. 1751. [Certain correspondence by officers prohibited.] No diplomatic or consular officer shall correspond in regard to the public affairs of any foreign government with any private person, newspaper, or other periodical, or otherwise than with the proper officers of the United States, nor recommend any person, at home or abroad, for any employment of trust or profit under the government of the country in which he is located; nor ask or accept, for himself or any other person, any present, emolument, pecuniary favor, office, or title of any kind, from any such government. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 59.

This section was, in effect, superseded by the substantial re-enactment of its provisions in the Act of June 17, 1874, ch. 294, *infra*, p. 52.

Sec. 1752. [Regulations.] The President is authorized to prescribe such regulations, and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers, the transaction of their business, the rendering of accounts and returns, the payment

of compensation, the safe keeping of the archives and public property in the hands of all such officers, the communication of information, and the procurement and transmission of the products of the arts, sciences, manufactures, agriculture, and commerce, from time to time, as he may think conducive to the public interest. It shall be the duty of all such officers to conform to such regulations, orders, and instructions. [R. S.]

Act of Aug. 18, 1856, ch. 127, 11 Stat. L. 60.

SEC. 4. [Time of transit allowed to diplomatic and consular officers to be established by Secretary of State, etc.] That the Secretary of State shall, as soon as practicable, establish and determine the maximum amount of time actually necessary to make the transit between each diplomatic and consular post and the city of Washington, and vice versa, and shall make the same public. He may also, from time to time, revise his decision in this respect; but in each case the decision is to be in like manner made public. And the allowance for time actually and necessarily occupied by each diplomatic and consular officer who may be entitled to such allowance shall in no case exceed that for the time thus established and determined, with the addition of the time usually occupied by the shortest and most direct mode of conveyance from Washington to the place of residence in the United States of such officer. [18 Stat. L. 70.]

The above section 4 is from the Consular and Diplomatic Appropriation Act of June 11, 1874, ch. 275.

An Act Relating to ambassadors, consuls and other officers.

[Act of June 17, 1874, ch. 294, 18 Stat. L. 77.]

[Absence without leave — correspondence on public affairs — recommending persons for employment — accepting presents.] That no Ambassador, Envoy Extraordinary, Minister Plenipotentiary, Minister Resident, Commissioner to any foreign country, chargé d'affaires, Secretary of Legation, Assistant Secretary of Legation, Interpreter to any legation in any foreign country, Consul General, Consul, Commercial Agent, consular pupils, or consular agent shall be absent from his post or the performance of his duties for a longer period than ten days at any one time, without the permission previously obtained of the President. And no compensation shall be allowed for the time of any such absence in any case except in cases of sickness; nor shall any diplomatic or consular officer correspond in regard to the public affairs of any foreign government with any private person, newspaper, or other periodical, or otherwise than with the proper officers of the United States; nor without the consent of the Secretary of State previously obtained, recommend any person at home or abroad for any employment of trust or profit under the Government of the country in which he is located; nor ask or accept, for himself or any other person, any present, emolument, pecuniary favor, office, or title of any kind from any such government. [18 Stat. L. 77.]

This Act, by the re-enactment of their provisions, practically supersedes R. S. sec. 1741, *supra*, p. 46, and R. S. sec. 1751, *supra*, p. 51.

The grade of commercial agent was abolished by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

By R. S. sec. 5335, embodied in Penal Laws, § 5, and repealed by section 341 thereof, carrying on certain correspondence with foreign governments or their agents was rendered an offense. See PENAL LAWS.

Absence of less than ten days.—As applicable to this statute, Attorney-General Williams quotes with approval the opinion of Attorney-General Black in (1858) 9 Op. Atty.-Gen. 138, on section 19 of the Act of Aug. 18, 1856, brought forward into the revision in section 1741, *supra*, p. 46. "It is manifest that absence of a certain sort takes away the right of the

officer to salary. But what sort of absence? Such absence as that previously described, namely, an absence of more than ten days without leave. An absence of less than ten days without permission, or of more than that time with leave, is not such absence as the law forbids." (1875) 14 Op. Atty.-Gen. 534.

[SEC. 1.] **[Estimates of annual expenditures.]** * * * And hereafter the Secretary of State shall in the estimates for the annual expenditures of the expenses of diplomatic and consular service estimate for the entire amount required for its support, including all commercial agents and other officers, whether paid by fees or otherwise, specifying the compensation to be allowed or deemed advisable [advisable] in each individual case. [22 *Stat. L. 133.*]

This is from the Consular and Diplomatic Appropriation Act of July 1, 1882, ch. 262. The grade of commercial agent was abolished by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

[SEC. 1.] **[Estimates for rent and expenses.]** * * * Hereafter the Secretary of State shall, in submitting estimates for the consular service, segregate, and submit separately, estimates for rent of consular offices, and under contingent expenses estimate for the amount required annually to be expended at consular offices for purposes within the discretion of the Department. [33 *Stat. L. 1214.*]

This is from the Deficiencies Appropriation Act of March 3, 1905, ch. 1484.

An Act Providing for the purchase or erection, within certain limits of costs, of embassy, legation, and consular buildings abroad.

[*Act of Feb. 17, 1911, ch. 105, 36 Stat. L. 917.*]

[Buildings for diplomatic and consular establishments.] That the Secretary of State be, and he is hereby, authorized to acquire in foreign countries such sites and buildings as may be appropriated for by Congress for the use of the diplomatic and consular establishments of the United States, and to alter, repair, and furnish the said buildings; suitable buildings for this purpose to be either purchased or erected, as to the Secretary of State may seem best, and all buildings so acquired for the diplomatic service shall be used both as the residences of diplomatic officials and for the offices of the diplomatic establishment: *Provided, however,* That not more than the sum of five hundred thousand dollars shall be expended in any fiscal year under the authorization herein made: *And provided*

further, That in submitting estimates of appropriation to the Secretary of the Treasury for transmission to the House of Representatives, the Secretary of State shall set forth a limit of cost for the acquisition of sites and buildings and for the construction, alteration, repair, and furnishing of buildings at each place in which the expenditure is proposed (which limit of cost shall not exceed the sum of one hundred and fifty thousand dollars at any one place) and which limit shall not thereafter be exceeded in any case, except by new and express authorization of Congress. [36 Stat. L. 917.]

An Act For the improvement of the foreign service.

[Act of Feb. 5, 1915, ch. 23, 38 Stat. L. 805.]

[SEC. 1.] [Regulation of appointments—secretaries and consuls—assignment for duty in Department of State—promotions.] That hereafter all appointments of secretaries in the Diplomatic Service and of consuls general and consuls shall be by commission to the offices of secretary of embassy or legation, consul general, or consul, and not by commission to any particular post, and that such officers shall be assigned to posts and transferred from one post to another by order of the President as the interests of the service may require: *Provided*, That any such officer may be assigned for duty in the Department of State without loss of grade, class, or salary, such assignment to be for a period of not more than three years, unless the public interests demand further service, when such assignment may be extended for a period not to exceed one year, and no longer: *Provided further*, That no secretary, consul general, or consul shall be promoted to a higher class except upon the nomination of the President, with the advice and consent of the Senate. [38 Stat. L. 805.]

This is the first section of the Consular Reorganization Act of 1915. The first part of section 2 of this Act related to salaries of secretaries in the Diplomatic Service and is given *supra*, p. 18, while the latter part of section 2, relating to salaries of consuls general and consuls is given *supra*, p. 45. Section 3 of this Act amends R. S. sec. 1685, given *supra*, p. 14. The first part of section 6 amends R. S. sec. 1674, given *supra*, p. 9, while the latter part of said section 6 abolishing certain consular offices is given *supra*, p. 45.

SEC. 4. [Expenses—secretary or consul detailed for special duty.] That a secretary, consul general, or consul of whatever class detailed for special duty outside of the city of Washington shall be paid his actual and necessary expenses for subsistence during such special detail not exceeding \$5 per day: *Provided*, That such special duty shall not continue for more than sixty days unless in the case of international gatherings, congresses, or conferences, when such subsistence expenses shall run only during the life of the international gathering, congress, or conference, as the case may be. [38 Stat. L. 806.]

See the note to the preceding section 1 of this Act.

SEC. 5. [Recommendations for promotions.] That the Secretary of State is directed to report from time to time to the President, along with his recommendations for promotion or for transfer between the department

and the foreign service, the names of those secretaries in the Diplomatic Service and the names of those consular officers or departmental officers or employees who by reason of efficient service, an accurate record of which shall be kept in the Department of State, have demonstrated special efficiency, and also the names of persons found upon examination to have fitness for appointment to the lower grades of the service. [38 Stat. L. 806.]

See the note to the preceding section 1 of this Act.

SEC. 7. [Diplomatic officers prohibited from transacting private business.] That no ambassador, minister, minister resident, diplomatic agent, or secretary in the Diplomatic Service of any grade or class shall, while he holds his office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as an agent for any such person to, from, or within the country or countries to which he or the chief of his mission, as the case may be, is accredited, either in his own name or in the name or through the agency of any other person, nor shall he, in such country or countries, practice as a lawyer for compensation or be interested in the fees or compensation of any lawyer so practicing. [38 Stat. L. 807.]

Earlier provisions on this subject are contained in R. S. secs. 1699, 1700, 1701, *supra*, pp. 27, 28.

SEC. 8. [Effect — repeal.] That this Act shall take effect on the day of its approval by the President, when all Acts or parts of Acts inconsistent with this Act are repealed. [38 Stat. L. 807.]

IV. FOREIGN RELATIONS

Sec. 4062. [Penalty for violating safe-conduct or assaulting public minister.] Every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court. [R. S.]

Act of April 30, 1790, ch. 9, 1 Stat. L. 118.

Sections 4062-4130 of the Revised Statutes constitute title XLVII. "Foreign Relations."

R. S. secs. 4062, 4063, 4064, and 4065 were originally sections 25, 26, 27, and 28 of the Crimes Act of April 30, 1790, ch. 9, 1 Stat. L. 118, and these were drawn from the statute 7 Anne, ch. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed, in *Heathfield v. Chilton*, (1767) 4 Burr. (Eng.) 2016, the Act did not intend to alter and could not alter. *In re Baiz*, (1890) 135 U. S. 403, 10 S. Ct. 854, 34 U. S. (L. ed.) 222.

The word "minister" is defined in R. S. sec. 4130, *infra*, p. 73. See also *Hollander*

v. Baiz, (1890) 41 Fed. 732; *In re Baiz*, (1890) 135 U. S. 403, 10 S. Ct. 854, 34 U. S. (L. ed.) 222; *U. S. v. Benner*, (1830) Baldw. 234, 24 Fed. Cas. No. 14,568.

A foreign consul, resident in the United States, must look for protection in his person and property to the laws of the state in which he resides. (1887) 19 Op. Atty-Gen. 16.

Jurisdiction of prosecution.—An indictment for offering violence to a public minister is not a case "affecting . . . public ministers," within the meaning of

U. S. Const., art. 3, § 2, par. 2, conferring original jurisdiction of such cases upon the Supreme Court. *U. S. v. Ortega*, (1826) 11 Wheat. 467, 6 U. S. (L. ed.) 521. See also (1797) 1 Op. Atty-Gen. 74.

An attack upon the house of a minister, in actual occupancy by him, is an offer of violence within the meaning of this section, since the law of nations, to which the section refers, identifies the property of the minister attached to his person, or in his use, with the person of the minister. *U. S. v. Hand*, (1810) 2 Wash. 435, 26 Fed. Cas. No. 15,297, holding, however, that knowledge by the defendant that the house upon which the violence was committed was the domicile of the minister must be proved in order to sustain a conviction.

A foreign minister who commits the first assault so far loses his privilege that his assault may lawfully be repelled by as much force as will prevent its continuance or repetition. *U. S. v. Ortega*, (1825) 4 Wash. 531, 27 Fed. Cas. No.

15,971; *U. S. v. Liddle*, (1808) 2 Wash. 205, 26 Fed. Cas. No. 15,598; *U. S. v. Benner*, (1830) Baldw. 234, 24 Fed. Cas. No. 14,568.

Ignorance of the public character of the minister assaulted is no defense to a prosecution under this section. *U. S. v. Ortega*, (1825) 4 Wash. 531, 27 Fed. Cas. No. 15,971; *U. S. v. Liddle*, (1808) 2 Wash. 205, 26 Fed. Cas. No. 15,598; *U. S. v. Benner*, (1830) Baldw. 234, 24 Fed. Cas. No. 14,568.

Procedure and evidence.—As to the requisites of an indictment under this section, see *U. S. v. Benner*, (1830) Baldw. 234, 24 Fed. Cas. No. 14,568. As to proof of official character of the alleged public minister, see *In re Baliz*, (1890) 135 U. S. 403, 10 S. Ct. 854, 34 U. S. (L. ed.) 222; *U. S. v. Ortega*, (1825) 4 Wash. 531, 27 Fed. Cas. No. 15,971; *U. S. v. Liddle*, (1808) 2 Wash. 205, 26 Fed. Cas. No. 15,598; *U. S. v. Benner*, (1830) Baldw. 234, 24 Fed. Cas. No. 14,568.

Sec. 4063. [Process against ministers and their domestics void.] Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void. [*R. S.*]

Act of April 30, 1790, ch. 9, 1 Stat. L. 117.

See the notes to the preceding *R. S.* sec. 4062. By section 233 of the Judicial Code (which re-enacted *R. S.* sec. 687) the Supreme Court is given exclusive "jurisdiction of suits or proceedings against ambassadors or public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors, or other public ministers or in which a consul or vice-consul is a party." See JUDICIARY.

Ambassador.—In (1797) 1 Op. Atty-Gen. 74, it was said that an ambassador is not liable, in any case, according to the law of nations, to answer either criminal or civilly before any court of the foreign nation to which he is sent. This opinion was cited with approval in (1885) 7 Op. Atty-Gen. 387.

A foreign consul is not a "public minister" within the meaning of this section. (1820) 1 Op. Atty-Gen. 406.

A secretary of legation appointed by a foreign power is under the protection of the law of nations, and is not amenable to the tribunals of this country, upon a civil or criminal charge. *Ex p. Cabrera*, (1805) 1 Wash. 232, 4 Fed. Cas. No. 2,278.

Attachment to compel his attendance as a witness cannot be issued against a person within the protection of this section, even on behalf of the defendant in a criminal case in a federal court. *In re Dillon*, (1854) 7 Sawy. 561, 7 Fed. Cas. No. 3,914.

An indictment of a domestic servant of a foreign minister, for assault and battery, was quashed on motion and affidavit in *U. S. v. Lafontaine*, (1831) 4 Cranch (C. C.) 173, 26 Fed. Cas. No. 15,550.

Seizure of an unregistered servant of a secretary of legation, as a fugitive slave, by a constable acting for the owner, is a breach of diplomatic privilege. *U. S. v. Jeffers*, (1836) 4 Cranch (C. C.) 704, 26 Fed. Cas. No. 15,471.

Duty to quash process.—"This law is not less obligatory upon the state courts and state judges than upon those of the United States. If a public minister be sued in the latter courts, it will be the duty of those courts to quash the process, as altogether void. If he be sued in the former, that court is equally bound, by the same law, to give the same decision." *Ex p. Cabrera*, (1805) 1 Wash. 232, 4 Fed. Cas. No. 2,278.

Sec. 4064. [Penalty for suing out or executing such process.] Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court. [R. S.]

Act of April 30, 1790, ch. 9, 1 Stat. L. 117.
See the notes to R. S. sec. 4062, *supra*, p. 55.

Process is "sued out" within the meaning of this section whenever it is issued, even though it be not executed. (1883) 17 Op. Atty-Gen. 563.

A marshal is not "concerned in executing" a writ of execution within the meaning of this section when the writ placed in his hands for execution is not in fact executed otherwise than by serving notice upon the party exempted by the preceding section. (1883) 17 Op. Atty-Gen. 563.

Ignorance of the public character of a minister unlawfully arrested on process is no defense to an indictment of a person executing such process. *U. S. v. Benner*, (1830) Baldw. 234, 24 Fed. Cas. No. 14,568.

A minister's waiver of his privilege of exemption from arrest is no justification for arresting him. *U. S. v. Benner*, (1830) Baldw. 234, 24 Fed. Cas. No. 14,568.

Sec. 4065. [When process may be issued against persons in service of ministers.] The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office. [R. S.]

Act of April 30, 1790, ch. 9, 1 Stat. L. 118.
See the notes to R. S. sec. 4062, *supra*, p. 55.

Sec. 4066. [Public access to list of names of ministers' servants.] All persons shall have resort to the list of names so posted in the marshal's office, and may take copies without fee. [R. S.]

Act of April 30, 1790, ch. 9, 1 Stat. L. 118.
R. S. secs. 4067 to 4070 inclusive, relating to alien enemies, are treated under ALIENS, vol. 1, p. 363.

R. S. secs. 4071, 4072, and 4073 relate to taking testimony to be used in foreign countries and are treated in the title EVIDENCE.

R. S. sec. 4074 providing for fees and mileage of witnesses is treated under the title WITNESSES.

R. S. secs. 4075 to 4078 inclusive relate to passports and are treated under the title PASSPORTS.

Sec. 4079. [Powers of foreign consuls over disputes between seamen.] Whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul-general, consuls, vice-consuls, or consular or commercial agents of each nation, shall have exclusive jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of the other nation, between the master or officers and any

of the crew, or between any of the crew themselves, of any vessel belonging to the nation represented by such consular officer, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the President shall be satisfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall issue his proclamation to that effect, declaring this section to be in force as to such nation. [R. S.]

Act of June 11, 1864, ch. 116, 13 Stat. L. 121.

By the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21, the grade of commercial agent was abolished.

See Judicial Code, § 271, under JUDICIARY.

Purpose of section.—The intent of section 4079 is not to provide that, where by treaty exclusive jurisdiction is given over controversies between the master and any of the crew of a foreign vessel to the consular officer of the country to which the vessel belongs, such jurisdiction can be exercised only in the manner directed in sections 4080 and 4081, and if not so exercised the court of admiralty is not deprived of jurisdiction. The purpose of those sections is to provide a method whereby consular officers exercising jurisdiction under the stipulations of the

treaty can enforce such jurisdiction and their orders in pursuance thereof. The *Ester*, (E. D. S. C. 1911) 190 Fed. 216.

This section does not supersede prior treaties whereby claims of American seamen against foreign vessels for damages for ill treatment or for wages are exclusively cognizable by the foreign consuls. The *Welhaven*, (1892) 55 Fed. 80; The *Burchard*, (1890) 42 Fed. 608, both cases holding that the district courts in admiralty have no jurisdiction of such claims.

Sec. 4080. [Arrest of seamen on application of consul.] In all cases within the purview of the preceding section the consul-general, consul, or other consular or commercial authority of such foreign nation charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or to any judge thereof, or to any commissioner of a circuit court, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping-articles, roll, or other proper paper of the vessel, to the effect that the person in question is of the crew or ship's company of such vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. Such application shall be in writing and duly authenticated by the consular or other sufficient official seal. Thereupon such court, judge, or commissioner shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring such person to be brought before him for examination at a certain time and place. [R. S.]

Act of June 11, 1864, ch. 116, 13 Stat. L. 121.

Arrest by marshal.—In *Dallemagne v. Moisan*, (1905) 197 U. S. 169, 25 S. Ct.

422, 49 U. S. (L. ed.) 709, it was held that only a federal marshal can make

an arrest on the requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to article 8 of the Treaty with France of Aug. 12, 1853, 10 Stat. L. 992, 996 (see *TREATIES*), since this, being the mode of arrest specified by the Act of Congress of June 11, 1864, 13 Stat. L. 121, ch. 116,

enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States, and re-enacted in substance in R. S. secs. 4079-4081, must be regarded as the only means proper to be adopted for this purpose.

Sec. 4081. [Commitment and discharge.] If, on such examination, it is made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge, or commissioner finds, upon the papers hereinbefore referred to, a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control, and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or any State thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty and shall not again be arrested for the same cause. The expenses of the arrest and the detention of the person so arrested shall be paid by the consular officers making the application. [*R. S.*]

Act of June 11, 1864, ch. 116, 13 Stat. L. 121.

Length of imprisonment.—The imprisonment of an insubordinate seaman on a French vessel, pursuant to article 8 of the Treaty with France of Aug. 12, 1853, 10 Stat. L. 992, 996 (see title *TREATIES*), providing that such persons may be arrested on the written requisition of the consul, "supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls," need not end with the departure of the vessel from the port at which the seaman was taken from the vessel, but may last until the expiration of the two months, which is the limit prescribed by the Act of June 11, 1864, 13 Stat. L. 121, ch. 116, carried forward in substance as R. S. secs. 4079-4081, enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the

waters and ports of the United States. *Dallemagne v. Moisan*, (1905) 197 U. S. 169, 25 S. Ct. 422, 49 U. S. (L. ed.) 709.

Validity of arrest by state officer.—In *Dallemagne v. Moisan*, (1905) 197 U. S. 169, 25 S. Ct. 422, 49 U. S. (L. ed.) 709, it was held that an unauthorized arrest by a state official on a requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to article 8 of the Treaty with France of Aug. 12, 1853, 10 Stat. L. 992, 996 (see title *TREATIES*), does not entitle the seaman to his discharge on habeas corpus when brought before a federal District Court, since the objection to the irregularity of the arrest is obviated by the action of that court in examining into the case under the authority conferred upon it by the Act of June 11, 1864, carried forward in substance as R. S. secs. 4079-4081.

Sec. 4082. [Power of United States consular officers to solemnize marriages.] Marriages in presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents

and purposes, and shall have the same effect as if solemnized within the United States. And such consular officers shall, in all cases, give to the parties married before them a certificate of such marriage, and shall send another certificate thereof to the Department of State, there to be kept; such certificates shall specify the names of the parties, their ages, places of birth, and residence. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 79.

Sec. 4083. [Judicial authority of United States ministers and consuls in certain countries.] To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 72; Act of July 28, 1866, ch. 296, 14 Stat. L. 322.

By R. S. sec. 4125, *infra*, p. 71, it was provided that the provisions of this title, in so far as they relate to crimes and offenses committed by citizens of the United States should extend to Turkey, in conformity with the treaty with the Sublime Porte of May 7, 1830, 8 Stat. L. 408, but by the Act of March 23, 1874, ch. 62, *infra*, p. 73, and the President's proclamation made in accordance therewith on March 27, 1876, 19 Stat. L. 662, the provisions of said section 4125 were suspended with respect to the governments of Egypt and Turkey.

Title 47 of the Revised Statutes consisted of sections 4062-4130 and was designated "Foreign Relations" (see the note to R. S. sec. 4062, *supra*, p. 55). The provisions of this title were extended to Persia by R. S. sec. 4126, *infra*, p. 71; to Tripoli, Tunis, Morocco, Muscat, and the Navigator Islands by R. S. sec. 4127, *infra*, p. 72, and to other countries with which the United States might enter into treaty relations by R. S. sec. 4129, *infra*, p. 73.

By the Treaty of May 22, 1882, Art. 4, 23 Stat. L. 721, consuls in Corea or Chosen were given jurisdiction over offenses wherein citizens of the United States were involved.

By the Treaty of November 22, 1894, Art. 18, 29 Stat. L. 851, the jurisdiction of United States Courts in Japan was abolished.

The authority of ministers and consuls as defined in this section was in part superseded by an Act of June 30, 1906, ch. 3934, 34 Stat. L. 814, which established a United States Court for China with "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China," except in certain minor civil and criminal cases designated by sec. 2 of said Act. See JUDICIARY.

Sec. 4084. [Their jurisdiction of crimes.] The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 72.

As to the jurisdiction of the officers mentioned in this text see the note to the preceding R. S. sec. 4083

Offenses committed on high seas.— Jurisdiction of the consular tribunal is not confined to offenses committed on

land; the jurisdiction conferred by R. S. sec. 730 (embodied in the Judicial Code, sec. 41, and repealed by sec. 297 thereof,

see JUDICIARY), to try offenses committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offense when committed in a port of a foreign country, in which that tribunal is established, and the offender is not taken to the United States. *In re Ross*, (1891) 140 U. S. 453, 11 S. Ct. 897, 35 U. S. (L. ed.) 581.

Crimes committed by foreigners—*In general*.—A consular court has no jurisdiction, under this section, in respect of offenses committed by subjects of foreign powers. (1886) 18 Op. Atty-Gen. 498.

Crimes by seamen of foreign nationality.

—In China and Japan the judicial authority of the consular tribunals extends over all persons duly shipped on and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person; and all offenses which would be justifiable by the consular courts of the United States where the persons so offending are native-born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiciable by the same consular courts in the case of seamen of foreign nationality. *In re Ross*, (1891) 140 U. S. 453, 11 S. Ct. 897, 35 U. S. (L. ed.) 581.

Sec. 4085. [Jurisdiction in civil cases.] Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 73.
See the note to R. S. sec. 4083, *supra*, p. 60.

Judgment for set-off.—In (1866) 11 Op. Atty-Gen. 474, it appeared that a Dutch merchant brought an action of debt against an American citizen in a United States consular court in Japan, and the question was whether the defendant could have a judgment in his favor for the balance due him on a plea of set-off filed therein. Attorney-General Speed said: "A jurisdiction to hear and determine a complaint made by a subject of another country against a citizen of the United States does not confer jurisdiction for a

cross-action in a consular court. So far as set-off is a defense it may be pleaded. I am of opinion, therefore, upon the case submitted that a consular court could not entertain the plea of set-off further than the extent of the claim asserted by the Dutch merchant; and secondly, that the consular court could not, under the treaty with Japan, and the statutes of the United States, render a judgment over against a person of foreign birth, not a citizen of the United States, in Japan."

Sec. 4086. [Jurisdiction, how exercised and enforced.] Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish

appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 73.
See the note to *R. S.* sec. 4083, *supra*, p. 60.

Constitutional rights of accused.—In accordance with the laws of the United States, "the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offense he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel, and indeed will have the benefit of all the provisions necessary to secure a fair trial." *In re Ross*, (1891) 140 U. S. 453,

11 S. Ct. 897, 35 U. S. (L. ed.) 581, holding, however, that one charged with an infamous crime is not entitled to a previous presentment or indictment by a grand jury, nor to a trial by a petit jury.

The consular court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel, petition, or complaint, otherwise it will be insufficient. *The Spark v. Lee Choi Chum*, (1872) 1 Sawy. 713, 22 Fed. Cas. No. 13,206.

Sec. 4087. [Arrest, trial, and sentence of criminals.] Each of the consuls mentioned in section forty hundred and eighty-three, at the port for which he is appointed, is authorized upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offense against law; and to arraign and try any such offender; and to sentence him to punishment in the manner herein prescribed. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 74.

R. S. sec. 4083 mentioned in the text is given *supra*, p. 60. See the note thereto.

Sec. 4088. [Powers of consular officers in uncivilized countries.] The consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States, are authorized to try, hear, and determine all cases in regard to civil rights, whether of person or property, where the real debt or damages do not exceed the sum of one thousand dollars, exclusive of costs, and upon full hearing of the allegations and evidence of both parties, to give judgment according to the laws of the United States, and according to the equity and right of the matter, in the same manner as justices of the peace are now authorized and empowered where the United States have exclusive jurisdiction. They are also invested with the powers conferred by the provisions of sections forty hundred and eighty-six and forty hundred and eighty-seven for trial of offenses or misdemeanors. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 78.

The grade of commercial agent was abolished by the Act of April 5, 1906, ch. 1366, § 3, *supra*, p. 21.

See the note to *R. S.* sec. 4083, *supra*, p. 60.

Commercial agent.—Prior to the abolition of the office of commercial agent it was held that a special commercial agent might be sent to an island or country within the class described in this section

for the purpose of trying a citizen of the United States residing there and charged with the commission of a crime in that place. (1885) 18 Op. Atty.-Gen. 219.

Sec. 4089. [Decisions of consuls; appeal to minister.] Any consul when sitting alone may also decide all cases in which the fine imposed does not exceed five hundred dollars, or the term of imprisonment does not exceed ninety days; but in all such cases, if the fine exceeds one hundred dollars, or the term of imprisonment for misdemeanor exceeds sixty days, the defendants or any of them, if there be more than one, may take the case, by appeal, before the minister, if allowed jurisdiction, either upon errors of law or matters of fact, under such rules as may be prescribed by the minister for the prosecution of appeals in such cases. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 74.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4090. [Jurisdiction of ministers over certain offenses against foreign governments.] Capital cases for murder or insurrection against the government of either of the countries hereinbefore mentioned, by citizens of the United States, or for offenses against the public peace amounting to felony under the laws of the United States, may be tried before the minister of the United States in the country where the offense is committed if allowed jurisdiction; and every such minister may issue all manner of writs, to prevent the citizens of the United States from enlisting in the military or naval service of either of the said countries, to make war upon any foreign power with whom the United States are at peace, or in the service of one portion of the people against any other portion of the same people; and he may carry out this power by a resort to such force belonging to the United States, as may at the time be within his reach. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4091. [Appellate jurisdiction of ministers in certain countries.] Each of the ministers mentioned in section forty hundred and eighty-three shall, in the country to which he is appointed, be fully authorized to hear and decide all cases, criminal and civil, which may come before him, by appeal, under the provisions of this Title, and to issue all processes necessary to execute the power conferred upon him; and he is fully empowered to decide finally any case upon the evidence which comes up with it, or to hear the parties further, if he thinks justice will be promoted thereby; and he may also prescribe the rules upon which new trials may be granted, either by the consuls or by himself, if asked for upon sufficient grounds. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 75.
R. S. sec. 4083 mentioned in the text is given *supra*, p. 60. See the note thereto.

R. S. secs. 4092 to 4096 inclusive were superseded by the Act of June 30, 1906, ch. 3934, 34 Stat. L. 814, given under the title JUDICIARY, which established a United States court for China and by the treaty with Japan concluded Nov. 22, 1894, 29 Stat. L. 848, article 18 of which abolished the jurisdiction of United States courts in Japan and conferred such jurisdiction on the Japanese courts.

R. S. sec. 4092 provided for appeals from the Consular Court of China or Japan to the minister in the country.

R. S. secs. 4093, 4094, 4095 and 4096 provided for appeals from the decisions of such courts or ministers to the Circuit Court for California.

Sec. 4097. [Evidence in consular courts, how taken.] In all cases, criminal and civil, the evidence shall be taken down in writing in open

court, under such regulations as may be made for that purpose; and all objections to the competency or character of testimony shall be noted, with the ruling in all such cases, and the evidence shall be part of the case. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 75.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4098. [Compromise or reference of civil cases, to be encouraged.] It shall be the duty of the ministers and the consuls in the countries mentioned in section forty hundred and eighty-three, to encourage the settlement of controversies of a civil character, by mutual agreement, or to submit them to the decision of referees agreed upon by the parties; and the minister in each country shall prepare a form of submission for such cases, to be signed by the parties, and acknowledged before the consul. When parties have so agreed to refer, the referees may, after suitable notice of the time and place of meeting for the trial, proceed to hear the case, and a majority of them shall have power to decide the matter. If either party refuses or neglects to appear, the referees may proceed *ex parte*. After hearing any case such referees may deliver their award, sealed, to the consul, who, in court, shall open the same; and if he accepts it, he shall indorse the fact, and judgment shall be rendered thereon, and execution issue in compliance with the terms thereof. The parties, however, may always settle the same before return thereof is made to the consul. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 76.
R. S. sec. 4083 mentioned in the text is given *supra*, p. 60. See the note thereto.

Sec. 4099. [Certain criminal cases may be settled.] In all criminal cases which are not of a heinous character, it shall be lawful for the parties aggrieved or concerned therein, with the assent of the minister in the country, or consul, to adjust and settle the same among themselves, upon pecuniary or other considerations. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 76.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4100. [Aid of local authorities may be invoked.] The ministers and consuls shall be fully authorized to call upon the local authorities to sustain and support them in the execution of the powers confided to them by treaty, and on their part to do and perform whatever is necessary to carry the provisions of the treaties into full effect, so far as they are to be executed in the countries, respectively. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 76.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4101. [Punishments by fine or imprisonment.] In all cases, except as herein otherwise provided, the punishment of crime provided for by this Title shall be by fine or imprisonment, or both, at the discretion of the officer who decides the case, but subject to the regulations herein contained, and such as may hereafter be made. It shall, however, be the duty of such officer to award punishment according to the magnitude and aggravation of the offense. Every person who refuses or neglects to comply with

the sentence passed upon him shall stand committed until he does comply, or is discharged by order of the consul, with the consent of the minister in the country. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 75.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4102. [For murder, insurrection, or rebellion.] Insurrection or rebellion against the government of either of those countries, with intent to subvert the same, and murder, shall be capital offenses, punishable with death; but no person shall be convicted of either of those crimes, unless the consul and his associates in the trial all concur in opinion, and the minister also approves of the conviction. But it shall be lawful to convict one put upon trial for either of these crimes, of a less offense of a similar character, if the evidence justifies it, and to punish, as for other offenses, by fine or imprisonment, or both. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 75.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4103. [Execution of criminals.] Whenever any person is convicted of either of the crimes punishable with death, in either of those countries, it shall be the duty of the minister to issue his warrant for the execution of the convict, appointing the time, place, and manner; but if the minister is satisfied that the ends of public justice demand it, he may from time to time postpone such execution; and if he finds mitigating circumstances which authorize it, he may submit the case to the President for pardon. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 75.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4104. [Punishment of contempts.] No fine imposed by a consul for a contempt committed in presence of the court, or for failing to obey a summons from the same, shall exceed fifty dollars; nor shall the imprisonment exceed twenty-four hours for the same contempt. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 74.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4105. [Decisions of consul sitting alone in criminal cases.] Any consul, when sitting alone for the trial of offenses or misdemeanors, shall decide finally all cases where the fine imposed does not exceed one hundred dollars, or the term of imprisonment does not [not] exceed sixty days. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 74.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4106. [Associates may be called by consul in criminal trials.] Whenever, in any case, the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or whenever he is of opinion that severer punishments than those specified in the preceding sections will be required, he shall summon, to sit with him on the trial, one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a

list which had previously been submitted to and approved by the minister, and shall be persons of good repute and competent for the duty. Every such associate shall enter upon the record his judgment and opinion, and shall sign the same; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the decision shall, in all cases, except of capital offenses and except as provided in the preceding section, be final. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, shall be referred to the minister for his adjudication, either by entering up judgment therein, or by remitting the same to the consul with instructions how to proceed therewith. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 74.

The provisions of this section, and of R. S. sec. 4107, allowing consuls to summon associates, have, by section 5 of the Act of June 30, 1906, ch. 3934, 34 Stat. L. 814, establishing a United States court for China, no application to that court. See JUDICIARY. See also the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4107. [Associates in civil cases.] Each of the consuls mentioned in section four thousand and eighty-three shall have at the port for which he is appointed, jurisdiction as herein provided, in all civil cases arising under such treaties, respectively, wherein the damages demanded do not exceed the sum of five hundred dollars; and, if he sees fit to decide the same without aid, his decision thereon shall be final. But whenever he is of opinion that any such case involves legal perplexities, and that assistance will be useful to him, or whenever the damages demanded exceed five hundred dollars, he shall summon, to sit with him on the hearing of the case, not less than two nor more than three citizens of the United States, if such are residing at the port, who shall be taken from a list which had previously been submitted to and approved by the minister, and shall be of good repute and competent for the duty. Every such associate shall note upon the record his opinion, and also, in case he dissents from the consul, such reasons therefor as he thinks proper to assign; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the judgment shall be final. If any of the associates differ in opinion from the consul, either party may appeal to the minister, under such regulations as may exist; but if no appeal is lawfully claimed, the decision of the consul shall be final. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 74.

See the note to the preceding R. S. sec. 4106.

R. S. sec. 4083 above mentioned is given *supra*, p. 60. See the note thereto.

The appellate jurisdiction of the minister when "any of the associates differ in opinion from the consul" is limited by the provisions of R. S. sec. 4092, noted *supra*, p. 63, to cases involving amounts not exceeding \$2,500. If the amount of

the judgment in such a case in the consular court exceeds \$2,500, an appeal can be taken only to the Circuit Court for the district of California as provided in R. S. sec. 4093, noted *supra*, p. 63. The *Ping-On v. Blethen*, (1882) 11 Fed. 607.

Sec. 4108. [Where jurisdiction of ministers may be exercised.] The jurisdiction allowed by treaty to the ministers, respectively, in the countries named in section four thousand and eighty-three shall be exercised by them in those countries, respectively, wherever they may be. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 78.

R. S. sec. 4083 to which reference is made in the text is given *supra*, p. 60. See the note thereto.

Sec. 4109. [Jurisdiction of minister, when appellate and when original.] The jurisdiction of such ministers in all matters of civil redress, or of crimes, except in capital cases for murder or insurrection against the governments of such countries, respectively, or for offenses against the public peace amounting to felony under the laws of the United States, shall be appellate only: *Provided*, That in cases where a consular officer is interested, either as party or witness, such minister shall have original jurisdiction. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 74.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4110. [Responsibility of diplomatic and consular officers.] All such officers shall be responsible for their conduct to the United States, and to the laws thereof, not only as diplomatic or consular officers, but as judicial officers, when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 76.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4111. [Marshals of consular courts.] The President is authorized to appoint marshals for such of the consular courts in those countries as he may think proper, not to exceed seven in number, namely: one in Japan, four in China, one in Siam, and one in Turkey, each of whom shall receive a salary of one thousand dollars a year, in addition to the fees allowed by the regulations of the ministers, respectively, in those countries. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77.
The office of marshal in China was abolished by the Act of June 30, 1906, ch. 3934, § 8, 34 Stat. L. 816, which Act established a United States court for China. See JUDICIARY.

The office of marshal in Japan was abolished by the treaty of Nov. 22, 1894, § 18, 29 Stat. L. 853, which abolished the consular courts and recognized the jurisdiction of the Japanese courts.

See the note to R. S. sec. 4083, *supra*, p. 60.

A subject of a foreign nation may be appointed marshal under this section, in which case he is not required to take an oath of allegiance, but may properly be required to take an oath or affirmation faithfully to perform the duties of his office. (1902) 23 Op. Atty.-Gen. 608.

Salary of marshal.—In (1862) 10 Op. Atty.-Gen. 250, the opinion was expressed that a marshal appointed under this sec-

tion is entitled to pay from the time when, having taken the oath and given bond, he actually enters upon such duties as are preliminary to his departure for his field of service; and that if any time intervenes between the performance of those legal requisites and the date of his entry on such preliminary duties, the latter is the period from which his pay should begin to run.

Sec. 4112. [Execution and return of process.] It shall be the duty of the marshals, respectively, to execute all process issued by the minister of the United States in those countries, respectively, or by the consul at the port at which they reside, and to make due return thereof to the officer by whom it was issued, and to conform in all respects to the regulations prescribed by the ministers, respectively, in regard to their duties. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77.
See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4113. [Marshal's bond.] Each marshal, before entering upon the duties of his office, shall give bond for the faithful performance thereof in a penal sum not to exceed ten thousand dollars, with two sureties to be approved by the Secretary of State. Such bond shall be transmitted to the Secretary of the Treasury, and a certified copy thereof be lodged in the office of the minister. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77.

See the note to R. S. sec. 4083, *supra*, p. 60.

Form of bond.—In (1885) 18 Op. Atty.-Gen. 274, construing a similar provision in another section of the statutes relating to official bonds, it was remarked that a bond wherein the principal and sureties are jointly and severally bound for the full amount of the penalty is preferable to any other, and is ordinarily

used in practice; and the opinion was expressed that though the form of a bond be left to the determination of the approving officer, his discretion in that regard should be governed by the established practice, and that a departure from the latter would not be justified in any case unless required by public considerations.

Sec. 4114. [Suits on marshal's bond.] Whenever any person desires to bring suit upon the bond of any such marshal, it shall be the duty of the Secretary of the Treasury, or of the minister having custody of a copy of the same, to give to the person so applying a certified copy thereof, upon which suit may be brought and prosecuted with the same effect as could be done upon the original: *Provided*, The Secretary of the Treasury, or the minister to whom the application is made, is satisfied that there is probable cause of action against the marshal. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4115. [Production of original bond.] Upon a plea of non est factum, verified upon oath, or any other good cause shown, the court or the consul or minister trying the cause may require the original bond of the marshal in those countries to be produced; and it shall be the duty of the Secretary of the Treasury to forward the original bond to the court, or consul, or minister requiring the same. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4116. [Process against marshal, how executed.] All rules, orders, writs, and processes of every kind which are intended to operate or be enforced against any of the marshals, in any of the countries named in this Title, shall be directed to and executed by such persons as may be appointed for that purpose by the minister or consul issuing the same. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4117. [Ministers to make regulations for consular courts.] In order to organize and carry into effect the system of jurisprudence demanded by such treaties, respectively, the ministers, with the advice of the several consuls in each of the countries, respectively, or of so many of them as can be conveniently assembled, shall prescribe the forms of all processes to be issued by any of the consuls; the mode of executing and

the time of returning the same; the manner in which trials shall be conducted, and how the records thereof shall be kept; the form of oaths for Christian witnesses, and the mode of examining all other witnesses; the costs to be allowed to the prevailing party, and the fees to be paid for judicial services; the manner in which all officers and agents to execute process, and to carry this Title into effect, shall be appointed and compensated; the form of bail-bonds, and the security which shall be required of the party who appeals from the decision of a consul; and shall make all such further decrees and regulations from time to time, under the provisions of this Title, as the exigency may demand. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 73.

See the note to R. S. sec. 4083, *supra*, p. 60.

Security on appeal from consular court.—Where an appeal to the Circuit Court was taken from the decision of a consul and no bond was given, but the sum of \$6,000 was deposited in the registry of the consular court in lieu thereof, and

the deposit was taken without objection, the Circuit Court presumed that the deposit was prescribed with the advice of the consul and held that the security was sufficient. *The Ping-On v. Blethen*, (1882) 11 Fed. 607.

Sec. 4118. [Publication of regulations.] All such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as hereinbefore provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, and such consul shall signify his assent or dissent in writing, with his name subscribed thereto. After taking such advice, and considering the same, the minister in each of those countries may, nevertheless, by causing the decree, order, or regulation to be published with his signature thereto, and the opinions of his advisers inscribed thereon, make it binding and obligatory, until annulled or modified by Congress; and it shall take effect from the publication or any subsequent day thereto named in the act. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 73.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4119. [Transmission to Secretary of State] All such regulations, orders, and decrees shall, as speedily as may be after publication, be transmitted by the ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 73.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4120. [Fees for judicial services.] It shall be the duty of the minister in each of those countries to establish a tariff of fees for judicial services, which shall be paid by such parties, and to such persons, as the minister shall direct; and the proceeds shall, as far as is necessary, be applied to defray the expenses incident to the execution of this Title; and regular accounts, both of receipts and expenditures, shall be kept by the minister and consuls and transmitted annually to the Secretary of State. [*R. S.*]

Act of June 22, 1860, ch. 179, 12 Stat. L. 75.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4121. [Expenses of prisons in foreign countries.] The President, when provision is not otherwise made, is authorized to allow, in the adjustment of the accounts of each of the ministers or consuls, the actual expenses of the rent of suitable buildings or parts of buildings to be used as prisons for American convicts in those countries, not to exceed in any case the rate of six hundred dollars a year; and also the wages of the keepers of the same, and for the care of offenders, not to exceed, in any case, the sum of eight hundred dollars per annum. But no more than one prison shall be hired in Japan, four in China, one in Turkey, and one in Siam, at such port or ports as the minister, with the sanction of the President, may designate, and the entire expense of prison and prison-keepers at the consulate of Bangkok, in Siam, shall not exceed the sum of one thousand dollars a year. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 77; Act of March 3, 1869, ch. 125, 15 Stat. L. 322.

That part of the above section providing for a prison in Japan is apparently superseded by the treaty of Nov. 22, 1894, 29 Stat. L. 853, abolishing the jurisdiction of United States courts in Japan. See the note to R. S. sec. 4083, *supra*, p. 60.

Where convict may be imprisoned.—In (1892) 20 Op. Atty.-Gen. 394, the opinion was expressed that, as the Appropriation Act of 1891, 26 Stat. L. 1061, indicated an intention on the part of Congress to sustain but one place in China for the confinement of offenders in that empire, a prisoner convicted in any one of our consular courts therein can be sent to such prison, without reference to the fact of its being situated within or without

the supposed territorial jurisdiction of the consul passing the sentence. Opinions in (1875) 14 Op. Atty.-Gen. 522 and (1889) 19 Op. Atty.-Gen. 377, were distinguished on the ground that in the latter cases the court convicting and the proposed place of confinement were in different countries, and the rights of our consular officers were determined under different treaties and statutes.

Sec. 4122. [In China.] The President is authorized to allow, in the adjustment of the accounts of the consul-general at Shanghai, the actual expense of the rent of a suitable building, to be used as a prison for American convicts in China, not to exceed one thousand five hundred dollars a year; and also the wages of the keepers of the same, and for the care of offenders, not to exceed five thousand dollars a year; and to allow, in the adjustment of the accounts of the consuls at other ports in China, the actual expense of the hire of constables and the care of offenders, not to exceed in all five thousand dollars a year. [R. S.]

Act of July 1, 1870, ch. 194, 16 Stat. L. 184.

See the Act of March 22, 1902, ch. 272, § 1, *infra*, p. 74. And see the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4123. [In Japan.] The President is hereby authorized to allow, in the adjustment of the accounts of the consul at Kanagawa, the actual expense of the rent of a suitable building, to be used as a prison for American convicts in Japan, and not to exceed seven hundred and fifty dollars a year; and also the wages of the keepers of the same, and for the care of offenders, not to exceed two thousand five hundred dollars a year; and to allow in the adjustment of the accounts of the consuls at other ports in Japan the actual expense of the hire of constables and the care of offenders, not to exceed in all two thousand five hundred dollars a year. [R. S.]

Act of July 1, 1870, ch. 194, 16 Stat. L. 184.

This and the following R. S. sec. 4124 were in effect superseded by section 18 of the treaty of Nov. 22, 1894, 29 Stat. L. 853, which abolished the consular courts of the United States in Japan. See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4124. [Court-house and jail in Jeddo.] The Secretary of State, through the minister resident at Japan, is authorized to rent, furnish, and keep suitable buildings, with grounds appurtenant, in Jeddo, or such other place as he may designate, for a court-house and jail, at an annual cost not exceeding five thousand dollars: *Provided*, That the period for which the buildings shall be rented shall be for two years, with renewals for two years, as the Secretary of State may determine. [R. S.]

Act of March 3, 1873, ch. 249, 17 Stat. L. 582.

See the note to the preceding R. S. sec. 4123, and R. S. sec. 4083, *supra*, p. 60.

Sec. 4125. [Provisions of Title extended to Turkey.] The provisions of this Title, so far as the same relate to crimes and offenses committed by citizens of the United States, shall extend to Turkey, under the treaty with the Sublime Porte of May seventh, eighteen hundred and thirty, and shall be executed in the Ottoman dominions in conformity with the provisions of the treaty, and of this Title, by the minister and the consuls appointed to reside therein, who are hereby *ex-officio* vested with the powers herein conferred upon the ministers and consuls in China, for the purposes above expressed, so far as regards the punishment of crime, and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks, or other foreign Christian nations. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 76.

"This Title," above mentioned, is Title XLVII. "Foreign Relations," and comprises R. S. secs. 4062-4130.

By the Act of March 23, 1874, ch. 62, *infra*, p. 73, the operation of this title to a certain extent was suspended with respect to Turkey and Egypt. See also the note to R. S. sec. 4083, *supra*, p. 60.

By the Act of June 30, 1906, ch. 3934, 34 Stat. L. 814, there was established a United States court for China. See JUDICIARY.

Judicial powers of consuls accredited to any nation depend upon the express provisions of the treaties entered into with that nation, and the laws of the nation

which the consul represents. *Dainese v. Hale*, (1875) 91 U. S. 13, 23 U. S. (L. ed.) 190.

Sec. 4126. [To Persia.] The provisions of this Title shall extend to Persia, in respect to all suits and disputes which may arise between citizens of the United States therein; and the minister and consuls who may be appointed to reside in Persia are hereby invested, in relation to such suits and disputes, with such powers as are by this Title conferred upon the ministers and consuls in China. All suits and disputes arising in Persia between Persian subjects and citizens of the United States shall be carried before the Persian tribunal to which such matters are usually referred, at the place where a consul or agent of the United States may reside, and shall be discussed and decided according to equity, in the presence of an employé of the consul or agent of the United States; and it shall be the duty of the consular officer to attend the trial in person, and see that justice is administered. All suits and disputes occurring in Persia between the citizens of the United States and the subjects of other foreign powers, shall be tried and adjudicated by the intermediation of their respective

ministers or consuls, in accordance with such regulations as shall be mutually agreed upon by the minister of the United States for the time being, and the ministers of such foreign powers, respectively, which regulations shall from time to time be submitted to the Secretary of State. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 78.

"This Title," above mentioned, is Title XLVII. "Foreign Relations," and comprises R. S. secs. 4062-4130.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4127. [Foreign relations; laws extended to Tripoli, Tunis, Morocco, Muscat, and Navigator Islands.] The provisions of this title, so far as the same are in conformity with the stipulations in the existing treaties between the United States and Tripoli, Tunis, Morocco, Muscat, and the Samoan or Navigator Islands, respectively, shall extend to those countries, and shall be executed in conformity with the provisions of the treaties and of the provisions of this title by the consuls appointed by the United States to reside therein, who are hereby ex officio invested with the powers herein delegated to the ministers and consuls of the United States appointed to reside in the countries named in section four thousand and eighty-three, so far as the same can be exercised under the provisions of treaties between the United States and the several countries mentioned in this section, and in accordance with the usages of the countries in their intercourse with the Franks or other foreign Christian nations. And whenever the United States shall negotiate a treaty with any foreign government, in which the American consul-general or consul shall be clothed with judicial authority, and securing the right of trial to American citizens residing therein before such consul-general or consul, and containing provisions similar to or like those contained in the treaties with the governments named in this act, then said title, so far as the same may be applicable, shall have full force in reference to said treaty, and shall extend to the country of the government negotiating the same. [R. S.]

This section was amended to read as above given by the Act of June 14, 1878, ch. 193, 20 Stat. L. 131.

Originally it was as follows:

"Sec. 4127. The provisions of this Title, so far as the same are in conformity with the stipulations in the existing treaties between the United States and Tripoli, Tunis, Morocco, and Muscat, respectively, shall extend to those countries, and shall be executed in conformity with the provisions of the treaties, and of the provisions of this Title, by the consuls appointed by the United States to reside therein, who are hereby ex-officio invested with the powers herein delegated to the ministers and consuls of the United States appointed to reside in the countries named in section forty hundred and eighty-three, so far as the same can be exercised under the provisions of treaties between the United States and the several countries mentioned in this section, and in accordance with the usages of the countries in their intercourse with the Franks or other foreign Christian nations." Act of June 22, 1860, ch. 179, 12 Stat. L. 78.

"This title," above mentioned, is Title XLVII. "Foreign Relations," and comprises R. S. secs. 4062-4130.

R. S. sec. 4083 mentioned in the text is given *supra*, p. 60. See the note thereto.

By the Convention of Feb. 16, 1900, 31 Stat. L. 1878, the questions which had arisen between the United States, Great Britain, and Germany with respect to the Samoan group of islands, were settled. By the treaty with France of March 15, 1904, 33 Stat. L. 2263, the rights of the United States in Tunis under previously existing treaties were renounced.

Sec. 4128. [Judicial duties, when to devolve on Secretary of State.] If at any time there be no minister in either of the countries hereinbefore mentioned, the judicial duties which are imposed by this Title upon the

minister shall devolve upon the Secretary of State, who is authorized and required to discharge the same. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 76; Act of July 1, 1870, ch. 194, 16 Stat. L. 183.

See the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4129. [Provisions of Title extended to other countries.] The provisions of this Title relating to the jurisdiction of consular and diplomatic officers over civil and criminal cases in the countries therein named, shall extend to any country of like character with which the United States may hereafter enter into treaty relations. [R. S.]

Act of July 1, 1870, ch. 194, 16 Stat. L. 183.

See the preceding R. S. sec. 4127. And see the note to R. S. sec. 4083, *supra*, p. 60.

Sec. 4130. [Definition of words "minister" and "consul."] The word "minister," when used in this title shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word "consul" shall be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, vice consul-general, consul or vice-consul. [R. S.]

Act of June 22, 1860, ch. 179, 12 Stat. L. 76; Act of July 1, 1870, ch. 194, 16 Stat. L. 183.

This section was amended to read as above given by the Act of Feb. 1, 1876, ch. 6; 19 Stat. L. 2. Originally this section was as follows: "The word 'minister,' when used in this Title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, consul, or vice-consul."

The office of vice-consul-general was abolished by section 6 of the Act of Feb. 5, 1915, ch. 23, *supra*, p. 43.

See the note to R. S. sec. 4083, *supra*, p. 60.

Consul-general not a "minister."—In *In re Baiz*, (1890) 135 U. S. 403, 10 S. Ct. 854, 34 U. S. (L. ed.) 222, it was held, under circumstances therein stated, that the consul-general of Guatemala and

Honduras in New York was not chargé d'affaires *ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a diplomatic officer or "minister."

An Act To authorize the President to accept for citizens of the United States the jurisdiction of certain tribunals in the Ottoman dominions, and Egypt, established, or to be established, under the authority of the Sublime Porte and of the government of Egypt.

[Act of March 23, 1874, ch. 62, 18 Stat. L. 23.]

[SEC. 1.] **[Jurisdiction of courts of Ottoman government and Egypt over citizens of United States may be accepted, and that of consular courts suspended.]** That whenever the President of the United States shall receive satisfactory information that the Ottoman government, or that of Egypt, has organized other tribunals on a basis likely to secure to citizens of the United States, in their dominions the same impartial justice which they now enjoy there under the judicial functions exercised by the minister, consuls, and other functionaries of the United States, pursuant to the act of Congress approved the twenty-second of June, eighteen hundred and sixty, entitled "An act to carry into effect provisions of the

treaties between the United States, China, Persia, and other countries, giving certain judicial powers to ministers and consuls, or other functionaries of the United States in those countries, and for other purposes," he is hereby authorized to suspend the operations of said acts as to the dominions in which such tribunals may be organized, so far as the jurisdiction of said tribunals may embrace matters now cognizable by the minister, consuls, or other functionaries of the United States in said dominions, and to notify the government of the Sublime Porte, or that of Egypt, or either of them, that the United States, during such suspension will, as aforesaid accept for their citizens the jurisdiction of the tribunals aforesaid over citizens of the United States which has heretofore been exercised by the minister, consuls, or other functionaries of the United States. [18 Stat. L. 23.]

The provisions of the Act of 1860, ch. 179, 12 Stat. L. 72, here referred to, are incorporated into Revised Statutes in sections 4083-4091, 4098-4121, 4125-4130.

The President issued his proclamation March 27, 1876 (19 Stat. L. 662), under this provision, suspending the jurisdiction of consular courts, as therein provided.

See the note to R. S. sec. 4083, *supra*, p. 60.

[SEC. 2.] **[Right to hold property in Turkey — acceptance of Turkish law by President.]** That the President is hereby authorized for the benefit of American citizens residing in the Turkish dominions, to accept the recent law of the Ottoman Porte ceding the right of foreigners possessing immovable property in said dominions. [18 Stat. L. 24.]

See President's proclamation, 18 Stat. L. 850.

See the note to R. S. sec. 4083, *supra*, p. 60.

[SEC. 1.] **[Keeping and feeding of prisoners in China, Korea, Siam, Turkey.]** Paying for the keeping and feeding of prisoners in China, Korea, Siam, and Turkey, nine thousand dollars: *Provided*, That no more than fifty cents per day for the keeping and feeding of each prisoner while actually confined shall be allowed or paid for any such keeping and feeding. This is not to be understood as covering cost of medical attendance and medicines when required by such prisoners: *And provided further*, That no allowance shall be made for the keeping and feeding of any prisoner who is able to pay or does pay the above sum of fifty cents per day; and the consular officer shall certify to the fact of inability in every case. [32 Stat. L. 87.]

This is from the Diplomatic and Consular Appropriation Act of March 22, 1902, ch. 272. Similar provisions occur in prior appropriation acts: 31 Stat. L. 893; 31 Stat. L. 70; 30 Stat. L. 832; 29 Stat. L. 589; 29 Stat. L. 37; 28 Stat. L. 824; 28 Stat. L. 150; 27 Stat. L. 506; 26 Stat. L. 1061; 26 Stat. L. 281, etc., and are repeated in substance from year to year. The appropriation for the fiscal year ending June 30, 1916, is contained in the Diplomatic and Consular Appropriation Act of March 4, 1915, ch. 145, § 1, 38 Stat. L. 1125, and provides for prisoners in "China, Chosen, Siam and Turkey," omitting however the last proviso of the text relating to prisoners who can, or do, pay the sum mentioned.

DISABILITY PENSION ACT

See PENSIONS

DISCRIMINATING LAWS AND DUTIES

R. S. 2502. *For Merchandise Imported in Foreign Vessels*, 75.

R. S. 4228. *Suspension by the President*, 76.

R. S. 4229. *Vessels of Prussia*, 77.

R. S. 4230. *Termination of Privileges*, 77.

R. S. 4231. *Spanish Vessels*, 77.

Act of June 19, 1886, ch. 421, 77.

Sec. 17. Suspension by President of Commercial Privileges to Foreign Vessels — Retaliation, 77.

Act of March 3, 1887, ch. 339, 78.

United States Fishing Vessels Denied Rights in British North America — Retaliation, 78.

Act of Aug. 30, 1890, ch. 839, 79.

Sec. 5. Discrimination by Foreign Countries against United States Products — Retaliation by President, 79.

Act of July 26, 1892, ch. 248, 80.

Sec. 1. Passage of Vessels through St. Marys Falls Canal — Tolls, 80.

2. Collection of Tolls, 80.

Act of Oct. 3, 1913, ch. 16, 81.

Sec. IV. E. Countervailing Duty on Imports Receiving Export Bounty, 81.

J. Subsection 1. Discriminating Duty on Imports in Foreign Vessels, etc., 82.

CROSS-REFERENCES

See *CUSTOMS DUTIES; IMPORTS AND EXPORTS*.

Sec. 2502. [For merchandise imported in foreign vessels.] A discriminating duty of ten per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, and merchandise which shall be imported on vessels not of the United States; but this discriminating duty shall not apply to goods, wares, and merchandise which shall be imported in vessels not of the United States, entitled, by treaty or any act of Congress, to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in vessels of the United States. [R. S.]

Act of June 30, 1864, ch. 171, 13 Stat. L. 215.

While provisions similar to the above section are contained in the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § IV J, subsection 1, *infra*, p. 82, yet this section must be regarded as intended to be left in the statutes, since by the Act of July 24, 1897, ch. 13, which amended R. S. sec. 4228, given *infra*, p. 76, it is referred to and the President is authorized to suspend in part its operation.

Construction.—In *Gautier v. Arthur*, (1881) 104 U. S. 345, 26 U. S. (L. ed.) 773, the contention of the government that this section imposed a duty on all goods

imported by foreign vessels, on such as were previously free as well as those already subjected to duty, was held to be a reasonable construction of the section.

The policy of discriminating against the importation by foreign vessels at all, would seem to require that no distinction should be made between the two classes of goods. The encouragement of importa-

tion by vessels of our country would be greater by extending the discrimination to all goods, than by limiting it to those upon which a duty was previously imposed.

Sec. 4228. [Suspension by the President.] Upon satisfactory proof being given to the President, by the government of any foreign nation, that no discriminating duties of tonnage or imposts are imposed or levied in the ports of such nation upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country, the President may issue his proclamation, declaring that the foreign discriminating duties of tonnage and impost within the United States are suspended and discontinued, so far as respects the vessels of such foreign nation, and the produce, manufactures, or merchandise imported into the United States from such foreign nation, or from any other foreign country; the suspension to take effect from the time of such notification being given to the President, and to continue so long as the reciprocal exemption of vessels, belonging to citizens of the United States, and their cargoes, shall be continued, and no longer. *Provided*, That the President is authorized to suspend in part the operation of sections forty-two hundred and nineteen and twenty-five hundred and two so that foreign vessels from a country imposing partial discriminating tonnage duties upon American vessels, or partial discriminating import duties upon American merchandise, may enjoy in our ports the identical privileges which the same class of American vessels and merchandise may enjoy in said foreign country. [R. S.]

Act of May 24, 1828, ch. 111, 4 Stat. L. 308; Act of May 31, 1830, ch. 219, 4 Stat. L. 425; Act of July 13, 1832, ch. 207, 4 Stat. L. 579.

The proviso at the close of this section, as above given, was added by the Act of July 24, 1897, ch. 13, 30 Stat. L. 214, "An Act To authorize the President to suspend discriminating duties imposed on foreign vessels and commerce."

R. S. sec. 2419 mentioned in the proviso above has been partly repealed. See the title TONNAGE DUTIES.

R. S. sec. 2502 also mentioned in the text is given *supra*, p. 75.

Provisions similar to those above given were made by the Tariff Act of Oct. 3, 1913, ch. 16, § IV J, subsection 1, *infra*, p. 82.

Purpose of section.—The purpose of this section was to secure to United States vessels the transportation of goods by sea by discriminating against transportation in other vessels to the United States, and also to prevent evasion to a contiguous country. (1897) 21 Op. Atty.-Gen. 597.

It was the opinion of the Attorney-General that this section was not repealed by section 22 of the Dingley Act of July 24, 1897, 30 Stat. L. 151, ch. 11; and, therefore, it was held that where certain goods had come from Japan by the way of Vancouver, B. C., and thence by rail through the Dominion of Canada to Chicago in cars which at Vancouver had been duly sealed by a consular officer of the United States, they were not subject to a discriminating duty under this R. S. sec. 4228. (1897) 21 Op. Atty.-Gen. 597.

"Section 22 (Dingley Act, July 24, 1897, 30 Stat. L. 151, ch. 11) and section 4228 and amendments are not coextensive in scope; in purpose, therefore, they may be the complements of each other. One prescribes a rule, the other the condition upon which, and the agency by which, it may be suspended. Each, therefore, has its purpose—definite and consistent. Section 4228 might be a proviso to section 22 and is in effect made so by the Suspension Act, and as such proviso it is certainly not repugnant to section 22. The latter has its operation—commencing with its passage, continuing until the conditions of section 4228 occur, and the President acts on account of them, resuming again if the reciprocal exemptions of foreign nations be withdrawn." (1897) 21 Op. Atty.-Gen. 597.

Sec. 4229. [Vessels of Prussia.] No other or higher rate of duties shall be imposed or collected on vessels of Prussia, or of her dominions, from whencesoever coming, nor on their cargoes, howsoever composed, than are or may be payable on vessels of the United States, and their cargoes. [R. S.]

Act of May 24, 1828, ch. 111, 4 Stat. L. 308.

Sec. 4230. [Termination of privileges.] The preceding section shall continue and be in force during the time that the equality for which it provides shall, in all respects, be reciprocated in the ports of Prussia and her dominions; and if at any time hereafter the equality shall not be reciprocated in the ports of Prussia and her dominions, the President may issue his proclamation, declaring that fact, and thereupon the section preceding shall cease to be in force. [R. S.]

Act of May 24, 1828, ch. 111, 4 Stat. L. 309.

Sec. 4231. [Spanish vessels.] From Spanish vessels coming from any port or place in Spain or her colonies, where no discriminating or counter-vailing duties on tonnage are levied upon vessels of the United States, or from any other port or place to and with which vessels of the United States are ordinarily permitted to go and trade, there shall be exacted in the ports of the United States no other or greater duty on tonnage than at the time may be exacted of vessels of the United States. [R. S.]

Act of March 1, 1869, ch. 54, 15 Stat. L. 282.

Sec. 4232. Repealed. This section was as follows: "The mail steamships employed in the mail-service between the United States and Brazil shall be exempt from all port-charges and custom-house dues at the port of departure and arrival in the United States if, and so long as, a similar immunity from port-charges and custom-house dues is granted by the government of Brazil."

Act of May 28, 1864, ch. 98, 13 Stat. L. 94.

It was repealed by the Tariff Act of Aug. 5, 1909, ch. 6, § 36, 36 Stat. L. 111. This last cited section was expressly saved from repeal by the Tariff Act of Oct. 3, 1913, ch. 16, § IV S, given under CUSTOMS DUTIES, vol. 2, p. 888.

See the title TONNAGE DUTIES.

SEC. 17. [Suspension by President of commercial privileges to foreign vessels — retaliation.] That whenever any foreign country whose vessels have been placed on the same footing in the ports of the United States as American vessels (the coastwise trade excepted) shall deny to any vessels of the United States any of the commercial privileges accorded to national vessels in the harbors, ports, or waters of such foreign country, the President, on receiving satisfactory information of the continuance of such discriminations against any vessels of the United States, is hereby authorized to issue his proclamation excluding, on and after such time as he may indicate, from the exercise of such commercial privileges in the ports of the United States as are denied to American vessels in the ports of such foreign country, all vessels of such foreign country of a similar character to the vessels of the United States thus discriminated against, and suspending such concessions previously granted to the vessels of such country; and on

and after the date named in such proclamation for it to take effect, if the master, officer, or agent of any vessel of such foreign country excluded by said proclamation from the exercise of any commercial privileges shall do any act prohibited by said proclamation in the ports, harbors, or waters of the United States for or on account of such vessel, such vessel, and its rigging, tackle, furniture, and boats, and all the goods on board, shall be liable to seizure and to forfeiture to the United States; and any person opposing any officer of the United States in the enforcement of this act, or aiding and abetting any other person in such opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanor, and, upon conviction, shall be liable to imprisonment for a term not exceeding two years. [24 Stat. L. 82.]

This is from the Act of June 19, 1886, ch. 421, "to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes."

An Act To authorize the President of the United States to protect and defend the rights of American fishing vessels, American fishermen, American trading and other vessels, in certain cases, and for other purposes.

[Act of March 3, 1887, ch. 339, 24 Stat. L. 475.]

[United States fishing vessels denied rights in British North America — Retaliation.] That whenever the President of the United States shall be satisfied that American fishing vessels or American fishermen, visiting or being in the waters or at any ports or places of the British dominions of North America, are or then lately have been denied or abridged in the enjoyment of any rights secured to them by treaty or law, or are or then lately have [been] unjustly vexed or harassed in the enjoyment of such rights, or subjected to unreasonable restrictions, regulations, or requirements in respect of such rights; or otherwise unjustly vexed or harassed in said waters, ports or places; or whenever the President of the United States shall be satisfied that any such fishing vessels or fishermen, having a permit under the laws of the United States to touch and trade at any port or ports, place or places, in the British dominions of North America, are or then lately have been denied the privilege of entering such port or ports, place or places in the same manner and under the same regulations as may exist therein applicable to trading vessels of the most favored nation, or shall be unjustly vexed or harassed, in respect thereof, or otherwise be unjustly vexed or harassed therein, or shall be prevented from purchasing such supplies as may there be lawfully sold to trading vessels of the most favored nation; or whenever the President of the United States shall be satisfied that any other vessels of the United States, their masters or crews, so arriving at or being in such British waters or ports or places of the British dominions of North America, are or then lately have been denied any of the privileges therein accorded to the vessels, their masters or crews, of the most favored nation, or unjustly vexed or harassed in

respect of the same, or unjustly vexed or harassed therein by the authorities thereof, then, and in either or all of such cases,

It shall be lawful, and it shall be the duty of the President of the United States, in his discretion, by proclamation to that effect, to deny vessels, their masters and crews, of the British dominions of North America, any entrance into the waters, ports, or places of, or within the United States (with such exceptions in regard to vessels in distress, stress of weather, or needing supplies as to the President shall seem proper), whether such vessels shall have come directly from said dominions on such destined voyage or by way of some port or place in such destined voyage elsewhere; and also, to deny entry into any port or place of the United States of fresh fish or salt fish or any other product of said dominions, or other goods coming from said dominions to the United States.

The President may, in his discretion, apply such proclamation to any part or to all of the foregoing-named subjects, and may revoke, qualify, limit, and renew such proclamation from time to time as he may deem necessary to the full and just execution of the purposes of this act.

Every violation of any such proclamation, or any part thereof, is hereby declared illegal, and all vessels and goods so coming or being within the waters, ports, or places of the United States contrary to such proclamation shall be forfeited to the United States; and such forfeiture shall be enforced and proceeded upon in the same manner and with the same effect as in the case of vessels or goods whose importation or coming to or being in the waters or ports of the United States contrary to law may now be enforced and proceeded upon.

Every person who shall violate any of the provisions of this act, or such proclamation of the President made in pursuance hereof, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both said punishments, in the discretion of the court. [24 Stat. L. 475.]

SEC. 5. [Discrimination by foreign countries against United States products — retaliation by President.] That whenever the President shall be satisfied that unjust discriminations are made by or under the authority of any foreign state against the importation to or sale in such foreign state of any product of the United States, he may direct that such products of such foreign state so discriminating against any product of the United States as he may deem proper shall be excluded from importation to the United States; and in such case he shall make proclamation of his direction in the premises, and therein name the time when such direction against importation shall take effect, and after such date the importation of the articles named in such proclamation shall be unlawful. The President may at any time revoke, modify, terminate, or renew any such direction as, in his opinion, the public interest may require. [26 Stat. L. 415.]

This is from the Act of Aug. 30, 1890, ch. 839. For other sections of this Act see the titles ANIMALS, vol. 1, p. 371; IMPORTS AND EXPORTS.

An Act To enforce reciprocal commercial relations between the United States and Canada, and for other purposes.

[*Act of July 26, 1892, ch. 248, 27 Stat. L. 267.*]

[SEC. 1.] [Passage of vessels through St. Marys Falls Canal — tolls.] That, with a view of securing reciprocal advantages for the citizens, ports, and vessels of the United States, on and after the first day of August, eighteen hundred and ninety-two, whenever and so often as the President shall be satisfied that the passage through any canal or lock connected with the navigation of the Saint Lawrence River, the Great Lakes, or the water ways connecting the same, of any vessels of the United States, or of cargoes or passengers in transit to any port of the United States, is prohibited or is made difficult or burdensome by the imposition of tolls or otherwise which, in view of the free passage through the Saint Marys Falls Canal, now permitted to vessels of all nations, he shall deem to be reciprocally unjust and unreasonable, he shall have the power, and it shall be his duty, to suspend by proclamation to that effect, for such time and to such extent (including absolute prohibition) as he shall deem just, the right of free passage through the Saint Marys Falls Canal, so far as it relates to vessels owned by the subjects of the government so discriminating against the citizens, ports, or vessels of the United States, or to any cargoes, portions of cargoes, or passengers in transit to the ports of the government making such discrimination, whether carried in vessels of the United States or of other nations. In such case and during such suspension tolls shall be levied, collected, and paid as follows, to wit: Upon freight of whatever kind or description, not to exceed two dollars per ton; upon passengers, not to exceed five dollars each, as shall be from time to time determined by the President: *Provided*, That no tolls shall be charged or collected upon freight or passengers carried to and landed at Ogdensburg, or any port west of Ogdensburg, and south of a line drawn from the northern boundary of the State of New York through the Saint Lawrence River, the Great Lakes, and their connecting channels to the northern boundary of the State of Minnesota. [27 Stat. L. 267.]

"By proclamation of August 18, 1892 (27 Stat. L. 1032), the President, under the authority of the above Act, and because of discrimination against citizens of the United States in the use of the Welland Canal, enforced a toll of 20 cents per ton on all freight passing through the St. Marys Falls Canal in transit to any part of the Dominion of Canada. This was suspended by proclamation of February 21, 1893 (27 Stat. L. 1065), upon satisfactory assurances that equality with British subjects had been secured to citizens of the United States in regard to the use of the Welland Canal." *Compilers' note, 2 Supp. R. S. 47.*

SEC. 2. [Collection of tolls.] All tolls so charged shall be collected under such regulations as shall be prescribed by the Secretary of the Treasury, who may require the master of each vessel to furnish a sworn statement of the amount and kind of cargo and the number of passengers carried and the destination of the same, and such proof of the actual delivery of such cargo or passengers at some port or place within the limits above named as he shall deem satisfactory; and until such proof is furnished such freight and passengers may be considered to have been landed at some port or place outside of those limits, and the amount of tolls which would have accrued if they had been so delivered shall constitute a lien, which may be

enforced against the vessel in default wherever and whenever found in the waters of the United States. [27 Stat. L. 268.]

E. [Countervailing duty on imports receiving export bounty.] That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties. [38 Stat. L. 193.]

This and the following text paragraph are from the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § IV. Provisions similar to these have appeared in former Tariff Acts. See R. S. sec. 2502 and the notes thereto, *supra*, p. 75.

Certificate entitled to lower classification in excise rating.—"We find that the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from 1 ruble and 25 kopecks to 1 ruble and 64 kopecks per pood, or from 1.8 to 2.35 cents per pound. Therefore, we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia, and we think it was from such indirect grants as this that the Congress of the United States intended to protect the manufacturers of this country, by authorizing the Secretary of the Treasury to make all proper regulations for the assessment and collection of such additional duties as were imposed by the collector on the sugars imported by the appellant." *Downs v. U. S.*, (C. C. A. 1902) 113 Fed. 144, 51 C. C. A. 100, *affirmed* (1903) 187 U. S. 496, 23 S. Ct. 222, 47 U. S. (L. ed.) 275.

Exemptions from excise tax.—The Dutch law imposes on sugar, whether produced in or imported into Holland, an excise tax, and pays a bounty for the production of raw sugar, and a further

bounty for the production of refined sugar therefrom. It is further provided that sugar withdrawn for exportation to a foreign country, and actually exported, shall be exempt from the excise tax. While the bounty is primarily a bounty on production, the other provisions of the law have the practical effect of making it, from the standpoint of the other country, a bounty on exportation. *U. S. v. Hills Bros. Co.*, (C. C. A. 1901) 107 Fed. 107, 46 C. C. A. 167.

Additional duty on quantity entered only.—The "additional" duty imposed on articles or merchandise imported into the United States and upon which an export bounty has been paid by the country of production, and which it is provided shall be "equal to the net amount of such bounty," is leviable only upon the article or merchandise which enters the United States, and in case of merchandise dutiable by weight and as to which the bounty as declared by the Secretary of the Treasury is also by weight, such as sugar, where the quantity entered at the custom house as shown by the official weigher is less than that shown by the foreign invoice, the "additional" duty, like the regular duty, is assessable only on the quantity so entered, and the cause of the

loss or shrinkage is immaterial. The mere diminution in the quantity of units of weight or measure of a commodity usually measured by such units is not such a change of condition "by remanufacture or otherwise," within the meaning of such section, as to authorize a resort to other than the usual means for ascertaining the amount of the additional duty. *Franklin Sugar Refining Co. v. U. S.*, (1906) 142 Fed. 376, 73 C. C. A. 476, *reversing* (1905) 137 Fed. 655.

Conclusiveness of Treasury determination.—It was undoubtedly the intention of Congress that the findings of the secretary as to the amount of bounties paid

by the foreign countries and collectable upon importation of merchandise as a countervailing duty should be final so far as any revision or examination by the courts is concerned. *Franklin Sugar Refining Co. v. U. S.*, (E. D. Pa. 1910) 178 Fed. 743.

Where an assistant secretary of the treasury has issued a declaration, it will be presumed, in the absence of evidence to the contrary, that he was performing a duty in accordance with law, and that the declaration was properly issued. *Franklin Sugar Refining Co. v. U. S.*, (E. D. Pa. 1910) 178 Fed. 743.

J. Subsection 1. [Discriminating duty on imports in foreign vessels, etc.] That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States entitled at the time of such importation by treaty or convention or Act of Congress to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade. [*38 Stat. L. 195.*]

See the notes to the preceding paragraph of the text.

By an Act of March 4, 1915, ch. 171, § 1, 38 Stat. L. 1193, there was repealed so much of the foregoing subsection "as imposes a discriminating duty of ten per centum ad valorem on all goods, wares, or merchandise imported in a vessel owned by citizens of the United States but not a vessel of the United States; . . . Any such . . . discriminating duties collected since the passage of the Act of August eighteenth, nineteen hundred and fourteen, shall be refunded, and any such forfeitures incurred are hereby remitted: *Provided, however,* That the provisions of this Act shall apply only in case that any vessel of the character above described after entering an American port shall, before leaving the same, be registered as a vessel of the United States."

Section 2 of said repealing Act provided that it should take effect immediately.

The part of the repealing section omitted repealed a part of section IV J, subsection 2 of the Act of Oct. 3, 1913, ch. 16, given under the title **IMPORTS AND EXPORTS**.

DISCRIMINATION

As to Civil Rights, see **CIVIL RIGHTS**

By Carriers, see **INTERSTATE COMMERCE**

As to Employees, see **LABOR**

In Pilotage Fees, see **PILOTAGE**

Against Persons Wearing Uniform of United States, see **UNIFORMS**

DISORDERLY HOUSE

See IMMIGRATION; WHITE SLAVE TRAFFIC

DISTILLERIES AND DISTILLED SPIRITS

See CUSTOMS DUTIES; INTERNAL REVENUE

DISTRICT ATTORNEYS

In Alaska, see ALASKA

In Panama Canal Zone, see RIVERS, HARBORS AND CANALS

See also JUDICIAL OFFICERS; JUSTICE, DEPARTMENT OF

DISTRICT COURTS

See JUDICIARY

DISTRICT OF COLUMBIA

Alien Ownership of Land in, see ALIENS

See also PUBLIC PROPERTY, BUILDINGS AND GROUNDS, and consult the
General Index

DISTRICTS

Collection Districts, see CUSTOMS DUTIES; INTERNAL REVENUE

Federal Reserve Districts, see NATIONAL BANKS

Judicial Districts, see JUDICIARY

Land Districts, see PUBLIC LANDS

DIVORCE

See ALASKA; HAWAIIAN ISLANDS; TERRITORIES

DOCKERY ACT

See TREASURY DEPARTMENT

DOCUMENTS

See PUBLIC DOCUMENTS

DOWER

See BANKRUPTCY; TERRITORIES

DRAWBACKS AND REFUNDS

See CUSTOMS DUTIES; INTERNAL REVENUE

DRUGS

See FOOD AND DRUGS; IMPORTS AND EXPORTS; INTERNAL REVENUE

DRUGS ACT

See FOOD AND DRUGS

DUTIES

See CUSTOMS DUTIES; DISCRIMINATING LAWS AND DUTIES; INTERNAL REVENUE; TONNAGE DUTIES

EDMUNDS ACT

See BIGAMY, POLYGAMY AND UNLAWFUL INTERCOURSE

EDMUNDS-TUCKER ACT

See BIGAMY, POLYGAMY AND UNLAWFUL INTERCOURSE

EDUCATION

- I. OFFICE OF EDUCATION, 88.
 - II. MILITARY INSTRUCTION IN SCHOOLS AND COLLEGES, 89.
 - III. NAUTICAL INSTRUCTION IN SCHOOLS AND COLLEGES, 96.
 - IV. AGRICULTURAL AND MECHANICAL COLLEGES, 99.
 - V. MARINE BIOLOGICAL STATION, 110.
 - VI. USE OF GOVERNMENT LITERARY AND SCIENTIFIC COLLECTIONS, 111.
 - VII. STUDY OF EFFECTS OF ALCOHOLIC DRINKS AND NARCOTICS, 113.
 - VIII. EDUCATION OF THE BLIND, 114.
 - IX. HOWARD UNIVERSITY, 116.
-

I. Office of Education, 88.

- R. S. 516. *Office of Education*, 88.
- R. S. 517. *Commissioner of Education*, 88.
- R. S. 518. *Duties of Commissioner*, 88.
- R. S. 519. *Rooms for Office of Education*, 88.

Act of May 28, 1896, ch. 252, 89.

Sec. 1. Bulletin of Higher Education, etc., to be Prepared — Printing and Distribution, 89.

II. Military Instruction in Schools and Colleges, 89.

- R. S. 1225. *Officers and Arms for Colleges*, 89.
- R. S. 1260. *Detail as Professor in a College*, 90.

Act of May 4, 1880, ch. 81, 91.

Sec. 1. Retired Army Officers Detailed on Application, 91.

Act of Jan. 13, 1891, ch. 70, 91.

Increase in Number of Officers Detailed, 91.

Act of Nov. 3, 1893, ch. 13, 92.

Increase in Number of Officers Detailed — Retired Officers, 92.

Act of Aug. 6, 1894, ch. 228, 93.

Detail of Retired Officers — Issue of Ordnance, 93.

Act of Feb. 26, 1901, ch. 607, 93.

Sec. 1. Officers Detailed as Instructors — Retired Officers, 93.

2. Payments to Officers, 94.

3. Issue of Ordnance, 94.

4. Effect, 94.

Act of April 21, 1904, ch. 1403, 94.

Sec. 1. Detail of Retired Officers and Noncommissioned Officers, 94.

2. Compensation of Officer — Detail Not Compulsory, 94.

3. Issue of Ordnance, etc. — Bond, 95.

4. Effect, 95.

Act of March 3, 1909, ch. 252, 95.

Sec. 1. Detail of Retired Officers — Compensation, 95.

Act of July 17, 1914, ch. 149, 95.

Purchase of Supplies from War Department, 95.

III. Nautical Instruction in Schools and Colleges, 96.

Act of Feb. 26, 1879, ch. 105, 96.

Engineers Detailed as Professors in Colleges, etc., 96.

Act of March 2, 1895, ch. 186, 96.

Retired Officers of Navy or Marine Corps as Teachers, 96.

Act of March 3, 1901, ch. 863, 96.

Military Schools — Loan of Naval Equipment, 96.

Act of March 4, 1911, ch. 265, 97.

Sec. 1. Vessels to Be Furnished Nautical Schools, 97.

2. Appropriation to Aid in Support, 98.

3. Detail and Recall of Officers — Restoration of Vessel — Sentence to School as Punishment for Crime, 98.

4. Repeal, 98.

IV. Agricultural and Mechanical Colleges, 99.

Act of July 2, 1862, ch. 130 ("Morrill Act"), 99.

Sec. 1. Public Lands to Be Given to Each State, 99.

2. Apportionment — Selection — Scrip to Be Issued, 99.

3. Expenses of Management, etc., 99.

4. Investment of Proceeds of Lands Sold — Endowment Fund, 100.

5. Conditions of Grant, 101.

6. Land Scrip — Location, 102.

7. Fees of Land Officers, 102.

8. Governors of States to Report, 102.

Act of July 23, 1866, ch. 209, 102.

Time for Complying with Provisions, 102.

Act of Aug. 30, 1890, ch. 841, 103.

Sec. 1. Annual Appropriations for Endowment of Agricultural Colleges, 103.

2. Time, Manner, etc., of Annual Payments to States or Territories — Assent of Legislature or Governor, 105.

3. Diminution of Fund to Be Made up by State — No Portion to Be Applied to Buildings — Annual Report, 106.

4. Annual Ascertainment and Certification of Amounts Due to States — Secretary of Interior to Administer Law, 106.

5. Annual Report to Congress, 107.

6. Amendment, Repeal, etc., 107.

Act of March 4, 1907, ch. 2907 ("Nelson Amendment"), 107.

Sec. 1. Annual Appropriation for Agricultural Colleges Increased — Method of Payment — Courses for Teachers, 107.

Act of May 8, 1914, ch. 79 ("Agricultural Extension Works Act"), 108.

Sec. 1. Co-operative Agricultural Extension Work Inaugurated, 108.

2. Course of Instruction, 108.

3. Appropriations for Payment of Expenses, 108.

4. Payment of Sums Appropriated — Report of Receipts and Disbursements, 109.

5. Moneys Received for Extension Work Lost or Misapplied — Report of Work Done, etc., 109.

6. States Entitled to Share in Appropriations, 110.

7. Reports by Secretary of Agriculture, 110.

8. Alteration, Amendment, or Repeal, 110.

V. Marine Biological Station, 110.

Act of March 1, 1911, ch. 189, 110.

Sec. 1. Marine Biological Station Authorized, 110.

2. Admission to Station, 111.

Act of Aug. 1, 1914, ch. 223, 111.

Sec. 1. Donation of Land for Station, 111.

VI. Use of Government Literary and Scientific Collections, 111.

Act of March 3, 1883, ch. 143, 111.

Sec. 1. Distribution of Duplicate Specimens by National Museum and Fish Commission, 111.

Res. of April 12, 1892, No. 8, 112.

Scientific and Literary Collections Accessible to Investigators and to Students, 112.

Act of March 3, 1901, ch. 831, 112.

Sec. 1. Study and Research in Departments, etc., for Students, 113.

VII. Study of Effects of Alcoholic Drinks and Narcotics, 113.

Act of May 20, 1886, ch. 362, 113.

Sec. 1. Study of Effects of Alcoholic Drinks and Narcotics to Be Compulsory, 113.

2. Officers Failing to Enforce Act to Be Removed, 113.

3. Teachers to Pass Examination on Hygiene, etc., 113.

VIII. Education of the Blind, 114.

Act of March 3, 1879, ch. 186, 114.

Sec. 1. Permanent Fund to Aid Education of the Blind, 114.

2. Fund to Be Held in Trust and Invested, 114.

3. Conditions of Payment to American Printing House for Blind, 115.

4. Trustees to Make Annual Reports, 116.

5. Effect, 116.

Act of June 25, 1906, ch. 3536, 116.

Proceeds of Matured Bonds Made a Trust Fund — Permanent Annual Appropriation in Place of Interest — Disposition, 116.

IX. Howard University, 116.

Act of July 1, 1898, ch. 546, 116.

Sec. 1. Report on Condition, Receipts and Disbursements, 116.

Act of March 3, 1899, ch. 424, 117.

Sec. 1. Use of Appropriations for Theological Department Forbidden — Inspection, 117.

CROSS-REFERENCES

Education in Alaska, see *ALASKA*.

Education of Blind and Deaf, see *HOSPITALS AND ASYLUMS*.

Education of Indians, see *INDIANS*.

Military Education, see *MILITARY ACADEMY; NAVAL ACADEMY*.

Public Lands for Educational Purposes, see *PUBLIC LANDS*.

I. OFFICE OF EDUCATION

Sec. 516. [Office of Education.] There shall be in the Department of the Interior a Bureau called the Office of Education, the purpose and duties of which shall be to collect statistics and facts showing the condition and progress of education in the several States and Territories, and to diffuse such information respecting the organization and management of schools and school-systems, and methods of teaching, as shall aid the people of the United States in the establishment and maintenance of efficient school-systems, and otherwise promote the cause of education throughout the country. [R. S.]

Act of March 2, 1867, ch. 158, 14 Stat. L. 434; Act of July 20, 1868, ch. 176, 15 Stat. L. 92, 106.

Sections 516 to 519 constitute chapter 9 of title XI of the Revised Statutes, which chapter is entitled "The Office of Education."

Sec. 517. [Commissioner of Education.] The management of the Office of Education shall, subject to the direction of the Secretary of the Interior, be intrusted to a Commissioner of Education, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of three thousand dollars a year. [R. S.]

Act of March 2, 1867, ch. 158, 14 Stat. L. 434; Act of July 20, 1868, ch. 176, 15 Stat. L. 92, 106.

The salary of the Commissioner has subsequently been increased. Five thousand dollars was appropriated for this purpose by the Legislative, Executive and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1032.

Sec. 518. [Duties of Commissioner.] The Commissioner of Education shall present annually to Congress a report embodying the results of his investigations and labors, together with a statement of such facts and recommendations as will, in his judgment, subserve the purpose for which the office is established. [R. S.]

Act of March 2, 1867, ch. 158, 14 Stat. L. 434.

See the Act of May 28, 1896, ch. 252, § 1, *infra*, p. 89.

Sec. 519. [Rooms for Office of Education.] The Chief of Engineers shall furnish proper offices for the use of the Office of Education. [R. S.]

Act of March 2, 1867, ch. 158, 14 Stat. L. 434; Act of March 2, 1867, ch. 167, 14 Stat. L. 466.

Chief engineer of the army as commissioner of public buildings.—The duties which formerly devolved upon the commissioner of public buildings, when that

office was created (April 29, 1816, 3 Stat. L. 324, ch. 150, sec. 2) continued to be performed by that officer until the office was abolished by the Act of March 2,

1867, and its duties transferred to the chief engineer of the army (14 Stat. L. 466, ch. 167, sec. 2), and the chief engineer of the army thereafter performed the

duties formerly belonging to the commissioner. See *U. S. v. Ashfield*, (1875) 91 U. S. 317, 23 U. S. (L. ed.) 396.

[SEC. 1.] [Bulletin of higher education, etc., to be prepared — printing and distribution.] The Commissioner of Education is hereby authorized to prepare and publish a bulletin of the Bureau of Education as to the condition of higher education, technical and industrial education, facts as to compulsory attendance in the schools, and such other educational topics in the several States of the Union and in foreign countries as may be deemed of value to the educational interests of the States, and there shall be printed one edition of not exceeding twelve thousand five hundred copies of each issue of said bulletin for distribution by the Bureau of Education, the expense of printing and binding such bulletin to be charged to the allotment for printing and binding for the Department of the Interior. * * * [29 Stat. L. 171.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 28, 1896, ch. 252.

II. MILITARY INSTRUCTION IN SCHOOLS AND COLLEGES

Sec. 1225. [Officers and arms for colleges.] The President may, upon the application of any established military institute, seminary or academy, college or university, within the United States having capacity to educate at the same time not less than one hundred and fifty male students, detail an officer of the Army or Navy to act as superintendent, or professor thereof; but the number of officers so detailed shall not exceed fifty from the Army, and ten from the Navy, being a maximum of sixty, at any time, and they shall be apportioned throughout the United States, first, to those State institutions applying for such detail that are required to provide instruction in military tactics under the provisions of the act of Congress of July second, eighteen hundred and sixty-two, donating lands for the establishment of colleges where the leading object shall be the practical instruction of the industrial classes in agriculture and the mechanic arts, including military tactics; and after that, said details to be distributed, as nearly as may be practicable, according to population. The Secretary of War is authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university under the provisions of this section, and the Secretary shall require a bond in each case, in double the value of the property, for the care and safe keeping thereof, and for the return of the same when required: *Provided*, That nothing in this act shall be so construed as to prevent the details of officers of the Engineer Corps of the Navy as professors in scientific schools or colleges as now provided by act of Congress approved February twenty-sixth, eighteen

hundred and seventy-nine, entitled "An act to promote a knowledge of steam-engineering and iron-ship building among the students of scientific schools or colleges in the United States"; and the Secretary of War is hereby authorized to issue ordnance and ordnance stores belonging to the Government on the terms and conditions hereinbefore provided to any college or university at which a retired officer of the Army may be assigned as provided by section twelve hundred and sixty of the Revised Statutes. [R. S.]

This section was amended "so as to read as" above given by section 1 of the Act of Sept. 26, 1888, ch. 1037, 25 Stat. L. 491.

Section 2 of that Act provides for the repeal of R. S. sec. 1225, as it existed before, "saving always, however, all acts and things done under the said amended section as heretofore existing." [25 Stat. L. 492.]

Originally this section was as follows:

"Sec. 1225. The President may, upon the application of any established college or university within the United States, having capacity to educate, at the same time, not less than one hundred and fifty male students, detail an officer of the Army to act as president, superintendent, or professor thereof; but the number of officers so detailed shall not exceed twenty at any time, and they shall be apportioned throughout the United States, as nearly as may be practicable, according to population. Officers so detailed shall be governed by general rules prescribed, from time to time, by the President. The Secretary of War is authorized to issue at his discretion and under proper regulations to be prescribed by him, out of any small arms or pieces of field artillery belonging to the Government and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice, by the students of any college or university under the provisions of this section; and the Secretary shall require a bond in each case, in double the value of the property, for the care and safe-keeping thereof, and for the return of the same when required." Act of July 28, 1866, ch. 299, 14 Stat. L. 336; Res. of May 4, 1870, No. 40, 16 Stat. L. 373.

By the Act of July 5, 1876, ch. 167, 19 Stat. L. 74, this section was first amended so as to authorize the President to detail thirty officers, "instead of twenty, as in said section provided."

By the Act of July 5, 1884, ch. 217, 23 Stat. L. 108, another amendment was enacted authorizing the detail of not to exceed forty officers, "instead of thirty, as now provided by Act of July fifth, eighteen hundred and seventy-six, amendatory of said section."

The number of officers authorized to be detailed by this section has been increased by the Act of Jan. 13, 1891, ch. 70, *infra*, p. 91, and the Act of Nov. 3, 1893, ch. 13, *infra*, p. 92.

Other amendments to this section were made by the Act of Feb. 26, 1901, ch. 607, *infra*, p. 93, and the Act of April 21, 1904, ch. 1403, *infra*, p. 94.

Provisions for the detail of retired army officers were also made by R. S. sec. 1260, *infra*, this page. And see the notes thereto.

The Act of Feb. 26, 1879, ch. 105, mentioned in the text, is given *infra*, p. 96.

Army regulations.—The Act of July 28, 1866 (14 Stat. L. 336, ch. 299, sec. 26), which first authorized the detail of officers to colleges, created a service unknown before and for which there was no provision in the army regulations. Long v. U. S., (1872) 8 Ct. Cl. 398.

Commutation for quarters and fuel.—If the officer is detailed on duty at a college or university at which there is no military station, and for that reason he

cannot make requisition for quarters and fuel in kind on the quartermaster, and the government does not furnish them in kind or commutation, according to his rank, he is entitled to recover, and his quarters "will be commuted at a rate fixed by the secretary, and fuel at the market price delivered," as provided by article 1080 of the army regulations. Long v. U. S., (1872) 8 Ct. Cl. 398.

Sec. 1260. [Detail as professor in a college.] Any retired officer may, on his own application, be detailed to serve as professor in any college. But while so serving, such officer shall be allowed no additional compensation. [R. S.]

Act of July 15, 1870, ch. 294, 16 Stat. L. 320.

The last sentence in this section as here given was added by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 243.

By a provision contained in the Act of Aug. 6, 1894, ch. 228, given *infra*, p. 93, nothing in the Act of Nov. 3, 1893 (*infra*, p. 92), shall be so construed as to prevent, limit, or restrict the detail of retired officers of the army under the provisions of this section.

By a provision of the Army Appropriation Act of May 4, 1880, ch. 81 (given below), upon the application of an institution of learning the President may detail retired army officers "to act as president, superintendent, or professor thereof," and such officer may receive additional pay.

Retired officers as professors in colleges.

— A retired officer is not required to perform any active service. Under the provisions of this section, upon his own application, such officer may be "detailed to serve as professor in any college" or may be assigned to duty at the Soldiers' Home by selection of the commissioners of that institution; but those employments, while without additional pecuniary compensation, are desirable by reason of benefits and privileges which accrue to those holding them, and are not re-

garded in the light of being impositions of official public service. *Collins's Case*, (1879) 15 Ct. Cl. 22.

Additional compensation.—This section is not to be construed as referring to any additional compensation from the college to which a retired officer has been detailed, or prohibiting him from accepting it, but any from the United States. This is evident from the language employed, which does not prohibit the receiving but the allowing of the additional compensation. (1893) 20 Op. Atty-Gen. 687.

[SEC. 1.] **[Retired Army officers detailed on application.]** That upon the application of any college, university, or institution of learning incorporated under the laws of any State within the United States, having capacity at the same time to educate not less than one hundred and fifty male students, the President may detail an officer of the Army on the retired list to act as president, superintendent, or professor thereof; and such officer may receive from the institution to which he may be detailed the difference between his retired and full pay, and shall not receive any additional pay or allowance from the United States. [21 Stat. L. 113.]

This is from the Army Appropriation Act of May 4, 1880, ch. 81.
See R. S. sec. 1260, *supra*, p. 90.

An act to amend section twelve hundred and twenty-five of the Revised Statutes, concerning details of officers of the Army and Navy to educational institutions.

[Act of Jan. 13, 1891, ch. 70, 26 Stat. L. 716.]

[Increase in number of officers detailed.] That section twelve hundred and twenty-five of the Revised Statutes, concerning details of officers of the Army and Navy to educational institutions, be, and the same is hereby, amended so as [to] permit the President to detail, under the provisions of said act, not to exceed seventy-five officers of the Army of the United States; and the maximum number of officers of the Army and Navy to be detailed at any one time under the provision of the act passed September twenty-sixth, eighteen hundred and eighty-eight, amending said section twelve hundred and twenty-five of the Revised Statutes, is hereby increased to eighty-five: *Provided*, That no officer shall be detailed to or maintained

at any of the educational institutions mentioned in said act where instruction and drill in military tactics is not given: *Provided further*, That nothing in this act shall be so construed as to prevent the detail of officers of the Engineer Corps of the Navy as professors in scientific schools or colleges as now provided by Act of Congress approved February twenty-sixth, eighteen hundred and seventy-nine, entitled "An act to promote a knowledge of steam-engineering and iron shipbuilding among the students of scientific schools or colleges in the United States.[]" [26 Stat. L. 716.]

R. S. sec. 1225, as amended by the Act of Sept. 26, 1888, ch. 1037, mentioned in the text, is given *supra*, p. 89. And see the notes thereto.

The Act of Feb. 26, 1879, ch. 105, mentioned in the text, is given *infra*, p. 96.

An Act To increase the number of officers of the Army to be detailed to colleges.

[Act of Nov. 3, 1893, ch. 13, 28 Stat. L. 7.]

[Increase in number of officers detailed — retired officers.] That section twelve hundred and twenty-five of the Revised Statutes, concerning details of officers of the Army and Navy to educational institutions, be, and the same is hereby, amended so as to permit the President to detail under the provisions of said act not to exceed one hundred officers of the Army of the United States; and no officer shall be thus detailed who has not had five years service in the Army and no detail to such duty shall extend for more than four years and officers on the retired list of the Army may upon their own application be detailed to such duty and when so detailed shall receive the full pay of their rank; and the maximum number of officers of the Army and Navy to be detailed at any one time under the provisions of the act approved January thirteenth, eighteen hundred and ninety-one, amending section twelve hundred and twenty-five of the Revised Statutes as amended by an act approved September twenty-sixth, eighteen hundred and eighty-eight, is hereby increased to one hundred and ten. [28 Stat. L. 7.]

R. S. sec. 1225, amended by the Act of Sept. 26, 1888, ch. 1037, mentioned in the text, is given *supra*, p. 89.

The Act of Jan. 13, 1891, ch. 70, mentioned above, is given *supra*, p. 91.

The application of the Act to the detail of retired officers was restricted by the Act of Aug. 6, 1894, ch. 288, *infra*, p. 93.

This Act was amended by a provision of the Act of March 3, 1909, ch. 252, § 1, *infra*, p. 95.

Act of Nov. 3, 1893, construed.—In construing the Act of Nov. 3, 1893, ch. 13, above given, the attorney-general was of the opinion that, while the law does authorize the detail of one hundred officers from the active list of the army, it does not *require* it, and that it is within the discretion of the President to make such detail wholly from the active list of the army, or wholly from the officers of the retired list who, "upon their own application," may be detailed for this service, or he may make the detail in such proportion as he sees fit (and the applica-

tions for such detail from the retired officers will allow) from both lists; that the "five years' service in the army" applies alike to officers from the retired and to those from the active lists of the army; that officers of the retired list who were detailed to colleges prior to Nov. 3, 1893, and who are still on duty under such details, are entitled to full pay only from the passage of the Act, under and by virtue of which alone they derive the right to draw full pay. (1893) 20 Op. Atty-Gen. 687.

[**Detail of retired officers — issue of ordnance.**] * * * That nothing in the Act entitled "An Act to increase the number of officers of the Army to be detailed to colleges," approved November third, eighteen hundred and ninety-three, shall be so construed as to prevent, limit, or restrict the detail of retired officers of the Army at institutions of learning under the provisions of section twelve hundred and sixty, Revised Statutes, and the Act making appropriations for the support of the Army, and so forth, approved May fourth, eighteen hundred and eighty, nor to forbid the issue of ordnance and ordnance stores, as provided in the Act approved September twenty-sixth, eighteen hundred and eighty-eight, amending section twelve hundred and twenty-five, Revised Statutes, to the institutions at which retired officers may be so detailed; and said Act of November third, eighteen hundred and ninety-three, and said Act of May fourth, eighteen hundred and eighty, shall not be construed to allow the full pay of their rank to retired officers detailed under said section twelve hundred and sixty, Revised Statutes, and said Act of May fourth, eighteen hundred and eighty. [28 Stat. L. 235.]

This is from the Army Appropriation Act of Aug. 6, 1894, ch. 228.

The Act of Nov. 3, 1893, mentioned above, is given *supra*, p. 92.

R. S. sec. 1260, mentioned above, is given *supra*, p. 90.

The provision of the Act of May 4, 1880, mentioned above, is given *supra*, p. 91.

R. S. sec. 1225, as amended by the Act of Sept. 26, 1888, above mentioned, is given *supra*, p. 89.

See the provisions of the Act of March 3, 1909, ch. 252, § 1, *infra*, p. 95.

An Act To amend section twelve hundred and twenty-five of Revised Statutes so as to provide for detail of retired officers of the Army and Navy to assist in military instruction in schools.

[Act of Feb. 26, 1901, ch. 607, 31 Stat. L. 810.]

[**Sec. 1.**] [**Officers detailed as instructors — retired officers.**] That section twelve hundred and twenty-five of the Revised Statutes, concerning the detail of officers of the Army and Navy to educational institutions be, and the same is hereby, amended so as to permit the President to detail under the provisions of that Act, and in addition to the detail of the officers of the Army and Navy now authorized to be detailed under the existing provisions of said Act, such retired officers of the Army and Navy of the United States as in his judgment may be required for that purpose, to act as instructors in military drill and tactics in schools in the United States, where such instruction shall have been authorized by the educational authorities thereof, and where the services of such instructors shall have been applied for by said authorities. [31 Stat. L. 810.]

The foregoing section was preceded by the following preamble:

"Whereas the national defense must depend upon the volunteer service of the people of the several States; and

"Whereas those schools which shall adopt a system of military instruction are entitled to the assistance of the Government in order to secure to the United States such a knowledge of military affairs among the youth of the country as will render them efficient as volunteers if called upon for the national defense: Therefore,"

R. S. sec. 1225 mentioned in the text is given *supra*, p. 89. See the notes thereto.

See further R. S. sec. 1260 and the notes thereto, *supra*, p. 90.

SEC. 2. [Payments to officers.] That no detail shall be made under this Act to any school unless it shall pay the cost of commutation of quarters of the retired officers detailed thereto and the extra-duty pay to which the latter may be entitled by law to receive for the performance of special duty: *Provided*, That no detail shall be made under the provisions of this Act unless the officers to be detailed are willing to accept such position without compensation from the Government other than their retired pay. [31 Stat. L. 810.]

Further provisions as to compensation of detailed officers were made by the Act of April 21, 1904, ch. 1403, § 2, *infra*, p. 94.

SEC. 3. [Issue of ordnance.] That the Secretary of War is authorized to issue at his discretion, and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, upon the approval of the governors of the respective States, such number of the same as may be required for military instruction and practice by such school, and the Secretary shall require a bond in each case, for double the value of the property, for the care and safe-keeping thereof and for the return of the same when required. [31 Stat. L. 811.]

Similar provisions were made by the Act of April 21, 1904, ch. 1403, § 3, *infra*, p. 95.

SEC. 4. [Effect.] That this Act shall take effect immediately. [31 Stat. L. 811.]

An Act To amend section twelve hundred and twenty-five of Revised Statutes, so as to provide for detail of retired officers of the Army and Navy to assist in military instruction in schools.

[Act of April 21, 1904, ch. 1403, 33 Stat. L. 225.]

[SEC. 1.] [Detail of retired officers and noncommissioned officers.] That section twelve hundred and twenty-five of the Revised Statutes, concerning the detail of officers of the Army and Navy to educational institutions, be, and the same is hereby, amended so as to permit the President to detail under the provisions of that Act, and in addition to the detail of the officers of the Army and Navy now authorized to be detailed under the existing provisions of said Act, such retired officers and noncommissioned officers of the Army and Navy of the United States as in his judgment may be required for that purpose to act as instructors in military drill and tactics in schools in the United States and Territories where such instructions shall have been authorized by the educational authorities thereof, and where the services of such instructors shall have been applied for by said authorities. [33 Stat. L. 225.]

R. S. sec. 1225 mentioned in the text is given *supra*, p. 89.

Provisions similar to those of the text were made by the Act of Feb. 26, 1901, ch. 607, § 1, *supra*, p. 93.

SEC. 2. [Compensation of officer — detail not compulsory.] That no detail shall be made under this Act to any school unless it shall pay the

cost of commutation of quarters of the retired officers or noncommissioned officers detailed thereto and the extra-duty pay to which they may be entitled by law to receive for the performance of special duty: *Provided*, That no detail shall be made under the provisions of this Act unless the officers and noncommissioned officers to be detailed are willing to accept such position: *Provided further*, That they shall receive no compensation from the Government other than their retired pay. [33 Stat. L. 225.]

Prior provisions as to compensation were made by the Act of Feb. 26, 1901, ch. 607, § 2, *supra*, p. 94.

SEC. 3. [Issue of ordnance, etc. — bond.] That the Secretary of War is authorized to issue at his discretion, and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, upon the approval of the governors of the respective States and Territories, such number of the same as may be required for military instruction and practice by such school, and the Secretary shall require a bond in each case, for double the value of the property, for the care and safe-keeping thereof and for the return of the same when required. [33 Stat. L. 225.]

Provisions similar to those of the text were made by the Act of Feb. 26, 1901, ch. 607, § 3, *supra*, p. 94.

SEC. 4. [Effect.] That this Act shall take effect immediately. [33 Stat. L. 225.]

[SEC. 1.] [Detail of retired officers — compensation.] * * * That the Act approved November third, eighteen hundred and ninety-three, authorizing the detail of officers of the army and navy to educational institutions, be amended so as to provide that retired officers, when so detailed, shall receive the full pay and allowances of their rank, except that the limitations on the pay of officers of the Army above the grade of major as provided in the Acts of March second, nineteen hundred and five, and June twelfth, nineteen hundred and six, shall remain in force. [35 Stat. L. 738.]

This is from the Army Appropriation Act of March 3, 1909, ch. 252.

The Act of Nov. 3, 1893, ch. 13, mentioned in the text, is given *supra*, p. 92.

For the Act of March 2, 1905, ch. 1307, and the Act of June 12, 1906, ch. 3078, mentioned in the text, see the title WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

An Act To permit sales by the supply departments of the Army to certain military schools and colleges.

[Act of July 17, 1914, ch. 149, 38 Stat. L. 512.]

[Purchase of supplies from War Department.] That, under such regulations as the Secretary of War may prescribe, educational institutions to which an officer of the Army is detailed as professor of military science and tactics may purchase from the War Department for cash, for the use of their military students, such stores, supplies, matériel of war, and military publications as are furnished to the Army, such sales to be at the price

listed to the Army with the cost of transportation added: *Provided*, That all moneys received from the sale of stores, supplies, matériel of war, and military publications to educational institutions to which an officer of the Army is detailed as professor of military science and tactics shall respectively revert to that appropriation out of which they were originally expended and shall be applied to the purposes for which they are appropriated by law. [38 Stat. L. 512.]

III. NAUTICAL INSTRUCTION IN SCHOOLS AND COLLEGES

An Act To promote a knowledge of steam-engineering and iron-ship building among the students of scientific schools or colleges in the United States.

[Act of Feb. 26, 1879, ch. 105, 20 Stat. L. 322.]

[Engineers detailed as professors in colleges, etc.] That for the purpose of promoting a knowledge of steam-engineering and iron-ship building among the young men of the United States, the President may, upon the application of an established scientific school or college within the United States, detail an officer from the Engineer Corps of the Navy as professor in such school or college: *Provided*, That the number of officers so detailed shall not at any time exceed twenty-five, and such details shall be governed by rules to be prescribed from time to time by the President: *And provided further*, That such details may be withheld or withdrawn whenever, in the judgment of the President, the interests of the public service shall so require. [20 Stat. L. 322.]

[Retired officers of Navy or Marine Corps as teachers.] * * * That any retired officer of the Navy or Marine Corps may, on his own application, be detailed to service as a teacher or professor in any school or college, but while so serving such officer shall be allowed no additional compensation. [28 Stat. L. 826.]

This is from the Navy Appropriation Act of March 2, 1895, ch. 186.

An Act To authorize the Secretary of the Navy to loan naval equipment to certain military schools.

[Act of March 3, 1901, ch. 863, 31 Stat. L. 1440.]

[Military schools — loan of naval equipment.] That the President be, and he is hereby, authorized, upon the application of the governor of any State having seacoast line or bordering on one or more of the Great Lakes, to direct the Secretary of the Navy to furnish to one well-established military school in that State, desiring to afford its cadets instruction in elementary seamanship, one fully equipped man-of-war's cutter for every twenty-five cadets in actual attendance, and such other equipment as may be spared and be deemed adequate for instruction in elementary seamanship:

Provided, That the said school shall have adequate facilities for cutter drill, and shall have in actual attendance at least seventy-five cadets over fifteen years of age in uniform receiving military instruction and quartered in barracks under military regulation, and shall have the capacity to quarter and educate at the same time one hundred and fifty cadets: *And provided further*, That the Secretary of the Navy shall require a bond in each case in double the value of the property, for the care and safe keeping thereof, and for the return of the same when required. [31 Stat. L. 1440, as amended by 34 Stat. L. 625, 36 Stat. L. 613.]

This Act, in its original form, provided for the loan of a man-of-war's cutter for every "fifty" cadets in actual attendance, the first proviso requiring that such schools should have in actual attendance "one hundred and forty cadets." By the Act of June 29, 1906, ch. 3612, 34 Stat. L. 625, the word "fifty" was changed to "twenty-five" as given in the text.

The provisions of the text were further amended by the Act of June 24, 1910, ch. 378, § 1, 36 Stat. L. 613, by "striking out the words 'one hundred and forty cadets' and inserting in lieu thereof the words 'seventy-five cadets over fifteen years of age,'" making the Act to read as given in the text.

An Act For the establishment of marine schools, and for other purposes.

[Act of March 4, 1911, ch. 265, 36 Stat. L. 1353.]

[SEC. 1.] [Vessels to be furnished nautical schools.] That the Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the governor of a State, a suitable vessel of the navy, with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each of the following ports of the United States: Boston, Philadelphia, New York, Seattle, San Francisco, Baltimore, Detroit, Saginaw, Michigan, Norfolk, and Corpus Christi, upon the condition that there shall be maintained at such port a school or branch of a school for the instruction of youths in navigation, steamship-marine engineering, and all matters pertaining to the proper construction, equipment, and sailing of vessels or any particular branch thereof. [36 Stat. L. 1353.]

By an Act of June 20, 1874, ch. 339, it was provided:

"That the Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the Governor of the State, a suitable vessel of the Navy, with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each or any of the ports of New York, Boston, Philadelphia, Baltimore, Norfolk, and San Francisco, upon the condition that there shall be maintained, at such port, a school or branch of a school for the instruction of youths in navigation, steamship, marine enginery and all matters pertaining to the proper construction, equipment and sailing of vessels or any particular branch thereof. And the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of, or instructors in, such schools: *Provided*,

That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy, and the officers so detailed recalled: *And provided further*, That no person shall be sentenced to or received at, such schools as a punishment or commutation of punishment for crime." [18 Stat. L. 121.]

This Act was amended by the Act of March 3, 1881, ch. 141: "so that it shall extend to the ports of Wilmington, Charleston, Savannah, Mobile, New Orleans, Baton Rouge, Galveston, and in Narragansett Bay." [21 Stat. L. 505.]

Both of these Acts were superseded by the provisions of the first section given in the text, and by section 3 of this Act, given *infra*, this page.

As to the loan of naval vessels to state militia under the Act of Aug. 3, 1894, ch. 192, see the title *MILITIA*.

Marine schools and rates of officers' pay.

—A lieutenant of the United States navy having been assigned to duty as an executive officer of a ship of the United States, used as a naval ship and furnished to the state of New York for that purpose by the navy department, under the provisions of the above Act, notwithstanding the fact that the order assigning him to said duty was designated as "employment on shore duty," the duties performed were services rendered "at sea," whether the vessel was attached to a wharf or was sailing on a cruise, and he was entitled during the whole period of his service, to the rate of pay allowed him by statute "when at

sea" in addition to the amount paid him by the state of New York for the performance of the distinct but quite consistent duties of instructor in its nautical school upon the vessel, the performance of which was contemplated and intended by Congress under the orders of the secretary of the navy. Payment by the state to such officer for acting as instructor in its nautical school is immaterial to affect the rate of pay at which he should be paid by the United States. U. S. v. Barnette, (1897) 165 U. S. 174, 17 S. Ct. 286, 41 U. S. (L. ed.) 675, *affirming* (1895) 30 Ct. Cl. 197.

SEC. 2. [Appropriation to aid in support.] That a sum not exceeding the amount annually appropriated by any State or municipality for the purpose of maintaining such a marine school or schools or the nautical branch thereof is hereby authorized to be appropriated for the purpose of aiding in the maintenance and support of such school or schools: *Provided, however*, That appropriations shall be made for one school in any port heretofore named in section one and that the appropriation for any one year shall not exceed twenty-five thousand dollars for any one school. [36 Stat. L. 1353.]

SEC. 3. [Detail and recall of officers — restoration of vessel — sentence to school as punishment for crime.] That the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the navy as superintendents of or instructors in such schools: *Provided*, That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy and the officers so detailed recalled: *And provided further*, That no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime. [36 Stat. L. 1353.]

See the notes to section 1 of this Act, *supra*, p. 97.

Earlier provisions as to the detail of officers were made by the Act of Feb. 26, 1879, ch. 105, *supra*, p. 96, and the Act of March 2, 1895, ch. 186, *supra*, p. 96.

SEC. 4. [Repeal.] That all laws and parts of laws in conflict herewith are hereby repealed. [36 Stat. L. 1354.]

IV. AGRICULTURAL AND MECHANICAL COLLEGES

An Act donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts.

[*Act of July 2, 1862, ch. 130, 12 Stat. L. 503.*]

[SEC. 1.] [Public lands to be given to each State.] That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act. [12 Stat. L. 503.]

This is the first section of the "Morrill Act." The provisions of this Act, with the exception of section 7, which was incorporated in R. S. sec. 2238 (see PUBLIC LANDS), were not, apparently, incorporated in the Revised Statutes, and might be regarded as executed were it not for a reference to them in the Act of May 8, 1914, ch. 79, § 1, *infra*, p. 108.

As to agricultural experiment stations in connection with colleges established under this Act, see the title AGRICULTURE, vol. 1, p. 212.

Sets of standard weights and measures for agricultural colleges were authorized by Res. of March 3, 1881, No. 26, 21 Stat. L. 521. See the title WEIGHTS AND MEASURES.

As to school lands generally, see the title PUBLIC LANDS.

SEC. 2. [Apportionment—selection—scrip to be issued.] That the land aforesaid, after being surveyed, shall be apportioned to the several States in sections or subdivisions of sections, not less than one quarter of a section; and whenever there are public lands in a State subject to sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said State shall be entitled shall be selected from such lands within the limits of such State, and the Secretary of the Interior is hereby directed to issue to each of the States in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said State may be entitled under the provisions of this act, land scrip to the amount in acres for the deficiency of its distributive share: said scrip to be sold by said States and the proceeds thereof applied to the uses and purposes prescribed in this act, and for no other use or purpose whatsoever: *Provided*, That in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other State, or of any Territory of the United States, but their assignees may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at one dollar and twenty-five cents, or less, per acre: *And provided, further*, That not more than one million acres shall be located by such assignees in any one of the States: *And provided, further*, That no such location shall be made before one year from the passage of this act. [12 Stat. L. 503, 504.]

See the notes to the preceding section 1 of this Act.

As to the issue of duplicate agricultural college land scrip where the original is lost or destroyed, as provided by Act of June 20, 1874, ch. 330, see the title PUBLIC LANDS.

SEC. 3. [Expenses of management, etc.] That all the expenses of management, superintendence, and taxes from date of selection of said lands,

previous to their sales, and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the States to which they may belong, out of the treasury of said States, so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes hereinafter mentioned. [12 Stat. L. 504.]

See the notes to section 1 of this Act, *supra*, p. 99.

SEC. 4. [Investment of proceeds of lands sold—endowment fund.] That all moneys derived from the sale of lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States or of the States, or some other safe stocks; or the same may be invested by the States having no State stocks, in any other manner after the legislatures of such States shall have assented thereto, and engaged that such funds shall yield not less than five per centum upon the amount so invested and that the principal thereof shall forever remain unimpaired: *Provided*, That the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section five of this act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading object shall be without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. [12 Stat. L. 504, as amended by 22 Stat. L. 484.]

This section was amended "so as to read as" above given by the Act of March 3, 1883, ch. 102. Originally this section was as follows:

"SEC. 4. That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, (except so far as may be provided in section fifth of this act,) and the interest of which shall be inviolably appropriated, by each state which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." [12 Stat. L. 504.]

See the notes to section 1 of this Act, *supra*, p. 99.

Appropriations to be controlled and administered by state.—This Act and the Act of Aug. 30, 1890, ch. 841, 26 Stat. L. 417, *infra*, p. 103, granting certain public lands or land scrip to the several states, provide that the proceeds thereof shall be invested to constitute a perpetual fund for the endowment of at least one college where the leading object shall be instruction in mechanic arts and agriculture; and appropriating money arising from the sales of the public lands to the states for

the benefit of such schools constituted a grant to the several states, and not to the colleges competent to receive the same in the states, to be received through the state as a mere channel of payment. *State v. Irvine*, (1906) 14 Wyo. 318, 84 Pac. 90.

In *State v. Bryan*, (1905) 50 Fla. 293, 39 So. 929, it was held that the legislature of Florida has the power to prescribe what college or colleges shall be the recipient or recipients of the interest on the fund derived from the sale of lands

donated by this Act for the maintenance of at least one college for instruction in agriculture and mechanic arts, or to bestow it for such purpose upon a university of the state, as it may elect, having also the power to withdraw the interest of this fund from any institution of learning which has been the recipient of it, and found another institution, at any time it may elect so to do, and make it the recipient of said interest for such instruction. It was further held that the legislature has the discretionary power to provide proper educational qualifications for admission to such state college or university, to appoint trustees thereof, subject to change, conferring such powers, not in conflict with some constitutional provision, upon them as it may see fit, or to establish a state board of control, as was done by chapter 5384, Laws Florida, 1905; said trustees or said state board of control being simply public agents to manage a public property.

See also this title under section 1 of the Act of Aug. 30, 1890, ch. 841, 26 Stat. L. 417, *infra*, p. 103.

Teaching military tactics.—In *State v. Bryan*, (1905) 50 Fla. 293, 39 So. 929, it was held that chapter 5384 of the Laws of 1905 of Florida was not unconstitutional or in conflict with this Act, donating to the state a fund for the establishment and maintenance of at least one college as therein specified, because said chapter 5384 provided that the state board of edu-

cation and the state board of control "shall include military tactics, if the said joint boards deem the same requisite and proper," as one of the branches of education in the University of the State of Florida.

Right to use for other than educational purposes.—In Nebraska it has been held that by the terms of this Act, and by the acceptance of the grants by the state, and the pledges contained in the state constitution and statutes with reference thereto, the state became a trustee of the funds derived from such grants, for the sole purpose of applying them to the objects of the grant, and with no power to divert the same to other purposes, or to render them general funds of the state. *State v. Brian*, (1909) 84 Neb. 30, 120 N. W. 916.

Institutions entitled to grants.—No particular institutions are entitled to the grants and appropriations made respectively by this Act, and by the Act of Aug. 30, 1890, ch. 841, 26 Stat. L. 417, *infra*, p. 103, appropriating annually certain sums to each state and territory for the more complete endowment and maintenance of such colleges, but the states take the property, charged with the duty to devote it to the purposes named. *Wyoming v. Irvine*, (1907) 208 U. S. 278, 27 S. Ct. 613, 51 U. S. (L. ed.) 1063.

Selection of beneficiary—duty of state.

—See this title, under section 1 of the Act of Aug. 30, 1890, *infra*, p. 103.

SEC. 5. [Conditions of grant.] That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts:

First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any State under the provisions of this act, may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said States.

Second. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretence whatever, to the purchase, erection, preservation, or repair of any building or buildings.

Third. Any State which may take and claim the benefit of the provisions of this act shall provide, within five years, at least not less than one college, as described in the fourth section of this act, or the grant to such State shall cease; and said State shall be bound to pay the United States the amount received of any lands previously sold, and that the title to purchasers under the State shall be valid.

Fourth. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, with their cost and results, and such other matters, including State industrial and economical statistics, as may be supposed useful; one copy of which shall be transmitted by mail free, by each, to all the other colleges which may be endowed under the provisions of this act, and also one copy to the Secretary of the Interior.

Fifth. When lands shall be selected from those which have been raised to double the minimum price, in consequence of railroad grants, they shall be computed to the States at the maximum price, and the number of acres proportionally diminished.

Sixth. No State while in a condition of rebellion or insurrection against the government of the United States shall be entitled to the benefit of this act.

Seventh. No State shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature within two years from the date of its approval by the President. [12 Stat. L. 504, 505.]

See the notes to section 1 of this Act, *supra*, p. 99.

The time limit imposed by the text was extended by the Act of July 23, 1866, ch. 209, *infra*, this page.

SEC. 6. [Land scrip — location.] That land scrip issued under the provisions of this act shall not be subject to location until after the first day of January, one thousand eight hundred and sixty-three. [12 Stat. L. 505.]

See the notes to section 1 of this Act, *supra*, p. 99.

SEC. 7. [Fees of land officers.] That the land officers shall receive the same fees for locating land scrip issued under the provisions of this act as is now allowed for the location of military bounty land warrants under existing laws; *Provided*, their maximum compensation shall not be thereby increased. [12 Stat. L. 505.]

See the notes to section 1 of this Act, *supra*, p. 99.

This section was incorporated in R. S. sec. 2238. See PUBLIC LANDS.

SEC. 8. [Governors of States to report.] That the Governors of the several States to which scrip shall be issued under this act shall be required to report annually to Congress all sales made of such scrip until the whole shall be disposed of, the amount received for the same, and what appropriation has been made of the proceeds. [12 Stat. L. 505.]

An Act to amend the fifth Section of an Act entitled "An Act donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts," approved July 2, 1862, so as to extend the Time within which the Provisions of said Act shall be accepted and such Colleges established.

[Act of July 23, 1866, ch. 209, 14 Stat. L. 208.]

[Time for complying with provisions.] That the time in which the several States may comply with the provisions of the act of July two, eighteen hundred and sixty-two, entitled "An act donating public lands

to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," is hereby extended so that the acceptance of the benefits of the said act may be expressed within three years from the passage of this act, and the colleges required by the said act may be provided within five years from the date of the filing of such acceptance with the Commissioner of the general land office: *Provided*, That when any Territory shall become a State and be admitted into the Union, such new State shall be entitled to the benefits of the said act of July two, eighteen hundred and sixty-two, by expressing the acceptance therein required within three years from the date of its admission into the Union, and providing the college or colleges within five years after such acceptance, as prescribed in this act: *Provided further*, That any State which has heretofore expressed its acceptance of the act herein referred to shall have the period of five years within which to provide at least one college, as described in the fourth section of said act, after the time for providing said college, according to the act of July second, eighteen hundred and sixty-two shall have expired. [14 Stat. L. 208.]

The Act of July 2, 1862, ch. 130, § 5, amended by the text, is given *supra*, p. 101.

An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two.

[Act of Aug. 30, 1890, ch. 841, 26 Stat. L. 417.]

[SEC. 1.] [Annual appropriations for endowment of agricultural colleges.] That there shall be, and hereby is, annually appropriated, out of any money in the Treasury not otherwise appropriated, arising from the sales of public lands, to be paid as hereinafter provided, to each State and Territory for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts now established, or which may be hereafter established, in accordance with an act of Congress approved July second, eighteen hundred and sixty-two, the sum of fifteen thousand dollars for the year ending June thirtieth, eighteen hundred and ninety, and an annual increase of the amount of such appropriation thereafter for ten years by an additional sum of one thousand dollars over the preceding year, and the annual amount to be paid thereafter to each State and Territory shall be twenty-five thousand dollars to be applied only to instruction in agriculture, the mechanic arts, the English language and the various branches of mathematical, physical, natural and economic science, with special reference to their applications in the industries of life, and to the facilities for such instruction:

Provided, That no money shall be paid out under this act to any State or Territory for the support or maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of the act if

the funds received in such State or Territory be equitably divided as hereinafter set forth:

Provided, That in any State in which there has been one college established in pursuance of the act of July second, eighteen hundred and sixty-two, and also in which an educational institution of like character has been established, or may be hereafter established, and is now aided by such State from its own revenue, for the education of colored students in agriculture and the mechanic arts, however named or styled, or whether or not it has received money heretofore under the act to which this act is an amendment, the legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored students established as aforesaid, which shall be divided into two parts and paid accordingly, and thereupon such institution for colored students shall be entitled to the benefits of this act and subject to its provisions, as much as it would have been if it had been included under the act of eighteen hundred and sixty-two, and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students. [26 Stat. L. 417.]

The Act of July 2, 1862, ch. 130, mentioned in the text, is given *supra*, p. 99.

An increased appropriation was made by the Act of March 4, 1907, ch. 2907, § 1, *infra*, p. 107.

The Act of June 17, 1902, ch. 1093, providing for appropriating the receipts from the sale of public lands to the reclamation of arid lands, contains a proviso to the effect that "in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several states and territories under" the Act of Aug. 30, 1890, "the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated." See the title *WATERS*.

Endowment of more than one college in a state.—All that is required by the Act of Congress of Aug. 30, 1890, as well as the provisions of the Act of July 2, 1862, *supra*, p. 99, establishing colleges for the benefit of agriculture and the mechanic arts, is that the leading object of such institution shall be to teach "such branches of learning as are related to agriculture and the mechanic arts"—"without excluding other scientific and classical studies, and including military tactics," pursuant to such methods and manner as the legislatures of the respective states may prescribe. The Act contemplates the endowment of colleges already in existence as well as those afterwards to be established. All that is required is, that the college shall be of the prescribed kind. Furthermore, the language used in section 4 of the Act of July 2, 1862, *supra*, p. 100, to wit, that the fund shall be for the "endowment, support, and maintenance of, at least, one college;" and in section 5, that any state may claim the benefit of the provisions of the Act, if it shall "provide, within five years, at least not less than one college," plainly contemplates the possible existence of more than one college of the kind described in each state. The

money in the hands of the treasurer is, therefore, the property of the state, held for a particular purpose and no other, and the legislature of the state should regulate its distribution, and the treasurer has no right to pay it out until he is directed so to do by the state. *Massachusetts Agricultural College v. Marden*, (1892) 156 Mass. 150, 30 N. E. 555. See also *Cornell University v. Fiske*, (1890) 136 U. S. 152, 10 S. Ct. 775, 34 U. S. (L. ed.) 427; *In re Agricultural Funds*, (1890) 17 R. I. 815, 21 Atl. 916; *People v. Davenport*, (1889) 117 N. Y. 549, 23 N. E. 664.

Appropriations to be controlled and administered by state.—This Act is in concord with the original grant for the purpose of founding such colleges, in the Act of July 2, 1862, 12 Stat. L. 503, ch. 130, *supra*, p. 99, which Act was a grant to the state; and the control of the fund, and probably also of the colleges established thereby, was committed to the state, and if the supplementary funds granted by the Act of Aug. 30, 1890, were intended to be otherwise administered, there should appear, at least, an undoubted inference to that effect in the latter Act, which must be taken to have been enacted in view of the particular, as well

as the general, provisions of the Act of 1862. The words of the Act of Aug. 30, 1890, import on their face a grant to the state, and therefore a duty in the state to administer the same for the prescribed purpose. The general scope of the Act is clearly consonant only with a grant to the state. By the terms of the Act the money is to be "paid to each state;" the amount to be "paid to each state" is to be so much; the money is referred to as "appropriated to the states," and the fund, if lost, diminished, or misapplied, "shall be replaced by the state or territory to which it belongs," and the United States Circuit Court has no jurisdiction to determine rights between two corporations each claiming to be the beneficiary, which should be settled by state legislation, since the state is to establish the beneficiary, to control the funds, and to be responsible for its misdeeds and for its errors, if any there be, as to the application of the funds. *Brown University v. Rhode Island College of Agriculture, etc.*, (1893) 56 Fed. 55. See also this title under section 4 of the Act of July 2, 1862, ch. 130, 12 Stat. L. 503, *supra*, p. 100.

Injunction to restrain diversion of endowment fund.—In 1863 the state of Connecticut received from the United States Government, under and by virtue of the Act of Congress of July 2, 1862, *supra*, p. 99, land scrip which subsequently sold for \$135,000, "for the uses and purposes prescribed in said Act," which prescribed "uses and purposes" was the investment of the money as a "perpetual fund," the interest of which was to be "appropriated to the endowment, maintenance, and support" of some college or colleges in Connecticut (to be provided by the state within five years), where the leading object should be to teach certain branches of learning relating to agriculture and the mechanic arts. The state accepted the donation upon the terms of the Act and selected Yale College for the endowment provided by the Act of Congress. Pursuant to the Act of Congress of Aug. 30, 1890, the secretary of the treasury paid over to the state treasurer

the additional sums provided by that Act for the more complete endowment and support of such colleges of agriculture and mechanic arts, and the United States treasurer thereupon immediately transferred the fund to the treasurer of Yale College as being the party entitled to receive the same for the benefit of said college "established" and "endowed" as aforesaid under the Act of July 2, 1862. The treasurer of the college refusing to pay over any of the funds in his hands to that institution and threatening to divert them in obedience to the direction of the general assembly of the state, it was held that the college was entitled to its preventive remedy by an injunction to restrain the treasurer from paying the income of the land-scrip funds to any other person than itself. But the court does not hold that, since the establishment of Yale College by its endowment under the federal statute of 1862, the state of Connecticut has no power to establish another college under the provisions of that Act, or to make any other disposition of the appropriations under the federal statute of 1890 than those which it had specified in the state statute of 1863, appropriating the whole interest accruing therefrom to Yale College. *Yale College v. Sanger*, (1894) 62 Fed. 177.

Selection of beneficiary — duty of state.—The endowment of land and money conferred by the Act of July 2, 1862, ch. 130, 12 Stat. L. 503, *supra*, p. 99, and this Act, for the benefit of colleges in the several states for the dissemination of learning and agriculture and mechanic arts, being grants to the states for the benefit of a college or colleges situated therein, and the state being required to accept the grant by the legislative act, it is the duty of the state legislature to select the beneficiary entitled to receive and expend the funds. *State v. Irvine*, (1906) 14 Wyo. 318, 84 Pac. 90.

Institutions entitled to grants.—See this title under section 4 of the Act of July 2, 1862, ch. 130, 12 Stat. L. 503, *supra*, p. 100.

SEC. 2. [Time, manner, etc., of annual payments to States or Territories — assent of legislature or governor.] That the sums hereby appropriated to the States and Territories for the further endowment and support of colleges shall be annually paid on or before the thirty-first day of July of each year, by the Secretary of the Treasury, upon the warrant of the Secretary of the Interior, out of the Treasury of the United States, to the State or Territorial treasurer, or to such officer as shall be designated by the laws of such State or Territory to receive the same, who shall, upon the order of the trustees of the college, or the institution for colored students, immediately pay over said sums to the treasurers of the respective

colleges or other institutions entitled to receive the same, and such treasurers shall be required to report to the Secretary of Agriculture and to the Secretary of the Interior, on or before the first day of September of each year, a detailed statement of the amount so received and of its disbursement. The grants of moneys authorized by this act are made subject to the legislative assent of the several States and Territories to the purpose of said grants: *Provided*, That payments of such installments of the appropriation herein made as shall become due to any State before the adjournment of the regular session of legislature meeting next after the passage of this act shall be made upon the assent of the governor thereof, duly certified to the Secretary of the Treasury. [26 Stat. L. 418.]

SEC. 3. [Diminution of fund to be made up by State — no portion to be applied to buildings — annual report.] That if any portion of the moneys received by the designated officer of the State or Territory for the further and more complete endowment, support, and maintenance of colleges, or of institutions for colored students, as provided in this act, shall, by any action or contingency, be diminished or lost, or be misapplied, it shall be replaced by the State or Territory to which it belongs, and until so replaced no subsequent appropriation shall be apportioned or paid to such State or Territory; and no portion of said moneys shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings. An annual report by the president of each of said colleges shall be made to the Secretary of Agriculture, as well as to the Secretary of the Interior, regarding the condition and progress of each college, including statistical information in relation to its receipts and expenditures, its library, the number of its students and professors, and also as to any improvements and experiments made under the direction of any experiment stations attached to said colleges, with their cost and results, and such other industrial and economical statistics as may be regarded as useful, one copy of which shall be transmitted by mail free to all other colleges further endowed under this act. [26 Stat. L. 418.]

SEC. 4. [Annual ascertainment and certification of amounts due to States — Secretary of Interior to administer law.] That on or before the first day of July in each year, after the passage of this act, the Secretary of the Interior shall ascertain and certify to the Secretary of the Treasury as to each State and Territory whether it is entitled to receive its share of the annual appropriation for colleges, or of institutions for colored students, under this act, and the amount which thereupon each is entitled, respectively, to receive. If the Secretary of the Interior shall withhold a certificate from any State or Territory of its appropriation the facts and reasons therefor shall be reported to the President, and the amount involved shall be kept separate in the Treasury until the close of the next Congress, in order that the State or Territory may, if it should so desire, appeal to Congress from the determination of the Secretary of the Interior. If the

next Congress shall not direct such sum to be paid it shall be covered into the Treasury. And the Secretary of the Interior is hereby charged with the proper administration of this law. [26 Stat. L. 419.]

SEC. 5. [Annual report to Congress.] That the Secretary of the Interior shall annually report to Congress the disbursements which have been made in all the States and Territories, and also whether the appropriation of any State or Territory has been withheld, and if so, the reasons therefor. [26 Stat. L. 419.]

SEC. 6. [Amendment, repeal, etc.] Congress may at any time amend, suspend, or repeal any or all of the provisions of this act. [26 Stat. L. 419.]

[SEC. 1.] [Annual appropriation for agricultural colleges increased—method of payment—courses for teachers.] * * * That there shall be, and hereby is, annually appropriated, out of any money in the Treasury not otherwise appropriated, to be paid as hereinafter provided, to each State and Territory for the more complete endowment and maintenance of agricultural colleges now established, or which may hereafter be established, in accordance with the Act of Congress approved July second, eighteen hundred and sixty-two, and the Act of Congress approved August thirtieth, eighteen hundred and ninety, the sum of five thousand dollars, in addition to the sums named in the said Act, for the fiscal year ending June thirtieth, nineteen hundred and eight, and an annual increase of the amount of such appropriation thereafter for four years by an additional sum of five thousand dollars over the preceding year, and the annual sum to be paid thereafter to each State and Territory shall be fifty thousand dollars, to be applied only for the purposes of the agricultural colleges as defined and limited in the Act of Congress approved July second, eighteen hundred and sixty-two, and the Act of Congress approved August thirtieth, eighteen hundred and ninety. That the sum hereby appropriated to the States and Territories for the further endowment and support of the colleges shall be paid by, to, and in the manner prescribed by the Act of Congress approved August thirtieth, eighteen hundred and ninety, entitled "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts established under the provisions of the Act of Congress approved July second, eighteen hundred and sixty-two," and the expenditure of the said money shall be governed in all respects by the provisions of the said Act of Congress approved July second, eighteen hundred and sixty-two, and the said Act of Congress approved August thirtieth, eighteen hundred and ninety: *Provided*, That said colleges may use a portion of this money for providing courses for the special preparation of instructors for teaching the elements of agriculture and the mechanic arts. [34 Stat. L. 1281.]

This is from the Agricultural Appropriation Act of March 4, 1907, ch. 2907, and is known as the "Nelson Amendment."

The Act of July 2, 1862, ch. 130, mentioned in the text, is given *supra*, p. 99, and the Act of Aug. 30, 1890, ch. 841, also mentioned in the text, is given *supra*, p. 103.

An Act To provide for cooperative agricultural extension work between the agricultural colleges in the several States receiving the benefits of an Act of Congress approved July second, eighteen hundred and sixty-two, and of Acts supplementary thereto, and the United States Department of Agriculture.

[*Act of May 8, 1914, ch. 79, 38 Stat. L. 372.*]

[SEC. 1.] [Co-operative agricultural extension work inaugurated.] That in order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same, there may be inaugurated in connection with the college or colleges in each State now receiving, or which may hereafter receive, the benefits of the Act of Congress approved July second, eighteen hundred and sixty-two, entitled "An Act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts" (Twelfth Statutes at Large, page five hundred and three), and of the Act of Congress approved August thirtieth, eighteen hundred and ninety (Twenty-sixth Statutes at Large, page four hundred and seventeen and chapter eight hundred and forty-one), agricultural extension work which shall be carried on in cooperation with the United States Department of Agriculture: *Provided*, That in any State in which two or more such colleges have been or hereafter may be established the appropriations hereinafter made to such State shall be administered by such college or colleges as the legislature of such State may direct: *Provided further*, That pending the inauguration and development of the cooperative extension work herein authorized, nothing in this Act shall be construed to discontinue either the farm management work or the farmers' cooperative demonstration work as now conducted by the Bureau of Plant Industry of the Department of Agriculture. [38 Stat. L. 372.]

This is the first section of the "Agricultural Extension Work Act."

The Act of July 2, 1862, ch. 130, mentioned in the text, is given *supra*, p. 99, and the Act of Aug. 30, 1890, ch. 841, also mentioned in the text, is given *supra*, p. 103.

By a provision of the Agricultural Appropriation Act of March 4, 1915, ch. 144, § 1, 38 Stat. L. 1110, given under the title AGRICULTURE, vol. 1, p. 241, an annual report on the work and expenditures under this Act was to be prepared.

SEC. 2. [Course of instruction.] That cooperative agricultural extension work shall consist of the giving of instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in said colleges in the several communities, and imparting to such persons information on said subjects through field demonstrations, publications, and otherwise; and this work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture and the State agricultural college or colleges receiving the benefits of this Act. [38 Stat. L. 373.]

SEC. 3. [Appropriations for payment of expenses.] That for the purpose of paying the expenses of said cooperative agricultural extension work and the necessary printing and distributing of information in connection with the same, there is permanently appropriated, out of any

money in the Treasury not otherwise appropriated, the sum of \$480,000 for each year, \$10,000 of which shall be paid annually, in the manner hereinafter provided, to each State which shall by action of its legislature assent to the provisions of this Act: *Provided*, That payment of such installments of the appropriation hereinbefore made as shall become due to any State before the adjournment of the regular session of the legislature meeting next after the passage of this Act may, in the absence of prior legislative assent, be made upon the assent of the governor thereof, duly certified to the Secretary of the Treasury: *Provided further*, That there is also appropriated an additional sum of \$600,000 for the fiscal year following that in which the foregoing appropriation first becomes available, and for each year thereafter for seven years a sum exceeding by \$500,000 the sum appropriated for each preceding year, and for each year thereafter there is permanently appropriated for each year the sum of \$4,100,000 in addition to the sum of \$480,000 hereinbefore provided: *Provided further*, That before the funds herein appropriated shall become available to any college for any fiscal year plans for the work to be carried on under this Act shall be submitted by the proper officials of each college and approved by the Secretary of Agriculture. Such additional sums shall be used only for the purposes hereinbefore stated, and shall be allotted annually to each State by the Secretary of Agriculture and paid in the manner hereinbefore provided, in the proportion which the rural population of each State bears to the total rural population of all the States as determined by the next preceding Federal census: *Provided further*, That no payment out of the additional appropriations herein provided shall be made in any year to any State until an equal sum has been appropriated for that year by the legislature of such State, or provided by State, county, college, local authority, or individual contributions from within the State, for the maintenance of the cooperative agricultural extension work provided for in this Act. [38 Stat. L. 373.]

SEC. 4. [Payment of sums appropriated — report of receipts and disbursements.] That the sums hereby appropriated for extension work shall be paid in equal semiannual payments on the first day of January and July of each year by the Secretary of the Treasury upon the warrant of the Secretary of Agriculture, out of the Treasury of the United States, to the treasurer or other officer of the State duly authorized by the laws of the State to receive the same; and such officer shall be required to report to the Secretary of Agriculture, on or before the first day of September of each year, a detailed statement of the amount so received during the previous fiscal year, and of its disbursement, on forms prescribed by the Secretary of Agriculture. [38 Stat. L. 374.]

SEC. 5. [Moneys received for extension work lost or misapplied — report of work done, etc.] That if any portion of the moneys received by the designated officer of any State for the support and maintenance of cooperative agricultural extension work, as provided in this Act, shall by any action or contingency be diminished or lost, or be misapplied, it shall be replaced by said State to which it belongs, and until so replaced no subsequent appropriation shall be apportioned or paid to said State, and

no portion of said moneys shall be applied, directly or indirectly, to the purchase, erection, preservation, or repair of any building or buildings, or the purchase or rental of land, or in college-course teaching, lectures in colleges, promoting agricultural trains, or any other purpose not specified in this Act, and not more than five per centum of each annual appropriation shall be applied to the printing and distribution of publications. It shall be the duty of each of said colleges annually, on or before the first day of January, to make to the governor of the State in which it is located a full and detailed report of its operations in the direction of extension work as defined in this Act, including a detailed statement of receipts and expenditures from all sources for this purpose, a copy of which report shall be sent to the Secretary of Agriculture and to the Secretary of the Treasury of the United States. [38 Stat. L. 374.]

SEC. 6. [States entitled to share in appropriations.] That on or before the first day of July in each year after the passage of this Act the Secretary of Agriculture shall ascertain and certify to the Secretary of the Treasury as to each State whether it is entitled to receive its share of the annual appropriation for cooperative agricultural extension work under this Act, and the amount which it is entitled to receive. If the Secretary of Agriculture shall withhold a certificate from any State of its appropriation, the facts and reasons therefor shall be reported to the President, and the amount involved shall be kept separate in the Treasury until the expiration of the Congress next succeeding a session of the legislature of any State from which a certificate has been withheld, in order that the State may, if it should so desire, appeal to Congress from the determination of the Secretary of Agriculture. If the next Congress shall not direct such sum to be paid, it shall be covered into the Treasury. [38 Stat. L. 374.]

SEC. 7. [Reports by Secretary of Agriculture.] That the Secretary of Agriculture shall make an annual report to Congress of the receipts, expenditures, and results of the cooperative agricultural extension work in all of the States receiving the benefits of this Act, and also whether the appropriation of any State has been withheld; and if so, the reasons therefor. [38 Stat. L. 374.]

SEC. 8. [Alteration, amendment, or repeal.] That Congress may at any time alter, amend, or repeal any or all of the provisions of this Act. [38 Stat. L. 374.]

V. MARINE BIOLOGICAL STATION

An Act To authorize the establishment of a marine biological station on the Gulf coast of the State of Florida.

[Act of March 1, 1911, ch. 189, 36 Stat. L. 964.]

[SEC. 1.] [Marine biological station authorized.] That the Secretary of Commerce and Labor be, and he is hereby, authorized, empowered, and directed to establish a marine biological station on the Gulf of Mexico at a point on the coast of the State of Florida, to be selected by him in said State: *Provided*, That the State of Florida donates and transfers, free of

cost, to the Government of the United States necessary land and water rights upon which may be erected such buildings, wharves, and other structures as may be necessary for the proper equipment of said station, such biological station, buildings, wharves, and other structures not to cost exceeding fifty thousand dollars. [36 Stat. L. 964.]

By the Act of March 4, 1913, ch. 141, § 1, 37 Stat. L. 736, given under the title LABOR DEPARTMENT, the Secretary of Commerce and Labor was designated the Secretary of Commerce.

The provisions of the text requiring the state of Florida to donate the land and water rights for the station therein authorized were amended by the Act of Aug. 1, 1914, ch. 223, § 1, *infra*, p. 111.

SEC. 2. [Admission to station.] That the professors, instructors, and students of the several land-grant, agricultural, and mechanical colleges of the United States shall be admitted to said station to pursue such investigation in fish culture and biology as may be practicable, without cost to the Government, under such rules and regulations as may be from time to time prescribed by the Secretary of Commerce and Labor. [36 Stat. L. 964.]

As to the Secretary of Commerce and Labor, see the note to the preceding section of this Act.

[SEC. 1.] **[Donation of land for station.]** * * * The provision of the Act to authorize the establishment of a marine biological station on the Gulf coast of the State of Florida, approved March first, nineteen hundred and eleven, requiring the State of Florida to donate and transfer free of cost the necessary land and water rights for such station, is hereby amended and modified to read as follows: *Provided*, That the State of Florida, a corporation, a firm, or an individual donates and transfers free of cost to the Government of the United States the necessary land and water rights. [38 Stat. L. 665.]

This is from the Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223.

The Act of March 1, 1911, ch. 189, amended by the text, is given *supra*, p. 110.

VI. USE OF GOVERNMENT LITERARY AND SCIENTIFIC COLLECTIONS

[SEC. 1.] **[Distribution of duplicate specimens by National Museum and Fish Commission.]** * * * And the distribution of duplicate specimens of the National Museum and Fish Commission may be made to colleges, academies, and other institutions of learning upon the payment by the recipients of the cost of preparation for transportation and the transportation thereof. [22 Stat. L. 629.]

This is from the Sundry Civil Appropriation Act of March 3, 1883, ch. 143. The same provision occurs in the Sundry Civil Appropriation Act of Aug. 7, 1882, ch. 433, 22 Stat. L. 332.

See the title SMITHSONIAN INSTITUTION.

Joint resolution to encourage the establishment and endowment of institutions of learning at the national capital by defining the policy of the Government with reference to the use of its literary and scientific collections by students.

[*Res. of April 12, 1892, No. 8, 27 Stat. L. 395.*]

[Scientific and literary collections accessible to investigators and to students.] That the facilities for research and illustration in the following and any other Governmental collections now existing or hereafter to be established in the city of Washington for the promotion of knowledge shall be accessible, under such rules and restrictions as the officers in charge of each collection may prescribe, subject to such authority as is now or may hereafter be permitted by law, to the scientific investigators and to students of any institution of higher education now incorporated or hereafter to be incorporated under the laws of Congress or of the District of Columbia, to wit:

- One. Of the Library of Congress.
- Two. Of the National Museum.
- Three. Of the Patent Office.
- Four. Of the Bureau of Education.
- Five. Of the Bureau of Ethnology.
- Six. Of the Army Medical Museum.
- Seven. Of the Department of Agriculture.
- Eight. Of the Fish Commission.
- Nine. Of the Botanic Gardens.
- Ten. Of the Coast and Geodetic Survey.
- Eleven. Of the Geological Survey.
- Twelve. Of the Naval Observatory. [*27 Stat. L. 395.*]

A preamble to the foregoing Resolution was as follows:

"Whereas, large collections illustrative of the various arts and sciences and facilitating literary and scientific research have been accumulated by the action of Congress through a series of years at the national capital; and

"Whereas it was the original purpose of the Government thereby to promote research and the diffusion of knowledge, and is now the settled policy and present practice of those charged with the care of these collections specially to encourage students who devote their time to the investigation and study of any branch of knowledge by allowing to them all proper use thereof; and

"Whereas it is represented that the enumeration of these facilities and the formal statement of this policy will encourage the establishment and endowment of institutions of learning at the seat of Government, and promote the work of education by attracting students to avail themselves of the advantages aforesaid under the direction of competent instructors: Therefore,"

[Sec. 1.] [Study and research in Departments, etc., for students.]

* * * That facilities for study and research in the Government Departments, the Library of Congress, the National Museum, the Zoological Park, the Bureau of Ethnology, the Fish Commission, the Botanic Gardens, and similar institutions hereafter established shall be afforded to scientific investigators and to duly qualified individuals, students, and graduates

of institutions of learning in the several States and Territories, as well as in the District of Columbia, under such rules and restrictions as the heads of the Departments and Bureaus mentioned may prescribe. [31 Stat. L. 1039.]

The above provision occurs in the Deficiencies Appropriation Act of March 3, 1901, ch. 831.

VII. STUDY OF EFFECTS OF ALCOHOLIC DRINKS AND NARCOTICS

An act to provide for the study of the nature of alcoholic drinks and narcotics, and of their effects upon the human system, in connection with the several divisions of the subject of physiology and hygiene, by the pupils in the public schools of the Territories and of the District of Columbia, and in the Military and Naval Academies, and Indian and colored schools in the Territories of the United States.

[Act of May 20, 1886, ch. 362, 24 Stat. L. 69.]

[SEC. 1.] **[Study of effects of alcoholic drinks and narcotics to be compulsory.]** That the nature of alcoholic drinks and narcotics, and special instructions as to their effects upon the human system, in connection with the several divisions of the subject of physiology and hygiene, shall be included in the branches of study taught in the common or public schools, and in the Military and Naval Schools, and shall be studied and taught as thoroughly and in the same manner as other like required branches are in said schools, by the use of text-books in the hands of pupils where other branches are thus studied in said schools, and by all pupils in all said schools throughout the Territories, in the Military and Naval Academies of the United States, and in the District of Columbia, and in all Indian and colored schools in the Territories of the United States. [24 Stat. L. 69.]

SEC. 2. **[Officers failing to enforce act to be removed.]** That it shall be the duty of the proper officers in control of any school described in the foregoing section to enforce the provisions of this act; and any such officer, school director, committee, superintendent, or teacher who shall refuse or neglect to comply with the requirements of this act, or shall neglect or fail to make proper provisions for the instruction required and in the manner specified by the first section of this act, for all pupils in each and every school under his jurisdiction, shall be removed from office, and the vacancy filled as in other cases. [24 Stat. L. 69.]

SEC. 3. **[Teachers to pass examination on hygiene, etc.]** That no certificate shall be granted to any person to teach in the public schools of the District of Columbia or Territories, after the first day of January, anno Domini eighteen hundred and eighty-eight, who has not passed a satisfactory examination in physiology and hygiene, with special reference to the nature and the effects of alcoholic drinks and other narcotics upon the human system. [24 Stat. L. 69.]

VIII. EDUCATION OF THE BLIND

An Act To promote the education of the blind.

[*Act of March 3, 1879, ch. 186, 20 Stat. L. 467.*]

[**SEC. 1.**] [**Permanent fund to aid education of the blind.**] That the sum of two hundred and fifty thousand dollars, out of money in the United States Treasury not otherwise appropriated, be, and hereby is, set apart as a perpetual fund for the purpose of aiding the education of the blind in the United States of America, through the American Printing House for the Blind. [*20 Stat. L. 467.*]

The foregoing section was preceded by the following preamble:

"Whereas, the trustees, superintendents, and teachers of the various State and public institutions for the instruction of the blind, representing the interests of over thirty thousand blind persons in the United States, have united in a petition to Congress to take into consideration the needs of the blind of the United States; and

"Whereas the Association of the American Instructors of the Blind, at their session in Philadelphia, in August, eighteen hundred and seventy-six, representing twenty-six State and public institutions for the instruction of the blind, have set forth in a series of resolutions that the especial needs of the blind are embossed books and tangible apparatus, and have recommended that if any aid should be given by Congress it would most efficiently come through increasing the means of the American Printing House for the Blind, located at Louisville, Kentucky; and

"Whereas it appears that the Kentucky legislature, in eighteen hundred and fifty-eight, by an act of special legislation, declared James Guthrie, W. F. Bullock, Theodore S. Bell, Bryce M. Patten, John Milton, H. T. Curd, and A. O. Brannin, and their successors, a body corporate under the name and style of the Trustees of the American Printing House for the Blind, with the avowed purpose of printing books and making apparatus for the instruction of the blind of the United States, for general distribution, and for the sake of philanthropy, and with no desire for pecuniary gain; and

"Whereas the States of Louisiana, Mississippi, Tennessee, Kentucky, New Jersey, and Delaware have made appropriations for the aid of said American Printing House for the Blind, of which, on account of the outbreak of the civil war, only a small part of the money appropriated by the first three named States was ever available; and

"Whereas by the money from the States of Kentucky, New Jersey, and Delaware, a printing-house for the blind was established, and is now supplied with presses, type, stereotype foundry, steam-engine, a well-equipped bindery, and all the appliances necessary for the manufacture of embossed books, and has for the last ten years been manufacturing embossed books superior in every way to any manufactured elsewhere, which have been distributed gratuitously to the blind in the States of Kentucky, New Jersey, and Delaware, by which the blind in those States have been very much benefited; and

"Whereas it is desirable that the blind of the whole country should be equally benefited, and the intentions of the trustees to establish an educational institution of the most practical beneficence and wisest philanthropy upon a national basis, should be accomplished, inasmuch as the education of the blind is a subject of national importance: Therefore,"

As to the education of indigent blind, see the title **HOSPITALS AND ASYLUMS**.

See *American Printing House v. American Printing House*, (1881) 104 U. S. 711, 26 U. S. (L. ed.) 902.

SEC. 2. [**Fund to be held in trust and invested.**] That the Secretary of the Treasury of the United States is hereby directed to hold said sum in trust for the purpose aforesaid; and it shall be his duty, upon the passage of this act, to invest said sum in United States interest-bearing bonds, bearing interest at four per centum, of the issue of July, eighteen hundred and seventy, and upon their maturity to reinvest their proceeds in other United States interest-bearing bonds, and so on forever. [*20 Stat. L. 468.*]

This section was affected by the provisions of the Act of June 25, 1906, ch. 3536, *infra*, p. 116.

SEC. 3. [Conditions of payment to American Printing House for Blind.]

That the Secretary of the Treasury of the United States is hereby authorized to pay over, semi-annually, to the trustees of the American Printing House for the Blind, located in Louisville, Kentucky, and chartered in eighteen hundred and fifty-eight by the legislature of Kentucky, upon the requisition of their president, countersigned by their treasurer, the semi-annual interest upon the said bonds, upon the following conditions:

First. The income upon the bonds thus held in trust for the education of the blind shall be expended by the trustees of the American Printing House each year in manufacturing and furnishing embossed books for the blind and tangible apparatus for their instruction;

And the total amount of such books and apparatus so manufactured and furnished by this income shall each year be distributed among all the public institutions for the education of the blind in the States and Territories of the United States and the District of Columbia, upon the requisition of the superintendent of each, duly certified by its board of trustees.

The basis of such distribution shall be the total number of pupils in all the public institutions for the education of the blind, to be authenticated in such manner and as often as the trustees of the said American Printing House shall require;

And each institution shall receive, in books and apparatus, that portion of the total income of said bonds held by the Secretary of the Treasury of the United States in trust for the education of the blind, as is shown by the ratio between the number of pupils in that institution for the education of the blind and the total number of pupils in all the public institutions for the education of the blind, which ratio shall be computed upon the first Monday in January of each year.

Second. No part of the income from said bonds shall be expended in the erection or leasing of buildings.

Third. No profit shall be put on any books or tangible apparatus for the instruction of the blind manufactured or furnished by the trustees of said American Printing House for the Blind, located in Louisville, Kentucky; and the price put upon each article so manufactured or furnished shall only be its actual cost.

Fourth. The Secretary of the Treasury of the United States shall have the authority to withhold the income arising from said bonds thus set apart for the education of the blind of the United States whenever he shall receive satisfactory proof that the trustees of said American Printing House for the Blind, located in Louisville, Kentucky, are not using the income from these bonds for the benefit of the blind in the public institutions for the education of the blind in the United States.

Fifth. Before any money be paid to the treasurer of the American Printing House for the Blind by the Secretary of the Treasury of the United States, the treasurer of the American Printing House for the Blind shall execute a bond, with two approved sureties, to the amount of twenty thousand dollars, conditioned that the interest so received shall be expended according to this law and all amendments thereto, which shall be held by the Secretary of the Treasury of the United States, and shall be renewed every two years.

Sixth. The superintendents of the various public institutions for the

education of the blind in the United States shall each, *ex officio*, be a member of the board of trustees of the American Printing House for the Blind, located in the city of Louisville, Kentucky. [20 Stat. L. 468.]

SEC. 4. [Trustees to make annual reports.] That the trustees of said American Printing House for the Blind shall annually make to the Secretary of the Treasury of the United States a report of the items of their expenditure of the income of said bonds during the year preceding their report, and shall annually furnish him with a voucher from each public institution for the education of the blind, showing that the amount of books and tangible apparatus due has been received. [20 Stat. L. 469.]

SEC. 5. [Effect.] That this act shall take effect from and after its passage. [20 Stat. L. 469.]

An Act To modify the requirements of the Act entitled "An Act to promote the education of the blind," approved March third, eighteen hundred and seventy-nine.

[Act of June 25, 1906, ch. 3536, 34 Stat. L. 460.]

[Proceeds of matured bonds made a trust fund — permanent annual appropriation in place of interest — disposition.] That the sum of two hundred and fifty thousand dollars heretofore invested in United States registered four per centum bonds, funded loan of nineteen hundred and seven, inscribed "Secretary of the Treasury, trustee — interest to the Treasurer of the United States for credit of appropriation 'To promote the education of the blind,' " shall upon the maturity and redemption of said bonds on the first day of July, nineteen hundred and seven, in lieu of reinvestment in other Government bonds, be set apart and credited on the books of the Treasury Department as a perpetual trust fund; and the sum of ten thousand dollars, being equivalent to four per centum on the principal of said trust fund, be, and the same is hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, and such appropriation shall be deemed a permanent annual appropriation and shall be expended in the manner and for the purposes authorized by the Act approved March third, eighteen hundred and seventy-nine, entitled "An Act to promote the education of the blind," approved March third, eighteen hundred and seventy-nine. [34 Stat. L. 460.]

The Act of March 3, 1879, ch. 186, mentioned in the text, is given *supra*, p. 114.

IX. HOWARD UNIVERSITY

[SEC. 1.] [Report on condition, receipts and disbursements.] The President and directors of the Howard University shall report to the Secretary of the Interior the condition of the institution on the first of July of each year, embracing therein the number of pupils received and discharged or leaving the same for any cause during the preceding year,

and the number remaining; also, the branches of knowledge and industry taught and the progress made therein, together with a statement showing the receipts of the institution and from what sources, and its disbursements and for what objects. [30 Stat. L. 624.]

This is from the Sundry Civil Appropriation Act of July 1, 1898, ch. 546. Similar provisions occur in prior Appropriation Acts. See 26 Stat. L. 973; 27 Stat. L. 372; 27 Stat. L. 595. The provision in the Act of Aug. 5, 1892, ch. 380, 27 Stat. L. 372, reads as follows:

"For maintenance of the Howard University, to be used in payment of part of the salaries of the officers, professors, teachers, and other regular employees of the university, the balance of which will be paid from donations and other sources, . . . And the proper officers of said university shall report annually to the Secretary of the Interior how the appropriation is expended; and the Secretary of the Interior shall estimate in detail for the next fiscal year the items of expenditure provided for in this paragraph; . . ."

[SEC. 1.] [Use of appropriations for theological department forbidden — inspection.] * * * That hereafter no part of the appropriations made by Congress for the Howard University shall be used, directly or indirectly, for the support of the theological department of said university, nor for the support of any sectarian, denominational, or religious instruction therein: *And provided further*, That no part thereof shall be paid to said university until it shall accord to the Secretary of the Interior, or to his designated agent or agents, authority to visit and inspect such university and to control and supervise the expenditure therein of all moneys paid under said appropriations. [30 Stat. L. 1101.]

This is from the Sundry Civil Appropriation Act of March 3, 1899, ch. 424. Substantially the same provision occurs in the Act of July 1, 1898, ch. 546, 30 Stat. L. 624.

EIGHT-HOUR LAW

See LABOR

ELECTIONS

R. S. 2003. *Interference with Freedom of Elections by Officers of Army or Navy*, 118.

R. S. 2004. *Race, Color, or Previous Condition Not to Affect the Right to Vote*, 118.

Act of June 25, 1910, ch. 392 ("Campaign Expenses Publicity Act" or "Publicity of Political Contributions Act"), 120.

Sec. 1. *Political Committees Defined*, 120.

2. *Officers Required — Duties of Treasurer — Accounts*, 120.

3. *Receipts for All Expenses — Preservation*, 120.

4. *Detailed Statement of Contributions to Be Given Treasurer — Recording*, 120.

5. *Statement to Be Filed with Clerk of House of Representatives — Preservation and Inspection*, 121.

6. *Details of Statement*, 121.

7. *Statements by Others than Political Committees*, 122.

8. *Candidates — Statements Required — Contributions, Promises, and Expenditures — Verification of Statement — Filing*, 122.

9. *Personal Traveling, etc., Expenses Excepted*, 126.

10. *Legal Expenses to Maintain or Contest Elections*, 126.

11. *Punishment for Violations*, 126.

Act of June 4, 1914, ch. 103, 126.

Sec. 1. *Election of United States Senator by People — Time*, 126.

2. *Procedure*, 126.

3. *Limitation of Section Two*, 127.

CROSS-REFERENCES

Members of Congress and Contested Elections, see **CONGRESS**.

Interference with Exercise of Elective Franchise and Offenses against Election Laws, see **PENAL LAWS**.

Presidential Election, see **PRESIDENT**.

See also **ALASKA**; **HAWAII**; **PHILIPPINE ISLANDS**; **PORTO RICO**.

Sec. 2003. [Interference with freedom of elections by officers of Army or Navy.] No officer of the Army or Navy of the United States shall prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State, or with the exercise of the free right of suffrage in any State. [R. S.]

Act of Feb. 25, 1865, ch. 52, 13 Stat. L. 437.

See the notes to the following R. S. sec. 2004.

Sec. 2004. [Race, color, or previous condition not to affect the right to vote.] All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district,

county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. [R. S.]

Act of May 31, 1870, ch. 114, 16 Stat. L. 140.

Title XXVI of the Revised Statutes, "The Elective Franchise," embraced sections 2002-2031, inclusive. All of these sections, with the exception of 2003 and 2004, here given, were specifically repealed by an Act of Feb. 18, 1894, ch. 25, § 1, 28 Stat. L. 36. While R. S. sec. 2002, prohibiting military or naval officers from having troops or armed men at election places unless necessary to repel the armed enemies of the United States or to keep the peace at the polls, was repealed by the last cited Act, R. S. sec. 5528, prescribing the punishment for such acts, was not repealed, but was incorporated in section 22 of the Penal Laws and repealed by section 341 thereof. See the title **PENAL LAWS**.

Title LXX of the Revised Statutes, ch. 7, "Crimes Against the Elective Franchise and Civil Rights of Citizens," embraced R. S. secs. 5506-5532, inclusive. Of these sections, 5506, 5511-5515 and 5520-5523 were repealed by an Act of Feb. 4, 1894, ch. 25, § 1, 28 Stat. L. 36. All of the remaining sections, with the exception of section 5517, were repealed by the Penal Laws of 1909, § 341, and subsequent provisions relating to offenses against the elective franchise were made by chapter 3 thereof. See the title **PENAL LAWS**.

R. S. sec. 5517, previously mentioned as not being repealed by the Penal Laws, is given under the title **CIVIL RIGHTS**.

The power of Congress over the right to vote in the several states is confined to the enforcement of the fifteenth amendment by preventing discrimination on account of race, color, or previous condition of servitude. *Neal v. Delaware*, (1880) 103 U. S. 370, 26 U. S. (L. ed.) 567; *Ex p. Yarbrough*, (1884) 110 U. S. 651, 4 S. Ct. 152, 28 U. S. (L. ed.) 274; *Williams v. Mississippi*, (1898) 170 U. S. 213, 18 S. Ct. 583, 42 U. S. (L. ed.) 1012; *McKay v. Campbell*, (1870) 1 Sawy. 374, 16 Fed. Cas. No. 8,339. See also *Pope v. Williams*, (1904) 193 U. S. 621, 24 S. Ct. 573, 48 U. S. (L. ed.) 817. The general right to vote in a particular state is derived from the state. *Mason v. Missouri*, (1900) 179 U. S. 328, 21 S. Ct. 125, 45 U. S. (L. ed.) 214. But the violation of a state law which affects the exercise of the right to vote for a member of Congress, as well as the violation of a special provision of the Constitution or laws of the United States, is a question arising under the Federal Constitution. *Swafford v. Templeton*, (1902) 185 U. S. 487, 22 S. Ct. 783, 46 U. S. (L. ed.) 1005, *reversing* on a question of jurisdiction (*E. D. Tenn.* 1901) 108 Fed. 309; *Files v. Davis*, (*E. D. Ark.* 1902) 118 Fed. 465.

Scope and construction of section.—It was not the intention of Congress to abolish the laws of the several states which prescribed the qualifications of voters, or even to alter them, except so far as they were founded upon the distinction of race, color, or previous condition of servitude. *Ex p. McIlwee*, (1870) 16 Fed. Cas. No. 8,820.

This section simply declares a right without providing a punishment for its violation. "Rights and immunities

created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." U. S. *v. Reese*, (1875) 92 U. S. 214, 23 U. S. (L. ed.) 563. See also U. S. *v. Cruikshank*, (1875) 92 U. S. 542, 23 U. S. (L. ed.) 588.

The words "distinction of race, color, or previous condition of servitude" are general terms, descriptive in their character, and are not restrictive, and do not limit the preceding words, "all citizens of the United States who are or shall be otherwise qualified to vote in any election by the people in any state." Enforcement Act, (1870) 2 Hughes 518, 30 Fed. Cas. No. 18,252; *Kellogg v. Warmouth*, (1872) 14 Fed. Cas. No. 7,667, holding also that this section applies to the election of a state governor.

Offense of refusing to receive vote.—Congress has not provided by "appropriate legislation" for the punishment of the offense of refusing to receive and count, at a municipal election, the vote of a citizen of African descent. U. S. *v. Reese*, (1875) 92 U. S. 214, 23 U. S. (L. ed.) 563. As to pleading in action to recover penalty for refusal to receive a vote, see *McKay v. Campbell*, (1870) 2 Abb. 120, 16 Fed. Cas. No. 8,339.

The so-called grandfather clause contained in some state statutes and aimed at the colored race is in violation of this statute. *Myers v. Anderson*, (1915) 238 U. S. 368, 35 S. Ct. 932, 59 U. S. (L. ed.) 1349.

An Act Providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected.

[*Act of June 25, 1910, ch. 392, 36 Stat. L. 822.*]

[SEC. 1.] **[Political committees defined.]** That the term "political committee" under the provisions of this Act shall include the national committees of all political parties and the national congressional campaign committees of all political parties and all committees, associations, or organizations which shall in two or more States influence the result or attempt to influence the result of an election at which Representatives in Congress are to be elected. [36 Stat. L. 822.]

This is the first section of the Act known as the "Campaign Expenses Publicity Act," or the "Publicity of Political Contributions Act."

Power of Congress.—The power, under the Constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected cannot be questioned. *In re Coy*, (1888) 127 U. S. 731, 8 S. Ct. 1263, 32 U. S. (L. ed.) 274.

SEC. 2. **[Officers required — duties of treasurer — accounts.]** That every political committee as defined in this Act shall have a chairman and a treasurer. It shall be the duty of the treasurer to keep a detailed and exact account of all money or its equivalent received by or promised to such committee or any member thereof, or by or to any person acting under its authority or in its behalf, and the name of every person, firm, association, or committee from whom received, and of all expenditures, disbursements, and promises of payment or disbursement made by the committee or any member thereof, or by any person acting under its authority or in its behalf, and to whom paid, distributed, or disbursed. No officer or member of such committee, or other person acting under its authority or in its behalf, shall receive any money or its equivalent, or expend or promise to expend any money on behalf of such committee, until after a chairman and treasurer of such committee shall have been chosen. [36 Stat. L. 823.]

SEC. 3. **[Receipts for all expenses — preservation.]** That every payment or disbursement made by a political committee exceeding ten dollars in amount be evidenced by a receipted bill stating the particulars of expense, and every such record, voucher, receipt, or account shall be preserved for fifteen months after the election to which it relates. [36 Stat. L. 823.]

SEC. 4. **[Detailed statement of contributions to be given treasurer — recording.]** That whoever, acting under the authority or in behalf of such political committee, whether as a member thereof or otherwise, receives any contribution, payment, loan, gift, advance, deposit, or promise of money or its equivalent shall, on demand, and in any event within five days after the receipt of such contribution, payment, loan, gift, advance, deposit, or promise, render to the treasurer of such political committee a detailed account of the same, together with the name and address from whom received, and said treasurer shall forthwith enter the same in a ledger or record to be kept by him for that purpose. [36 Stat. L. 823.]

SEC. 5. [Statement to be filed with clerk of House of Representatives — preservation and inspection.] That the treasurer of every such political committee shall, not more than fifteen days and not less than ten days next before an election at which Representatives in Congress are to be elected in two or more States, file in the office of the Clerk of the House of Representatives at Washington, District of Columbia, with said Clerk, an itemized detailed statement; and on each sixth day thereafter until such election said treasurer shall file with said Clerk a supplemental itemized detailed statement. Each of said statements shall conform to the requirements of the following section of this Act, except that the supplemental statement herein required need not contain any item of which publicity is given in a previous statement. Each of said statements shall be full and complete, and shall be signed and sworn to by said treasurer.

It shall also be the duty of said treasurer to file a similar statement with said Clerk within thirty days after such election, such final statement also to be signed and sworn to by said treasurer and to conform to the requirements of the following section of this Act. The statements so filed with the Clerk of the House shall be preserved by him for fifteen months and shall be a part of the public records of his office and shall be open to public or agent thereof. [36 Stat. L. 823, as amended by 37 Stat. L. 25.]

This section was amended to read as above given by an Act of Aug. 19, 1911, ch. 33, § 1. As originally enacted it was as follows:

"SEC. 5. That the treasurer of every such political committee shall, within thirty days after the election at which Representatives in Congress were chosen in two or more States, file with the Clerk of the House of Representatives at Washington, District of Columbia, an itemized, detailed statement, sworn to by said treasurer and conforming to the requirements of the following section of this Act. The statement so filed with the Clerk of the House of Representatives shall be preserved by him for fifteen months, and shall be a part of the public records of his office, and shall be open to public inspection." [36 Stat. L. 823.]

SEC. 6. [Details of statement.] That the statements required by the preceding section of this Act shall state:

First. The name and address of each person, firm, association, or committee who or which has contributed, promised, loaned, or advanced to such political committee, or any officer, member, or agent thereof, either in one or more items, money or its equivalent of the aggregate amount or value of one hundred dollars or more, and the amount or sum contributed, promised, loaned, or advanced by each.

Second. The aggregate sum contributed, promised, loaned, or advanced to such political committee, or to any officer, member, or agent thereof, in amounts of less than one hundred dollars.

Third. The total sum of all contributions, promises, loans, and advances received by such political committee or any officer, member, or agent thereof.

Fourth. The name and address of each person, firm, association, or committee to whom such political committee, or any officer, member, or agent thereof, has distributed, disbursed, contributed, loaned, advanced, or promised any sum of money or its equivalent of the amount or value of ten dollars or more, stating the amount or sum distributed, disbursed, contributed, loaned, advanced, or promised to each, and the purpose thereof.

Fifth. The aggregate sum distributed, disbursed, contributed, loaned,

advanced, or promised by such political committee, or any officer, member, or agent thereof, where the amount or value of such distribution, disbursement, loan, advance, or promise to any one person, firm, association, or committee in one or more items is less than ten dollars.

Sixth. The total sum disbursed, distributed, contributed, loaned, advanced, or promised by such political committee, or any officer, member, or agent thereof. [36 Stat. L. 823, as amended by 37 Stat. L. 25.]

This section was amended to read as above given by an Act of Aug. 19, 1911, ch. 33, § 1. As originally enacted it was as follows:

"Sec. 6. That the statements required by the preceding section of this Act shall state:

"First. The name and address of each person, firm, association, or committee who or which has contributed, promised, loaned, or advanced to such political committee, or any officer, member, or agent thereof, either in one or more items, money or its equivalent of the aggregate amount or value of one hundred dollars or more.

"Second. The total sum contributed, promised, loaned, or advanced to such political committee, or to any officer, member, or agent thereof, in amounts less than one hundred dollars.

"Third. The total sum of all contributions, promises, loans, and advances received by such political committee or any officer, member, or agent thereof.

"Fourth. The name and address of each person, firm, association, or committee to whom such political committee, or any officer, member, or agent thereof, has disbursed, distributed, contributed, loaned, advanced, or promised any sum of money or its equivalent of the amount or value of ten dollars or more, and the purpose thereof.

"Fifth. The total sum disbursed, distributed, contributed, loaned, advanced, or promised by such political committee, or any officer, member, or agent thereof, where the amount or value of such disbursement, distribution, loan, advance, or promise to any one person, firm, association, or committee in one or more items is less than ten dollars.

"Sixth. The total sum disbursed, distributed, contributed, loaned, advanced, or promised by such political committee or any officer, member, or agent thereof." [36 Stat. L. 823.]

SEC. 7. [Statements by others than political committees.] That every person, firm, association, or committee, except political committees as hereinbefore defined, that shall expend or promise any sum of money or other thing of value amounting to fifty dollars or more for the purpose of influencing or controlling, in two or more States, the result of an election at which Representatives to the Congress of the United States are elected, unless he or it shall contribute the same to a political committee as hereinbefore defined, shall file the statements of the same under oath, as required by section six of this Act, in the office of the Clerk of the House of Representatives, at Washington, District of Columbia, which statements shall be held by said Clerk in all respects as required by section five of this act. [36 Stat. L. 824.]

SEC. 8. [Candidates — statements required — contributions, promises, and expenditures — verification of statement — filing.] The word "candidate" as used in this section shall include all persons whose names are presented for nomination for Representative or Senator in the Congress of the United States at any primary election or nominating convention, or for indorsement or election at any general or special election held in connection with the nomination or election of a person to fill such office, whether or not such persons are actually nominated, indorsed, or elected.

Every person who shall be a candidate for nomination at any primary election or nominating convention, or for election at any general or special election, as Representative in the Congress of the United States, shall, not

less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which candidates for Representatives are to be elected, file with the Clerk of the House of Representatives at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made, for the purpose of procuring his nomination or election.

Every person who shall be a candidate for nomination at any primary election or nominating convention, or for indorsement at any general or special election, or election by the legislature of any State, as Senator in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which he is seeking indorsement, and not less than five nor more than ten days before the day upon which the first vote is to be taken in the two houses of the legislature before which he is a candidate for election as Senator, file with the Secretary of the Senate at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination or election.

Every such candidate for nomination at any primary election or nominating convention, or for indorsement or election at any general or special election, or for election by the legislature of any State, shall, within fifteen days after such primary election or nominating convention, and within thirty days after any such general or special election, and within thirty days after the day upon which the legislature shall have elected a Senator, file with the Clerk of the House of Representatives or with the Secretary of the Senate, as the case may be, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, up to, on, and after

the day of such primary election, nominating convention, general or special election, or election by the legislature, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination, indorsement, or election.

Every such candidate shall include therein a statement of every promise or pledge made by him, or by any one for him with his knowledge and consent or to whom he has given authority to make any such promise or pledge, before the completion of any such primary election or nominating convention or general or special election or election by the legislature, relative to the appointment or recommendation for appointment of any person to any position of trust, honor, or profit, either in the county, State, or Nation, or in any political subdivision thereof, or in any private or corporate employment, for the purpose of procuring the support of such person or of any person in his candidacy, and if any such promise or pledge shall have been made the name or names, the address or addresses, and the occupation or occupations, of the person or persons to whom such promise or pledge shall have been made, shall be stated, together with a description of the position relating to which such promise or pledge has been made. In the event that no such promise or pledge has been made by such candidate, that fact shall be distinctly stated.

No candidate for Representative in Congress or for Senator of the United States shall promise any office or position to any person, or to use his influence or to give his support to any person for any office or position for the purpose of procuring the support of such person, or of any person, in his candidacy; nor shall any candidate for Senator of the United States give, contribute, expend, use, or promise any money or thing of value to assist in procuring the nomination or election of any particular candidate for the legislature of the State in which he resides, but such candidate may, within the limitations and restrictions and subject to the requirements of this act, contribute to political committees having charge of the disbursement of campaign funds.

No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: *Provided*, That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding five thousand dollars in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding ten thousand dollars in any campaign for his nomination and election: *Provided further*, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed

as the limit of expense and need not be shown in the statements herein required to be filed.

The statements herein required to be made and filed before the general election, or the election by the legislature at which such candidate seeks election, need not contain items of which publicity is given in a previous statement, but the statement required to be made and filed after said general election or election by the legislature shall, in addition to an itemized statement of all expenses not theretofore given publicity, contain a summary of all preceding statements.

Any person, not then a candidate for Senator of the United States, who shall have given, contributed, expended, used, or promised any money or thing of value to aid or assist in the nomination or election of any particular member of the legislature of the State in which he resides, shall, if he thereafter becomes a candidate for such office, or if he shall thereafter be elected to such office without becoming a candidate therefor, comply with all of the provisions of this section relating to candidates for such office, so far as the same may be applicable; and the statement herein required to be made, verified, and filed after such election shall contain a full, true, and itemized account of each and every gift, contribution, expenditure, and promise whenever made, in any wise relating to the nomination or election of members of the legislature of said State, or in any wise connected with or pertaining to his nomination and election of which publicity is not given in a previous statement.

Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths; and the depositing of any such statement in a regular post office, directed to the Clerk of the House of Representatives, or to the Secretary of the Senate, as the case may be, duly stamped and registered, within the time required herein, shall be deemed a sufficient filing of any such statement under any of the provisions of this Act.

This Act shall not be construed to annul or vitiate the laws of any State, not directly in conflict herewith, relating to the nomination or election of candidates for the offices herein named, or to exempt any such candidate from complying with such State laws. [37 Stat. L. 26, as amended by 37 Stat. L. 360.]

This section was inserted as a new section after section 7 of the Act of June 25, 1910, ch. 392, by an Act of Aug. 19, 1911, ch. 33, § 2.

The tenth paragraph of the foregoing section 8, relating to the verification of the statements therein required, was amended to read as given in the text by an Act of Aug. 23, 1912, ch. 349. As originally enacted, this paragraph was as follows:

"Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths under the laws of the State in which he is a candidate, and shall be sworn to or affirmed by the candidate in the district in which he is a candidate for Representative, or the State in which he is a candidate for Senator in the Congress of the United States: *Provided*, That if at the time of such primary election, nominating convention, general or special election, or election by the State legislature said candidate shall be in attendance upon either House of Congress as a Member thereof, he may at his election verify such statements before any officer authorized to administer oaths in the District of Columbia: *Provided further*, That the depositing of any such statement in a regular post office, directed to the Clerk of the House of Representatives or to the Secretary of the Senate, as the case may be, duly stamped and registered within the time required herein shall be deemed a sufficient filing of any such statement under any of the provisions of this Act." [37 Stat. L. 26.]

SEC. 9. [Personal traveling, etc., expenses excepted.] That any person may in connection with such election incur and pay from his own private funds for the purpose of influencing or controlling, in two or more States, the results of an election at which Representatives to the Congress of the United States are elected, all necessary personal expenses for his traveling, for stationery, and postage, and for telegraph and telephone service without being subject to the provisions of this act. [36 Stat. L. 824, as amended by 37 Stat. L. 25.]

As originally enacted this section was section 8. It was amended to read as above given by an Act of Aug. 19, 1911, ch. 33, § 1, and by section 2 of said Act was renumbered as section 9. The original provisions of this section were as follows:

"SEC. 8. That any person may in connection with such election incur and pay from his own private funds for the purpose of influencing or controlling, in two or more States, the result of an election at which Representatives to the Congress of the United States are elected all personal expenses for his traveling and for purposes incidental to traveling, for stationery and postage, and for telegraph and telephone service without being subject to the provisions of this Act." [36 Stat. L. 824.]

SEC. 10. [Legal expenses to maintain or contest elections.] That nothing contained in this Act shall limit or affect the right of any person to spend money for proper legal expenses in maintaining or contesting the results of any election. [36 Stat. L. 824, as amended by 37 Stat. L. 26.]

This section was originally enacted as section 9. It was renumbered as section 10 by an Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. L. 26.

SEC. 11. [Punishment for violations.] That every person willfully violating any of the foregoing provisions of this Act shall, upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year, or both. [36 Stat. L. 824, as amended by 37 Stat. L. 26.]

This section was originally enacted as section 10. It was renumbered as section 11 by an Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. L. 26.

An Act Providing a temporary method of conducting the nomination and election of United States Senators.

[Act of June 4, 1914, ch. 103, 38 Stat. L. 384.]

[SEC. 1.] **[Election of United States Senator by people — time.]** That at the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter. [38 Stat. L. 384.]

SEC. 2. [Procedure.] That in any State wherein a United States Senator is hereafter to be elected either at a general election or at any special election called by the executive authority thereof to fill a vacancy, until or unless otherwise specially provided by the legislature thereof, the nomination of candidates for such office not heretofore made shall be made, the election to fill the same conducted, and the result thereof determined, as

near as may be in accordance with the laws of such State regulating the nomination of candidates for and election of Members at Large of the National House of Representatives: *Provided*, That in case no provision is made in any State for the nomination or election of Representatives at Large, the procedure shall be in accordance with the laws of such State respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire State: *And provided further*, That in any case the candidate for Senator receiving the highest number of votes shall be deemed elected. [38 Stat. L. 384.]

Sec. 3. [Limitation of section two.] That section two of this Act shall expire by limitation at the end of three years from the date of its approval. [38 Stat. L. 384.]

ELECTIVE FRANCHISE

See ELECTIONS

ELKINS ACT

See INTERSTATE COMMERCE

EMBEZZLEMENT

See PENAL LAWS, and consult the General Index

EMIGRATION

See IMMIGRATION

EMPLOYERS' LIABILITY ACTS

See LABOR; RAILROADS

ENLARGED HOMESTEAD ACT

See PUBLIC LANDS

ENTRY AND CLEARANCE OF VESSELS

See CUSTOMS DUTIES; HEALTH AND QUARANTINE; SHIPPING AND NAVIGATION; TONNAGE DUTIES

ENTRY OF MERCHANDISE

See CUSTOMS DUTIES

EPIDEMIC DISEASES ACT

See HEALTH AND QUARANTINE

EQUITY

See JUDICIARY

ERDMAN ACT

See LABOR

ERROR, WRIT OF

See JUDICIARY

ESCAPE

See PENAL LAWS

ESCH BILL

See RAILROADS

ESTIMATES, APPROPRIATIONS, AND REPORTS

- I. ESTIMATES, 131.
 - II. APPROPRIATIONS, 137.
 - III. REPORTS, 156.
-

I. Estimates, 131.

R. S. 3660. *Manner of Communicating Estimates by Heads of Departments*, 131.

R. S. 3661. *Estimates for Printing and Binding*, 131.

R. S. 3662. *Estimates for Salaries*, 132.

R. S. 3663. *Requisites for Estimates for Appropriation for Public Works*, 132.

R. S. 3664. *What Additional Explanations Are Required of Heads of Departments*, 132.

R. S. 3665. *Amount of Outstanding Appropriations to Be Designated*, 132.

R. S. 3669. *Estimates to Be Submitted to Congress Through Secretary of Treasury*, 133.

R. S. 3670. *Estimates to Be Accompanied by Statement of Prior Appropriations*, 133.

R. S. 3672. *Statement of Proceeds of Sales of Old Material*, 133.

Act of March 3, 1875, ch. 129, 133.

Sec. 3. Extracts to Be Included in Book of Estimates, 133.

Act of July 7, 1884, ch. 334, 133.

Sec. 1. Estimates to Be Classified, Indexed, etc., 133.

Act of March 3, 1901, ch. 830, 134.

Sec. 5. Time for Submitting Estimates, 134.

Act of June 22, 1906, ch. 3514, 134.

Sec. 4. Estimates to Follow Preceding Year's Appropriations — Changes — General Appropriation Bills — All Estimates to Be Included in Book of Estimates — Restriction on Special Estimates, 134.

Act of March 4, 1909, ch. 297, 135.

Sec. 4. Estimates Not Conforming to Law to Be Rearranged, 135.

Act of March 4, 1909, ch. 299, 135.

Sec. 7. Annual Estimates — Statement to President if Estimated Revenue Is Exceeded — Recommendations of Reductions, or New Taxes, etc., 135.

Act of June 25, 1910, ch. 384, 135.

Sec. 6. Statement of Sales of Old Material Not Included in Book of Estimates, 135.

Act of Aug. 23, 1912, ch. 350, 136.

Sec. 9. Annual Estimates to Be Made as Now Required by Law, 136.

Act of Aug. 24, 1912, ch. 355, 136.

Sec. 6. Estimates for Lump-sum Appropriations — Statements Required, 136.

Act of June 23, 1913, ch. 3, 137.

Sec. 3. Official to Be Designated to Supervise Preparation of Estimates from Each Department, 137.

II. Appropriations, 137.

R. S. 3678. Applications of Moneys Appropriated, 137.

R. S. 3679. No Expenditures beyond Appropriations, 138.

R. S. 3681. Expenses of Commissions and Inquiries, 140.

R. S. 3682. Restrictions on Contingent, etc., Appropriations, 140.

R. S. 3683. Restrictions upon Purchases from Contingent Funds, 141.

R. S. 3689. Permanent Indefinite Appropriations, 141.

R. S. 3690. Expenditure of Balances of Appropriations, 150.

R. S. 3691. Disposal of Balances after Two Years, 151.

R. S. 3692. Proceeds of Certain Sales, etc., of Material, 151.

Act of June 20, 1874, ch. 328, 152.

Sec. 5. Unexpended Appropriations to Be Covered into Treasury; Exceptions, 152.

Act of June 14, 1878, ch. 191, 152.

Sec. 4. Claims under Exhausted Appropriations, to Be Examined, etc., 152.

Act of May 28, 1896, ch. 252, 153.

Sec. 1. Footing of Paragraphs to Determine Amount Appropriated, 153.

Act of March 15, 1898, ch. 68, 153.

Sec. 3. Restrictions on Purchases of Books and Periodicals, 153.

Act of June 30, 1906, ch. 3914, 153.

Sec. 9. Appropriations to Be Specifically Made, 153.

Act of Aug. 23, 1912, ch. 350, 153.

Sec. 6. Contingent Funds, etc.—Apportionment of Amount to Be Expended by Each Office or Bureau — No Change Except on Written Order — Purchases Limited to Contingent Funds, 153.

7. Expenditure of Appropriations for Private Telephone Service Forbidden, 154.

Act of Aug. 24, 1912, ch. 355, 154.

Sec. 7. Regular Appropriations Restricted to Fiscal Year — Exceptions, 154.

Act of Aug. 26, 1912, ch. 408, 154.

Sec. 7. Lump Sum Appropriations — Restriction on Salaries Paid From, 154.

Act of July 16, 1914, ch. 141, 155.

Sec. 5. Expenditure of Appropriations for Automobiles and Carriages, 155.

Act of March 4, 1915, ch. 147, 155.

Sec. 4. Reappropriation of Unexpended Balance — How Construed, 155.

III. Reports, 156.

R. S. 193. *Annual Report by Heads of Departments of Expenditure of Contingent Funds*, 156.

R. S. 195. *Time of Making Annual Reports by Heads of Departments*, 156.

R. S. 196. *Department Reports, When to Be Furnished to Printer*, 156.

Act of March 3, 1877, ch. 102, 156.

Sec. 1. Contingent Expenses to Be Annually Reported by Heads of Departments, 156.

Act of July 11, 1890, ch. 667, 157.

Sec. 2. Annual Reports by Heads of Departments of Number and Salaries of Employees Below Standard of Efficiency, 157.

Act of March 2, 1895, ch. 177, 157.

Sec. 7. Statement of Condition of Business to Be Submitted in Estimates by Heads of Departments, 157.

Act of March 4, 1915, ch. 147, 157.

Sec. 5. Report of Exchanges of Labor Saving Devices, 157.

CROSS-REFERENCES

For matters relating to estimates, appropriations and reports of the sundry bureaus and departments, see the various departmental titles and consult the General Index.

I. ESTIMATES

Sec. 3660. [Manner of communicating estimates by heads of departments.] The heads of Departments, in communicating estimates of expenditures and appropriations to Congress, or to any of the committees thereof, shall specify, as nearly as may be convenient, the sources from which such estimates are derived, and the calculations upon which they are founded, and shall discriminate between such estimates as are conjectural in their character and such as are framed upon actual information and applications from disbursing officers. They shall also give references to any law or treaty by which the proposed expenditures are, respectively, authorized, specifying the date of each, and the volume and page of the Statutes at Large, or of the Revised Statutes, as the case may be, and the section of the act in which the authority is to be found. [R. S.]

Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 525.

Further provisions with respect to the order and arrangement of estimates were made by the *Act of June 22, 1906, ch. 3514, § 4, infra*, p. 134.

Congress is not restricted by the estimates, and may, of course, make appropriations for objects not included therein or reject them altogether. (1878) 16 Op. Atty.-Gen. 213.

Estimates should be confined to lawful expenditures under existing laws, and such expenditures as may necessarily be

required for the exigencies of the public service during the ensuing year; it is not within the official duty of the head of a department to make estimates for appropriations to pay claims which the government is not in law bound to pay. *Pitman v. U. S.*, (1885) 20 Ct. Cl. 256.

Sec. 3661. [Estimates for printing and binding.] The head of each of the Executive Departments, and every other public officer who is authorized to have printing and binding done at the Congressional Printing-Office

for the use of his Department or public office, shall include in his annual estimate for appropriations for the next fiscal year such sum or sums as may to him seem necessary "for printing and binding, to be executed under the direction of the Congressional Printer." [R. S.]

Act of May 8, 1872, ch. 140, 17 Stat. L. 82.

For further provisions as to estimates for public printing and binding, see the title PUBLIC PRINTING.

Sec. 3662. [Estimates for salaries.] All estimates for the compensation of officers authorized by law to be employed shall be founded upon the express provisions of law, and not upon the authority of executive distribution. [R. S.]

Act of March 3, 1855, ch. 175, 10 Stat. L. 670.

Sec. 3663. [Requisites for estimates for appropriation for public works.] Whenever any estimate submitted to Congress by the head of a Department asks an appropriation for any new specific expenditure, such as the erection of a public building, or the construction of any public work, requiring a plan before the building or work can be properly completed, such estimate shall be accompanied by full plans and detailed estimates of the cost of the whole work. All subsequent estimates for any such work shall state the original estimated cost, the aggregate amount theretofore appropriated for the same, and the amount actually expended thereupon, as well as the amount asked for the current year for which such estimate is made. And if the amount asked is in excess of the original estimate, the full reasons for the excess, and the extent of the anticipated excess, shall be also stated. [R. S.]

Act of June 17, 1844, ch. 105, 5 Stat. L. 693; Act of March 3, 1855, ch. 175, 10 Stat. L. 670.

R. S. sec. 3663 as originally enacted was amended to read as above by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 249, by striking out the word "plan" where it occurred for the second time in the section and inserting therefor the word "plans."

Sec. 3664. [What additional explanations are required of heads of departments.] Whenever the head of a Department, being about to submit to Congress the annual estimates of expenditures required for the coming year, finds that the usual items of such estimates vary materially in amount from the appropriation ordinarily asked for the object named, and especially from the appropriation granted for the same objects for the preceding year, and whenever new items not theretofore usual are introduced into such estimates for any year, he shall accompany the estimates by minute and full explanations of all such variations and new items, showing the reasons and grounds upon which the amounts are required, and the different items added. [R. S.]

Act of June 17, 1844, ch. 105, 5 Stat. L. 693; Act of March 3, 1855, ch. 175, 10 Stat. L. 670.

Sec. 3665. [Amount of outstanding appropriations to be designated.] The head of each Department, in submitting to Congress his estimates of expenditures required in his Department during the year then approaching, shall designate not only the amount required to be appropriated for the

next fiscal year, but also the amount of the outstanding appropriation, if there be any, which will probably be required for each particular item of expenditure. [R. S.]

Act of June 2, 1858, ch. 82, 11 Stat. L. 308.

Sec. 3669. [Estimates to be submitted to Congress through Secretary of Treasury.] All annual estimates for the public service shall be submitted to Congress through the Secretary of the Treasury, and shall be included in the book of estimates prepared under his direction. [R. S.]

Act of Sept. 2, 1789, ch. 12, 1 Stat. L. 65; Act of March 10, 1800, ch. 58, 2 Stat. L. 79, 80; Res. No. 2, Jan. 7, 1846, 9 Stat. L. 108; Act of Aug. 4, 1854, ch. 242, 10 Stat. L. 573; Act of May 18, 1865, ch. 85, 14 Stat. L. 49.

See the provisions of the Act of July 7, 1884, ch. 334, § 1, *infra*, this page.

Sec. 3670. [Estimates to be accompanied by statement of prior appropriations.] The Secretary of the Treasury shall annex to the annual estimates of the appropriations required for the public service, a statement of the appropriations for the service of the year, which may have been made by former acts. [R. S.]

Act of May 1, 1820, ch. 52, 3 Stat. L. 568.

Sec. 3672. [Statement of proceeds of sales of old material.] A detailed statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind except materials, stores, or supplies sold to officers and soldiers of the Army, or to exploring or surveying expeditions authorized by law shall be included in the appendix to the book of estimates. [R. S.]

Act of May 8, 1872, ch. 140, 17 Stat. L. 83.

R. S. sec. 3672 as originally enacted was amended to read as above by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 249, by inserting after the word "kind" the words "except materials, stores, or supplies sold to officers and soldiers of the Army, or to exploring or surveying expeditions authorized by law."

The statement of the proceeds of the sale of certain articles, required to be included in the book of estimates by the provisions of the text was required to be submitted separately by the Act of June 25, 1910, ch. 384, § 6, *infra*, p. 135.

SEC. 3. [Extracts to be included in Book of Estimates.] * * * The Secretary of the Treasury shall submit, as a part of the appendix to the Book of Estimates, such extracts from the annual reports of the several heads of Departments and Bureaus as relate to estimates for appropriations, and the necessities therefor. [18 Stat. L. 370.]

This is the latter part of section 3 of the Legislative, Executive and Judicial Appropriation Act of March 3, 1875, ch. 129. The first part of this section, relating to the time of submitting estimates, was superseded by the Act of March 3, 1901, ch. 830, § 5, *infra*, p. 134.

[SEC. 1.] [Estimates to be classified, indexed, etc.] And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall

first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department. [23 Stat. L. 254.]

This is from the Deficiencies Appropriation Act of July 7, 1884, ch. 334.

Estimates were required to be submitted to Congress through the Secretary of the Treasury by R. S. sec. 3669, *supra*, p. 133.

SEC. 5. [Time for submitting estimates.] That hereafter it shall be the duty of the heads of the several Executive Departments, and of other officers authorized or required to make estimates, to furnish to the Secretary of the Treasury, on or before the fifteenth day of October of each year, their annual estimates for the public service, to be included in the Book of Estimates prepared by law under his direction, and in case of failure to furnish estimates as herein required it shall be the duty of the Secretary of the Treasury to cause to be prepared in the Treasury Department, on or before the first day of November of each year, estimates for such appropriations as in his judgment shall be requisite in every such case, which estimates shall be included in the Book of Estimates prepared by law under his direction for the consideration of Congress. [31 Stat. L. 1009.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1901, ch. 830.

The provisions of the text superseded those of the Act of March 3, 1875, ch. 129, § 3, 18 Stat. L. 370, requiring the estimates to be furnished on or before the first day of October of each year.

SEC. 4. [Estimates to follow preceding year's appropriations — changes — general appropriation bills — all estimates to be included in book of estimates — restriction on special estimates.] Hereafter the estimates for expenses of the Government, except those for sundry civil expenses, shall be prepared and submitted each year according to the order and arrangement of the appropriation Acts for the year preceding. And any changes in such order and arrangement, and transfers of salaries from one office or bureau to another office or bureau, or the consolidation of offices or bureaus desired by the head of any Executive Department may be submitted by note in the estimates. The committees of Congress in reporting general appropriation bills shall, as far as may be practicable, follow the general order and arrangement of the respective appropriation Acts for the year preceding.

Hereafter the heads of the several Executive Departments and all other officers authorized or required to make estimates for the public service shall include in their annual estimates furnished the Secretary of the Treasury for inclusion in the Book of Estimates all estimates of appropriations required for the service of the fiscal year for which they are prepared and submitted, and special or additional estimates for that fiscal year shall only be submitted to carry out laws subsequently enacted, or when deemed imperatively necessary for the public service by the Department in which they shall originate in which case such special or additional estimate shall

be accompanied by a full statement of its imperative necessity and reasons for its omission in the annual estimates. [34 *Stat. L.* 448.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 22, 1906, ch. 3514.

As to the rearrangement of estimates not complying with this section, see the Act of March 4, 1909, ch. 297, § 4, immediately following.

SEC. 4. [Estimates not conforming to law to be rearranged.] When estimates hereafter transmitted to the Treasury for submission to Congress do not in form and arrangement comply with the provisions of section four of the legislative, executive, and judicial appropriation Act, approved June twenty-second, nineteen hundred and six, they shall, under direction of the Secretary of the Treasury, be rearranged so as to comply with said requirements of law. [35 *Stat. L.* 907.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1909, ch. 297.

The Act of June 22, 1906, § 4, above referred to, is given in the preceding text.

SEC. 7. [Annual estimates — statement to President if estimated revenue is exceeded — recommendations of reductions, or new taxes, etc.] Immediately upon the receipt of the regular annual estimates of appropriations needed for the various branches of the Government it shall be the duty of the Secretary of the Treasury to estimate as nearly as may be the revenues of the Government for the ensuing fiscal year, and if the estimates for appropriations, including the estimated amount necessary to meet all continuing and permanent appropriations, shall exceed the estimated revenues the Secretary of the Treasury shall transmit the estimates to Congress as heretofore required by law and at once transmit a detailed statement of all of said estimates to the President, to the end that he may, in giving Congress information of the state of the Union and in recommending to their consideration such measures as he may judge necessary, advise the Congress how in his judgment the estimated appropriations could with least injury to the public service be reduced so as to bring the appropriations within the estimated revenues, or, if such reduction be not in his judgment practicable without undue injury to the public service, that he may recommend to Congress such loans or new taxes as may be necessary to cover the deficiency. [35 *Stat. L.* 1027.]

This is from the Sundry Civil Appropriation Act of March 4, 1909, ch. 299.

SEC. 6. [Statement of sales of old material not included in Book of Estimates.] Hereafter the statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind shall be submitted to Congress at the beginning of each regular session

thereof as a separate communication and shall not hereafter be included in the annual Book of Estimates. [36 Stat. L. 773.]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

Former provisions requiring these statements to be included in the Book of Estimates were made by R. S. 3670, *supra*, p. 133.

SEC. 9. [Annual estimates to be made as now required by law.] That until otherwise provided by law, the regular annual estimates of appropriations for expenses of the Government of the United States shall be prepared and submitted to Congress, by those charged with the duty of such preparation and submission, only in the form and at the time now required by law, and in no other form and at no other time. [37 Stat. L. 415.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

SEC. 6. [Estimates for lump-sum appropriations—statements required.] That there shall be submitted hereafter, in the annual Book of Estimates following every estimate for a general or lump-sum appropriation, except public buildings or other public works constructed under contract, a statement showing in parallel columns:

First, the number of persons, if any, intended to be employed and the rates of compensation to each, and the amounts contemplated to be expended for each of any other objects or classes of expenditures specified or contemplated in the estimate, including a statement of estimated unit cost of any construction work proposed to be done; and

Second, the number of persons, if any, employed and the rate of compensation paid each, and the amounts expended for each other object or class of expenditure, and the actual unit cost of any construction work done, out of the appropriation corresponding to the estimate so submitted, during the completed fiscal year next preceding the period for which the estimate is submitted.

Other notes shall not be submitted following any estimate embraced in the annual Book of Estimates other than such as shall suggest changes in form or order of arrangement of estimates and appropriations and reasons for such changes. [37 Stat. L. 487, as amended by 38 Stat. L. 680.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355. It was amended to read as above given by a provision of the Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223, § 10. As originally enacted it was as follows:

"SEC. 6. Hereafter there shall be submitted, in the annual Book of Estimates, following every estimate for a general or lump sum appropriation which exceeds \$250,000 in amount, a statement showing in parallel columns:

First, the number of persons, if any, intended to be employed and the rates of compensation to each, and the amounts contemplated to be expended for each of any other objects or classes of expenditures specified or contemplated in the estimate; and

Second, the number of persons, if any, employed and the rates of compensation paid each, and the amounts expended for each other object or class of expenditures out of the appropriation corresponding to the estimate so submitted, during the completed fiscal year next preceding the period for which the estimate is submitted." [37 Stat. L. 487.]

SEC. 3. [Official to be designated to supervise preparation of estimates from each department.] That hereafter the head of each executive department and other Government establishment shall, on or before July first in every fiscal year, designate from among the officials employed therein one person whose duty it shall be to supervise the classification and compilation of all estimates of appropriations, including supplemental and deficiency estimates to be submitted by such department or establishment. In the performance of their duties persons so designated shall have due regard for the requirements of all laws respecting the preparation of estimates, including the manner and time of their submission through the Treasury Department to Congress; they shall also, as nearly as may be practicable, eliminate from all such estimates unnecessary words and make uniform the language commonly used in expressing purposes or conditions of appropriations. [38 Stat. L. 75.]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

II. APPROPRIATIONS

Sec. 3678. [Applications of moneys appropriated.] All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others. [R. S.]

Act of March 3, 1809, ch. 28, 2 Stat. L. 535; Act of Feb. 12, 1868, ch. 8, 15 Stat. L. 36.

A provision of the Indian Appropriation Act of June 7, 1897, ch. 3, § 11, 30 Stat. L. 93, providing that "where funds appropriated in specific terms for a particular object are not sufficient for the object named, any other appropriation, general in its terms, which otherwise would be available may, in the discretion of the Secretary of the Interior, be used to accomplish the object for which the specific appropriation was made," was repealed by the Act of March 3, 1911, ch. 210, § 1, 36 Stat. L. 1062.

Use for other purpose.—If appropriations are not used for the particular work designated by Congress they cannot be used for any other purpose. (1896) 21 Op. Atty.-Gen. 414.

Reimbursement of one department by another.—In (1882) 17 Op. Atty.-Gen. 481, Attorney-General Brewster said: "Where appropriations, made for different departments, are applicable to the same objects of expenditure (e. g., the same kind of supplies) it may often be advantageous to the public service and in the interest of economy for one department to avail itself of resources and facilities at the command of another department in obtaining the supplies needed, and in the absence of any statute forbidding it I perceive no objection to such a course. Should one department receive in this way from another department supplies which are within the scope of appropriations belonging to each, I submit that a reimbursement of the appropriation of the one department from the appropriation of the other of the cost of such supplies would not violate the pro-

visions of said section 3678. This could not be regarded as a diversion of funds from one object of expenditure to another, which is inhibited by that section; since the case supposes that the supplies are a legitimate object of expenditure for either appropriation." Accordingly, he was of opinion that there was no legal obstacle to reimbursing the appropriation for the navy department from the appropriation for the revenue marine for the cost of certain heavy ordnance and ordnance stores furnished by the navy department for the use of the revenue marine service.

Instance of unwarrantable diversion.—In (1886) 18 Op. Atty.-Gen. 463, the opinion was expressed that application of the fund provided for the Mississippi river improvement to the payment of the salaries and traveling expenses of members of the Mississippi river commission, such members having been appointed from civil life, and Congress not having made any specific appropriation for such salaries and traveling expenses, would be inconsistent with this section.

Sec. 3679. [No expenditures beyond appropriations.] No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month. [R. S.]

This section was amended to read as above given by a provision of the Urgent Deficiency Appropriation Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. L. 48. As originally enacted this section was as follows:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations."

Act of July 12, 1870, ch. 251, 16 Stat. L. 251.

The section was first amended by an Act of March 3, 1905, ch. 1484, § 4, 33 Stat. L. 1257, to read as follows:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any Department or officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made for the fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year; and all such apportionments shall be adhered to except when waived or modified in specific cases by the written order of the head of the

Executive Department or other Government establishment having control of the expenditure, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and all such waivers or modifications, together with the reasons therefor, shall be communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month."

It was amended a second time to read as given in the text by the Act of Feb. 27, 1906, ch. 510, § 3, previously cited.

A provision of the Act of May 1, 1884, ch. 37, 23 Stat. L. 17, relating to voluntary service, similar to the second sentence of this section given as amended in the text, was superseded thereby.

Provisions limiting certain contracts to amounts appropriated are made in R. S. secs. 3732, 3733, and in Act of March 3, 1875, ch. 130, 18 Stat. L. 395, all set forth in title PUBLIC CONTRACTS.

It is the settled and recognized policy of Congress to keep all the departments of the government, in the matter of incurring obligations for expenditures, within the appropriations annually made for conducting its affairs. *Parshall v. U. S.*, (C. C. A. 8th Cir. 1906) 147 Fed. 433, 77 C. C. A. 457.

R. S. sec. 3732 provides that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the war and navy departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year." That section is given in the title PUBLIC CONTRACTS, and in the annotations thereto will be found other authorities construing R. S. sec. 3679. This section and said R. S. sec. 3732 are *in pari materia* and are to be read together as one law. *U. S. v. Doullut*, (C. C. A. 5th Cir. 1914) 213 Fed. 729, 130 C. C. A. 243; (1877) 15 Op. Atty-Gen. 209; (1876) 15 Op. Atty-Gen. 124.

"The balance of the appropriation made for a given purpose may be used for that purpose, in the discharge of the obligations imposed by a lawful continuous contract, even though the appropriation be contained in the general annual appropriation bill, if the terms of the appropriation are applicable to the purpose to which it is proposed to be applied." (1887) 18 Op. Atty-Gen. 569. See also (1870) 13 Op. Atty-Gen. 291.

A certificate by an army paymaster upon an officer's pay account in the following words: "The within account is believed to be correct, and would be paid by me if I had public funds available for that purpose," would not be a violation of R. S. sec. 3679 (see PUBLIC CONTRACTS); and the secretary of war may properly issue an order giving authority to army paymasters to make such certificates. (1877) 15 Op. Atty-Gen. 271.

After an appropriation is exhausted, a contract not for the completion of any specific work, as the erection of a building, the construction of a road, or rendering a channel adequate for the passage of

vessels of a certain draft, is at an end. Work done after the appropriation is exhausted would not come within such a contract. Executive officers are prohibited by R. S. secs. 3679, 3732, 3733 (see PUBLIC CONTRACTS) and 5503 (re-enacted as section 98 of the Penal Laws and repealed thereby, see PENAL LAWS) from continuing the employment of the contractors. If further appropriations are made, there must be a new contract for their expenditure. (1895) 21 Op. Atty-Gen. 244.

Rent in excess of appropriation.—In *Hooe v. U. S.*, (1910) 218 U. S. 322, 31 S. Ct. 85, 54 U. S. (L. ed.) 1055, it was held that the owners of a building who have received the entire sums which Congress has from year to year appropriated as full compensation for the rent of quarters secured for the civil service commission by the secretary of the interior, in the discharge of his duty under the Act of Jan. 16, 1883, ch. 27, 22 Stat. L. 403, 405 (see CIVIL SERVICE), cannot maintain suit against the government under the Act of March 3, 1887, ch. 359, 24 Stat. L. 505, (repealed in part by the Judicial Code, see JUDICIARY), to recover the difference between such sums and the fair rental value of the building, including the basement, which was used without consent, on the theory that the claim is founded upon a contract, express or implied, or upon the constitutional obligation to make just compensation for private property taken for public use, in view of R. S. secs. 3679, 3732, providing respectively that "no department of the government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations," and that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment," and of the Acts of Congress of June 22, 1874, ch. 388, 18 Stat. L. 133, 144, and March 3, 1877, ch. 106, 19 Stat. L. 363, 370 (see PUBLIC CONTRACTS), prohibiting contracts for the rental of property for government purposes until an

appropriation therefor shall have been made in terms by Congress.

Construction of provision of Act of May 1, 1884.—With reference to the provision of the Act of May 1, 1884, ch. 37, noted as superseded by the second sentence of the text, it was said in *Glavey v. U. S.*, (1900) 35 Ct. Cl. 256 that it related only to employees in the Indian office. But in *U. S. v. San Jacinto Tin Co.*, (1888) 125 U. S. 273, 8 S. Ct. 850, 31 U. S. (L. ed.) 747, Mr. Justice Field said: "I cannot admit that the attorney-general can, at the request of private parties, rightfully allow the use

of the name and power of the United States in proceedings for the annulment of patents, upon such parties executing a bond as security for costs, or upon any other stipulation of indemnity to them." And after quoting the provision he continued: "The language here used clearly indicates that the government shall not, except in the emergencies mentioned, place itself under obligations to any one. The principle condemned is the same, whether the party rendering the service does so without any charge or because paid by other parties."

Sec. 3681. [Expenses of commissions and inquiries.] No accounting or disbursing officer of the Government shall allow or pay any account or charge whatever, growing out of, or in any way connected with, any commission or inquiry, except courts-martial or courts of inquiry in the military or naval service of the United States, until special appropriations shall have been made by law to pay such accounts and charges. This section, however, shall not extend to the contingent fund connected with the foreign intercourse of the Government, placed at the disposal of the President. [R. S.]

Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 533.

Inquiry by executive department.—The executive department has authority to appoint agents or commissioners to make investigations required by congressional acts or resolutions; but it has no authority to pay for them, except from an appropriation for that purpose. (1843) 4 Op. Atty.-Gen. 248.

In (1842) 4 Op. Atty.-Gen. 106, it was advised that the executive department had no authority to pay for an inquiry or commission as to damages incurred by certain persons from a party of Indians, without a previous appropriation therefor.

Sec. 3682. [Restrictions on contingent, etc., appropriations.] No moneys appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation. [R. S.]

Act of July 12, 1870, ch. 251, 16 Stat. L. 250.

Employment at the seat of government in any executive department or subordinate bureau or office thereof, or payment of employees from any appropriation made for contingent expenses, or for any specific or general purpose, is prohibited unless provision is specifically made therefor in the law granting the appropriation. See Act of Aug. 5, 1882, ch. 389, § 4, 22 Stat. L. 255, given in the title CIVIL SERVICE.

"The adjectives contingent, incidental, and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well understood meaning; it is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business, which cannot well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of 'contingent expenses,' or 'incidental expenses,' or 'miscellaneous expenses.' Such appro-

priations the law says shall not be used for clerk hire. . . . It is clear that specific appropriation being made for clerks, messengers, laborers, rent, light, fuel, stationery, telegrams, and postage, no disbursement can be made for any such expense from the appropriation for 'miscellaneous expenses' which covers non-enumerated petty disbursements necessarily made in performance of the duties imposed by law." *Dunwoody v. U. S.*, (1887) 22 Ct. Cl. 280.

"Expenses."—"When Congress appropriate money to pay expenses, they must be assumed to mean those expenses which are necessarily incident to the work they direct to be done. Where a duty is placed

upon an officer the performance of which necessarily involves travel, or clerk hire, or office rent, then a broad provision for expenses will include the cost of such travel, clerk hire, or office rent." *Dunwoody v. U. S.*, (1887) 22 Ct. Cl. 279.

Special enactment superseding.—In (1878) 15 Op. Atty.-Gen. 434, the opinion was expressed that under the Act of Aug. 15, 1876, ch. 289, 19 Stat. L. 198,

making appropriations for the current and contingent expenses of the Indian department, etc., and providing "that amounts now due employees for year ending June 30, 1876, may be paid out of unexpended balance of the incidental fund of that year," the accounting officers were authorized to pay clerical or official services out of the unexpended balance of the incidental fund of the fiscal year 1876.

Sec. 3683. [Restrictions upon purchases from contingent funds.] No part of the contingent fund appropriated to any Department, Bureau, or office, shall be applied to the purchase of any articles except such as the head of the Department shall deem necessary and proper to carry on the business of the Department, Bureau, or office, and shall, by written order, direct to be procured. [*R. S.*]

Act of Aug. 26, 1842, ch. 202, 19 Stat. L. 527.

Appropriations for the bureau of engraving and printing are not to be deemed contingent expenses of the Treasury Department, and they are expressly excepted from the operation of the above section. See the Act of June 4, 1897, ch. 2, 30 Stat. L. 18, given in the title **TREASURY DEPARTMENT**.

Delegation of authority.—The authority given by this section to the heads of departments is a special authority and cannot be delegated or transferred by the head of a department to any one else, and he should not only give the order himself for the purpose, but should approve the vouchers therefor also. (1886) 18 Op. Atty.-Gen. 424.

But under *R. S.* sec. 439 (see **INTERIOR DEPARTMENT**), providing that "the assistant secretary of the interior shall perform such duties in the department of the interior as shall be prescribed by the secretary, or may be required by law," it is competent for the secretary to devolve upon such assistant the authority vested by *R. S.* sec. 3683. (1886) 18 Op. Atty.-Gen. 432.

Sec. 3689. [Permanent indefinite appropriations.] There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively; and such appropriations shall be deemed permanent annual appropriations. [*R. S.*]

MISCELLANEOUS.

Salaries and expenses southern claims commission:

In the Revised Statutes at this place appeared the following paragraph: "Salaries and expenses southern claims commission: To pay the salaries and actual expenses of office-rent, furniture, fuel, stationery, and printing of the southern claims commission."

Act of March 3, 1871, ch. 116, 16 Stat. L. 525.

It was expressly repealed by the Legislative, Executive, and Judicial Appropriation Act of June 19, 1878, ch. 329, 20 Stat. L. 205.

EXECUTIVE.

UNDER THE TREASURY DEPARTMENT

Return of the proceeds of captured and abandoned property:

For the return of proceeds from the sale of captured and abandoned property in insurrectionary districts, to the owners thereof, who may, to the satisfaction of the Court of Claims, prove their right to and ownership of said property. [*R. S.*]

Act of March 12, 1863, ch. 120, 12 Stat. L. 820.

Consular receipts:

For the proceeds of the personal estates of American citizens who die abroad, to be paid to the legal representatives of the said deceased party upon proper demand and proof. [R. S.]

Act of April 14, 1792, ch. 24, 1 Stat. L. 255.

Payment for land sold for direct taxes:

To repay to purchasers evicted through failure of title from lands sold to them in insurrectionary districts for direct taxes. [R. S.]

Act of May 9, 1872, ch. 145, 17 Stat. L. 89; Act of June 8, 1872, ch. 337, 17 Stat. L. 332.

Eviction by the judgment of a state court is not sufficient under this provision. Failure of title must be by the judgment of a United States court in order to give the right to the repayment of the purchase money. *Beaumont v. U. S.*, (1890) 25 Ct. Cl. 349.

The purchaser must defend in good

faith, and can recover only upon a judgment of eviction, without collusion; and where the purchaser sells by quitclaim, the government is not liable, as he does not suffer by eviction on the part of his grantee. *Bliss v. U. S.*, (1892) 27 Ct. Cl. 388.

Payment for coin, &c., destroyed at Chicago:

For the adjustment of the accounts of the collector of customs and ex-officio depositary at Chicago, to allow him a proper credit for moneys held by him and destroyed by fire in said city on the ninth and tenth days of October, eighteen hundred and seventy-one. [R. S.]

Act of June 10, 1872, ch. 415, 17 Stat. L. 369.

Refunding money for lands redeemed, (direct-tax laws):

For refunding the principal and interest of the purchase-money of lands redeemed after the sale of the same, under "An act further to amend an act entitled 'An act for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes,' approved June 7, 1862." [R. S.]

Act of March 3, 1865, ch. 87, 13 Stat. L. 502.

Refunding taxes illegally collected under the direct-tax laws:

To refund to persons money collected from them without warrant of law, as in payment of dues under the direct-tax laws. [R. S.]

Res. No. 28, Feb. 25, 1867, 14 Stat. L. 568.

When right of action accrues.—It is not until it has become a trust fund in the treasury, payable on presentation of the demand, that money "collected without warrant of law as in payment of dues under the direct tax laws" constitutes a right of action; and the statute of limitations runs from the date of such demand. *Harrison v. U. S.*, (1885) 20 Ct. Cl. 175;

Simons v. U. S., (1884) 19 Ct. Cl. 601. See also *U. S. v. Taylor*, (1881) 104 U. S. 216, 26 U. S. (L. ed.) 721.

Interest on a direct tax exacted for a term beginning prior to a legal assessment is money collected "without warrant of law." *Simons v. U. S.*, (1884) 19 Ct. Cl. 601.

Salaries and expenses of steamboat inspectors:

There appeared at this place the following provision:

"Out of the revenues received into the Treasury from the inspection of steam-vessels and the licensing of the officers of such vessels; for the payment of the salaries of all

supervising inspectors, local inspectors, assistant inspectors, supervising inspector-general, and clerks, together with their traveling and other expenses when on official duty, and for all instrumenta, books, blanks, stationery, furniture, and other things necessary to carry into effect the provisions of Title 'REGULATION OF STEAM-VESSELS.'"

Act of Feb. 25, 1871, ch. 100, 16 Stat. L. 458.

It was included in the repeal of all laws making appropriations of this nature by a provision of the Act of June 25, 1910, ch. 384, § 8, 36 Stat. L. 773.

Interest on the public debt:

For payment of interest on the public debt, under the several acts authorizing the same. [R. S.]

Act of Feb. 9, 1847, ch. 7, 9 Stat. L. 123.

Bonds issued to Pacific Railway:

For payment of interest on bonds issued by authority of law to Pacific Railway. [R. S.]

Act of Feb. 9, 1847, ch. 7, 9 Stat. L. 123; Act of July 1, 1862, ch. 120, 12 Stat. L. 492; Act of July 2, 1864, ch. 216, 13 Stat. L. 359.

Expenses of national loan.

In the Revised Statutes at this place appeared the following paragraph: "Expenses of national loan: To pay the expenses of the issue, re-issue, transfer, delivery, redemption, and destruction of securities, legal-tender notes, fractional currency, checks, certificates, commissions, and for any plate and seal engraving and printing required by the Treasury Department, one per centum of the amount of legal-tender notes, fractional currency, and securities issued during each fiscal year." Act of May 23, 1872, ch. 197, 17 Stat. L. 156.

The above paragraph was repealed by force of the following provision in the Legislative, Executive, and Judicial Appropriation Act of June 20, 1874, ch. 328, 18 Stat. L. 109:

"SEC. 4. That the act entitled 'An act limiting the appropriation of certain moneys for the preparation, issue, and reissue of certain securities of the United States, and for other purposes,' approved May twenty-third, eighteen hundred and seventy-two, and all other acts and parts of acts making permanent appropriations for the expenses of the national loan, except the second section of the act approved July fourteenth, eighteen hundred and seventy, entitled 'An act to authorize the refunding of the national debt,' are hereby repealed, this repeal to take place on the first day of July next; and hereafter the Secretary of the Treasury shall annually submit to Congress detailed estimates of appropriations required for said expenses; * * *"

Refunding the national debt:

Of one-half of one per centum of the amount of bonds authorized under the act of July fourteen, eighteen hundred and seventy, to pay the expenses of preparing, issuing, and disposing of the same. [R. S.]

Act of July 14, 1870, ch. 256, 16 Stat. L. 272; Act of Jan. 20, 1871, ch. 23, 16 Stat. L. 399.

This paragraph was excepted from the repealing provisions of the Act of June 20, 1874, ch. 328, § 4, set forth in the note to the preceding paragraph of the text, and was originally a part of section 2 of the Act of July 14, 1870, therein referred to.

Sinking fund:

Of one per centum of the entire debt of the United States, to be set apart as a sinking fund for the purchase or payment of the public debt, in such manner as the Secretary of the Treasury shall from time to time direct. [R. S.]

Act of Feb. 25, 1862, ch. 33, 12 Stat. L. 346.

Refunding moneys erroneously received and covered:

To refund moneys received and covered into the Treasury before the payment of legal and just charges against the same. [R. S.]

Act of July 23, 1866, ch. 208, 14 Stat. L. 208.

Compensation of persons employed in insurrectionary States, (internal revenue:)

To pay such persons as were actually employed in the insurrectionary States, in connection with the Treasury Department, as officers of the United States, during the years eighteen hundred and sixty-five and eighteen hundred and sixty-six. [R. S.]

Act of July 15, 1870, ch. 292, 16 Stat. L. 310.

Allowances and drawbacks, (internal revenue:)

In the Revised Statutes at this place appeared the following paragraph: "Allowances and drawbacks, (internal revenue:) Indefinite appropriation to pay allowance or drawback on articles on which any internal duty or tax shall have been paid when said articles are exported under the act of July one, eighteen hundred and sixty-two, chapter one hundred and nineteen." Act of July 1, 1862, ch. 117, 12 Stat. L. 488.

The above paragraph was amended by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 249, by striking out the words "the act of July one, eighteen hundred and sixty-two, chapter one hundred and nineteen," and inserting therefor the words "section three thousand four hundred and forty-one." R. S. sec. 3441 authorized certain drawbacks and has been repealed or superseded by the Act of June 18, 1890, ch. 432, 26 Stat. L. 162, and the Act of March 3, 1883, ch. 121, § 1, 22 Stat. L. 488. See the title **INTERNAL REVENUE**.

Refunding taxes illegally collected, (internal revenue:)

To refund and pay back duties erroneously or illegally assessed or collected under the internal-revenue laws. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 239.

Redemption of stamps, (internal revenue:)

Of such sum of money as may be necessary to repay the amount or value paid for internal-revenue stamps which may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or which through mistake may have been improperly or unnecessarily used. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 294; Act of June 6, 1872, ch. 315, 17 Stat. L. 257.

Debentures and other charges, (customs:)

To pay debentures and other charges arising from duties, the revenue remaining in the hands of the collecting officers not being sufficient to pay said debentures. [R. S.]

Act of October 16, 1837, ch. 10, 5 Stat. L. 207.

Debentures and drawbacks, (customs:)

For the payment of debentures or drawbacks, bounties, and allowances, which are or may be authorized and payable according to laws authorizing them: *Provided*, The collectors of customs shall be the disbursing agents to pay the same. [R. S.]

Act of March 3, 1849, ch. 110, 9 Stat. L. 398.

Distributive shares of fines, penalties, and forfeitures, (customs:)

In the Revised Statutes at this place appeared the following paragraph: "For the payment, under the direction of the Secretary of the Treasury, of the distributive shares of fines, penalties, and forfeitures under the customs laws." Act of March 2, 1867, ch. 188, 14 Stat. L. 546.

The above paragraph was abrogated by the provisions of sections 2 and 3 of the Act of June 22, 1874, ch. 391, 18 Stat. L. 186, abolishing moieties to informers and officers, which are set forth in title CUSTOMS DUTIES.

Repayment of excess of deposits for unascertained duties, (customs:)

To repay to importers the excess of deposits for unascertained duties, or duties or other moneys paid under protest. [R. S.]

Act of June 30, 1864, ch. 171, 13 Stat. L. 215.

By the Act of June 10, 1890, ch. 407, § 24, 26 Stat. L. 140, a provision was made for refunding overpayments of customs duties and a permanent appropriation made therefor. This Act was amended by the Tariff Act of Aug. 5, 1909, ch. 6, § 28, 36 Stat. L. 743, and was in effect re-enacted by the Underwood Tariff Act of Oct. 3, 1912, ch. 16, § III Y, 38 Stat. L. 191. See the title CUSTOMS DUTIES.

Refunding duties on goods destroyed, (customs:)

For refunding duties paid or accruing on goods, wares, or merchandise injured or destroyed by accidental fire or other casualty, while in the custody of the officers of customs, in any public or private warehouse, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or after their arrival within the limits of any port of entry of the United States, and before the same have been landed under the supervision of the officers of the customs, or while in transportation under bond from the port of entry to any other port of the United States. [R. S.]

Act of March 28, 1854, ch. 30, 10 Stat. L. 273; Act of March 3, 1865, ch. 80, 13 Stat. L. 495.

Marine-hospital establishment, (customs:)

In the Revised Statutes at this place appeared the following paragraph: "Of the moneys collected from masters or owners of vessels of the United States, at the rate of forty cents per month for every seaman employed, to constitute a general fund to be used for the benefit and convenience of sick and disabled American seamen." Act of July 16, 1798, ch. 77, 1 Stat. L. 605; Act of March 2, 1799, ch. 36, 1 Stat. L. 729; Act of March 3, 1802, ch. 51, 2 Stat. L. 192; Act of March 1, 1843, ch. 49, 5 Stat. L. 602; Act of July 20, 1846, ch. 60, 9 Stat. L. 38; Act of June 29, 1870, ch. 169, 16 Stat. L. 170.

The above paragraph is repealed by force of the provisions of the Act of June 28, 1884, ch. 121, § 15, 23 Stat. L. 57, which repeal all Acts and parts of Acts providing for the assessment and collection of a hospital tax for seamen.

Of the proceeds of leases and sales of marine-hospital buildings, and lands appertaining thereto, for the marine-hospital establishment. [R. S.]

Act of April 20, 1866, ch. 63, 14 Stat. L. 40.

Refunding duties, (customs:)

To refund to parties entitled to refund of duties, under the twenty-sixth section of the act of July fourteen, eighteen hundred and seventy, and joint resolution approved January thirty, eighteen hundred and seventy-one. [R. S.]

Act of March 3, 1871, ch. 114, 16 Stat. L. 514; Act of June 6, 1872, ch. 315, 17 Stat. L. 238; Act of June 10, 1872, ch. 425, 17 Stat. L. 381.

Refunding proceeds of goods seized and sold, (customs:)

To refund the proceeds of goods, wares, and merchandise seized and sold for having been illegally imported into the United States. [R. S.]

Act of April 2, 1844, ch. 8, 5 Stat. L. 653.

Refunding proceeds of unclaimed merchandise, (customs:)

To repay to claimants the overplus received from the sale of unclaimed merchandise, on due proof of their property and entitlement. [R. S.]

Act of March 2, 1799, ch. 22, 1 Stat. L. 670.

Refunding duty on tea and coffee, (customs:)

To refund the duties which may have been paid on all tea and coffee in bonded warehouses on the first day of July, eighteen hundred and seventy-two. [R. S.]

Act of May 1, 1872, ch. 131, 17 Stat. L. 59.

Drawback on certain articles imported into the district of Chicago, (customs:)

For the payment of a drawback of the import duties paid on all materials, except lumber, imported to be and actually used in buildings erected on the site of buildings burned by the fire in Chicago. [R. S.]

Act of April 5, 1872, ch. 88, 17 Stat. L. 51.

Refunding certain discriminating duties, (customs:)

To refund the duties which may have been paid under the provisions of section twenty-five hundred and two on merchandise imported in French vessels from countries other than France, and which was on shipboard and bound to the United States on the fifth day of November, eighteen hundred and seventy-two. [R. S.]

Act of Feb. 14, 1873, ch. 137, 17 Stat. L. 437.

UNDER THE WAR DEPARTMENT.

Bounty to soldiers:

For payment of bounties to soldiers, or their widows or legal heirs, under the twelfth, thirteenth, fourteenth, fifteenth, and sixteenth sections of "An act making appropriations for sundry civil expenses of the Government for the year ending June thirty, eighteen hundred and sixty-seven, and for other purposes." [R. S.]

Act of July 28, 1866, ch. 296, 14 Stat. L. 322; Act of April 22, 1872, ch. 114, 17 Stat. L. 55.

The Act of April 22, 1872, ch. 114, from which the text was drawn, was amended by an Act of July 20, 1888, § 1, 25 Stat. L. 338, but the amendment is omitted as obsolete.

Support of National Home for Disabled Volunteer Soldiers:

In the Revised Statutes at this place appeared the following paragraph: "Support of National Asylum for Disabled Volunteer Soldiers: Of all stoppages or fines adjudged against volunteer officers and soldiers by sentence of court-martial or military commission, over and above the amount necessary for the re-imbursement of the Government

or individuals, all forfeitures on account of desertion from such service, and all moneys due such deceased officers and soldiers which are or may be unclaimed for three years after the death of such officers and soldiers, to be repaid upon the demand of the heirs or legal representatives of such deceased officers and soldiers, to be used for the establishment and support of the National Asylum for Disabled Volunteer Soldiers."

Act of March 3, 1849, ch. 129, 9 Stat. L. 415, 416; Act of March 3, 1863, ch. 78, 12 Stat. L. 743.

The above paragraph was amended by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 319, by striking out the word "asylum" wherever it occurred and inserting therefor the word "home."

The paragraph as amended was repealed by provisions in the Legislative, Executive, and Judicial Appropriation Act of March 3, 1875, ch. 129, 18 Stat. L. 359. See the title HOSPITALS AND ASYLUMS.

Soldiers' Home:

Of all stoppages or fines adjudged against soldiers by sentence of court-martials, over and above any amount that may be due for the reimbursement of Government or of individuals; all forfeitures on account of desertion; and all moneys belonging to the estates of deceased soldiers, which now are or may hereafter be unclaimed for the period of three years subsequent to the death of said soldier or soldiers, to be repaid by the commissioners of the institution, upon the demand of the heirs or legal representatives of the deceased. [R. S.]

Act of March 3, 1851, ch. 25, 9 Stat. L. 596; Act of July 5, 1862, ch. 133, 12 Stat. L. 508.

Horses and other property lost in military service:

To pay for horses, mules, oxen, wagons, carts, sleighs, harness, steamboats, and other vessels, railroad-engines and railroad-cars, killed, lost, captured, destroyed, or abandoned while in the military service under the provisions of Title "DEBTS DUE BY OR TO THE UNITED STATES." [R. S.]

Act of March 3, 1849, ch. 129, 9 Stat. L. 415, 416; Act of March 3, 1863, ch. 78, 12 Stat. L. 743.

The provisions of title "Debts Due by or to the United States," to which the text refers, are R. S. secs. 3482-3487, which are set forth and annotated in title CLAIMS.

Payment to certain military organizations in Kansas:

To pay to the members of the military organizations known as the Westport Police Guards, Hickman's Mills Company, and Companies A, B, C, D, and E, of the Kansas City Station Guards, under private act of April twelve, eighteen hundred and seventy-one, chapter twelve, the pay and allowances of volunteers in the service of the United States. [R. S.]

Private Act of April 12, 1871, ch. 12, 17 Stat. L. 641, 642.

Tax on salaries:

For the payment of the tax on salaries and compensation, where no other appropriation is available, in order to show the true receipts of the Government, under the operations of this section, upon the books of the Treasury Department. [R. S.]

Act of March 2, 1867, ch. 169, 14 Stat. L. 480.

Traveling expenses of California and Nevada volunteers:

To pay for the traveling expenses of such California and Nevada volunteers as were discharged in New Mexico, Arizona, or Utah, and at points

distant from the place or places of enlistment, such proportionate sum, according to the distance traveled, as has been paid to the troops of other States similarly situated. [R. S.]

Act of March 2, 1867, ch. 170, 14 Stat. L. 487.

Allowance for reduction of wages under eight-hour law:

Of such sum as may be required in the settlement of all accounts for the services of laborers, workmen, and mechanics employed by or on behalf of the Government, between the twenty-fifth day of June, eighteen hundred and sixty-eight, the date of the act constituting eight hours a day's work for all such laborers, workmen, and mechanics, and the nineteenth day of May, eighteen hundred and sixty-nine, the date of the proclamation of the President concerning such pay, to settle and pay for the same without reduction on account of reduction of hours of labor by said act, when it shall be made to appear that such was the sole cause of the reduction of wages. [R. S.]

Act of May 18, 1872, ch. 172, 17 Stat. L. 134.

UNDER THE NAVY DEPARTMENT.

Indemnity to seamen and marines for lost clothing:

To allow and pay to each person, not an officer, employed on a vessel of the United States, sunk or otherwise destroyed, and whose personal effects have been lost, a sum not exceeding sixty dollars. In the event of the death of the person, this sum is to be paid to his proper legal representatives. [R. S.]

Act of July 4, 1864, ch. 248, 13 Stat. L. 390.

Prize-money to captors:

For one moiety of the proceeds of prizes captured by vessels of the United States, to be distributed to the officers and crews thereof, in conformity to the provisions of Title "PRIZE;" also, the proceeds of derelict and salvage cases adjudged by the courts of the United States to salvors. [R. S.]

Act of June 30, 1864, ch. 174, 13 Stat. L. 311.

By the Act of March 3, 1899, ch. 413, § 13, set forth in NAVY, "all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war" are thereby repealed.

UNDER THE INTERIOR DEPARTMENT.

Deposits by individuals for surveying public lands:

Of the amount deposited by individuals under the provisions of Title "THE PUBLIC LANDS," to pay the cost and expenses incident to the survey of lands, not mineral or reserved, upon which they have settled, any excess of the sums so deposited, over and above the actual cost of surveys comprising all expenses incident thereto, for which they were severally deposited, to be repaid to the depositors, respectively. [R. S.]

Act of May 30, 1862, ch. 86, 12 Stat. L. 410; Rea. No. 60, July 1, 1864, 13 Stat. L. 414.

The provisions of title "The Public Lands" to which the text refers are R. S. secs. 2402-2403, which are set forth, with amendments, in title PUBLIC LANDS

Five, three, and two per centum fund to States, (lands:)

To pay to the States of Missouri, Michigan, Florida, Iowa, Wisconsin, Minnesota, Oregon, and Nevada, five per centum of the net proceeds of sales of all public lands lying within their limits, for the purpose of education, or of making public roads and improvements, in pursuance of the acts of March sixth, eighteen hundred and twenty, chapter twenty-two; of June twenty-third, eighteen hundred and thirty-six, chapter one hundred and twenty-one; of March third, eighteen hundred and forty-five, chapter seventy-five; of March third, eighteen hundred and forty-five, chapter seventy-six; of August sixth, eighteen hundred and forty-six, chapter fifty-three; of February twenty-sixth, eighteen hundred and fifty-seven, chapter sixty; of February fourteenth, eighteen hundred and fifty-nine, chapter thirty-three; of February twenty-eight, eighteen hundred and fifty-nine, chapter sixty-five; and of March twenty-first, eighteen hundred and sixty-four, chapter thirty-six. [R. S.]

Act of March 6, 1820, ch. 22, 3 Stat. L. 547; Act of June 23, 1836, ch. 121, 5 Stat. L. 60; Act of March 3, 1845, ch. 75, 5 Stat. L. 788; Act of March 3, 1845, ch. 76, 5 Stat. L. 790; Act of March 3, 1847, ch. 53, 9 Stat. L. 179; Act of Feb. 26, 1857, ch. 60, 11 Stat. L. 167; Act of Feb. 14, 1859, ch. 33, 11 Stat. L. 384; Act of Feb. 28, 1859, ch. 65, 11 Stat. L. 388; Act of March 21, 1864, ch. 36, 13 Stat. L. 32.

Indemnity for swamp-lands for States:

To pay to the States the proceeds of swamp-lands within their limits which may have been erroneously sold by the United States. [R. S.]

Act of March 2, 1855, ch. 147, 10 Stat. L. 634.

Refunding money for lands erroneously sold:

To pay to the purchaser or purchasers the sum or sums of money received for lands erroneously sold by the United States. [R. S.]

Act of Jan. 12, 1825, ch. 5, 4 Stat. L. 80; Act of Feb. 25, 1825, ch. 13, 4 Stat. L. 91; Act of Feb. 28, 1859, ch. 64, 11 Stat. L. 387.

Survey of Vigil and Saint Vrain land-claims:

To pay the expenses for the survey of the Vigil and Saint Vrain land-claims. [R. S.]

Act of Feb. 25, 1869, ch. 47, 15 Stat. L. 275.

Instructing the blind:

There appeared at this place the following provision:

"To pay for the instruction of the indigent blind children formerly instructed in the 'Columbia Institution for the Instruction of the Deaf, Dumb, and Blind,' in Maryland, or some other State."

Act of Feb. 23, 1865, ch. 50, 13 Stat. L. 436.

It was repealed by a provision of the Act of May 26, 1908, ch. 198, § 1, 35 Stat. L. 295.

Payment of interest to North Carolina Cherokees:

To pay each member of every family of the Cherokee Nation of Indians that remained in the State of North Carolina at the time of the treaty of New Echota, May twenty-third, eighteen hundred and thirty-six, interest

at the rate of six per centum per annum on a sum equal to fifty-three dollars and thirty-three cents for each individual member, as aforesaid. [R. S.]

Act of July 29, 1848, ch. 118, 9 Stat. L. 284.

Survey of the Nolan private land-claim in Colorado:

To pay the expenses for the survey of the Nolan land-claim. [R. S.]

Private Act of July 1, 1870, ch. 202, 16 Stat. L. 646.

Smithsonian Institution:

To pay for the erection of buildings and expenses of the Smithsonian Institution, being six per centum on the fund derived from the bequest of James Smithson. [R. S.]

Act of Aug. 10, 1846, ch. 178, 9 Stat. L. 102.

JUDICIAL.

SUPREME COURT OF THE UNITED STATES.

Salaries, justices, &c., Supreme Court.

In the Revised Statutes at this place appeared the following paragraph: "To pay the reporter of the Supreme Court for three hundred copies of the second volume of the decisions of the court." Act of March 2, 1867, ch. 168, 14 Stat. L. 471.

The volumes mentioned by the text were required by R. S. sec. 681, 682, which, with other Acts relating to the same subject, are incorporated in the Judicial Code, § 236, 36 Stat. L. 1153, and repealed by section 297 thereof, 36 Stat. L. 1168. See JUDICIARY.

MISCELLANEOUS.

Fees of supervisors of elections.

In the Revised Statutes at this place appeared the following paragraph: "To pay supervisors of elections compensation apart from and in excess of all fees allowed by law for the performance of any duty as circuit-court commissioner." Act of Feb. 28, 1871, ch. 99, 16 Stat. L. 438.

It was repealed by virtue of a provision of the Act of Feb. 8, 1894, ch. 25, § 2, 28 Stat. L. 36, which repealed all "statutes and parts of statutes relating in any manner to supervisors of election."

Sec. 3690. [Expenditure of balances of appropriations.] All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations. [R. S.]

Act of July 12, 1870, ch. 251, 16 Stat. L. 251.

See the note to the following R. S. sec. 3691.

Pay of navy and marine corps.—Moneys appropriated under the heads of pay of the navy and pay of the marine corps for the fiscal year ending June 30, 1884, of which there were unexpended balances without outstanding indebtedness against them, were held inapplicable to payment

of the navy and marine corps, for services rendered in the fiscal year 1885. (1886) 18 Op. Atty.-Gen. 412.

Funds in hands of disbursing officers.—Although funds have been paid from the treasury into the hands of disbursing officers, if they have not been paid out or

have not been expressly set aside for the payment of debts which have been ascertained and determined, when the time arrives at which the unexpended balances of appropriations lapse into the treasury, it will be the duty of the disbursing officers to repay such funds, that they may be carried to the surplus fund and thereafter covered into the treasury. If, however, previous to that time, they should have issued certificates by which claims upon these appropriations have been definitely determined and decided, and the parties in whose favor the cer-

tificates are issued are entitled to their money, although the payment has not actually been made before the date referred to, such claims may thereafter properly be paid by the disbursing officers. For what period the disbursing officers should be allowed to retain in their hands funds for the purpose of meeting certificates issued by them is a matter of administration only, the regulation of which falls within the jurisdiction of the secretary of the treasury. (1877) 15 Op. Atty-Gen. 357.

Sec. 3691. [Disposal of balances after two years.] All balances of appropriations which shall have remained on the books of the Treasury, without being drawn against in the settlement of accounts, for two years from the date of the last appropriation made by law, shall be reported by the Secretary of the Treasury to the Auditor of the Treasury, whose duty it is to settle accounts thereunder, and the Auditor shall examine the books of his Office, and certify to the Secretary whether such balances will be required in the settlement of any accounts pending in his office; and if it appears that such balances will not be required for this purpose, then the Secretary may include such balances in his surplus-fund warrant, whether the head of the proper Department shall have certified that it may be carried into the general Treasury or not. But no appropriation for the payment of the interest or principal of the public debt, or to which a longer duration is given by law, shall be thus treated. [R. S.]

Act of July 12, 1870, ch. 251, 16 Stat. L. 251.

The provisions of this and the preceding R. S. sec. 3690 were extended to balances of appropriations for volunteer soldiers' homes by a provision of the Act of Oct. 2, 1883, ch. 1069, 25 Stat. L. 543. See HOSPITALS AND ASYLUMS.

Further provisions with respect to the disposal of unexpended appropriations were made by the Act of June 20, 1874, ch. 328, § 5, *infra*, p. 152, and the Act of June 14, 1878, ch. 191, § 4, *infra*, p. 152.

Sec. 3692. [Proceeds of certain sales, etc., of material.] All moneys received from the leasing or sale of marine hospitals, or the sale of revenue-cutters, or from the sale of commissary stores to the officers and enlisted men of the Army, or from the sale of materials, stores, or supplies sold to officers and soldiers of the Army, or from sales of condemned clothing of the Navy, or from sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall respectively revert to that appropriation out of which they were originally expended, and shall be applied to the purposes for which they are appropriated by law. [R. S.]

Act of March 3, 1847, ch. 48, 9 Stat. L. 171; Act of April 20, 1866, ch. 63, 14 Stat. L. 40; Act of July 28, 1866, ch. 299, 14 Stat. L. 336; Act of May 8, 1872, ch. 140, 17 Stat. L. 83; Act of June 8, 1872, ch. 348, 17 Stat. L. 337.

R. S. sec. 3692, as originally enacted, was amended to read as above by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 249, by inserting after the word "Army," where it first occurs, the words "or from the sale of materials, stores, or supplies sold to officers and soldiers of the Army."

"Proceeds of all sales of subsistence-supplies shall hereafter be exempt from being covered into the Treasury and shall be immediately available for the purchase of fresh supplies," is a provision in the Deficiencies Appropriation Act of March 3, 1875, ch. 131, 18 Stat. L. 410. The entire provision of which the above is a part is set forth in title WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

The Isthmian Canal Commission having finished its work, its president had authority, under the direction or with the approval of the President of the United States, to sell, as favorably as possible, material, supplies, and equipments, which

had been purchased for, and had been made use of by, the commission, and which could not, to advantage, be brought to the United States. (1900) 23 Op. Atty-Gen. 163.

SEC. 5. [Unexpended appropriations to be covered into Treasury; exceptions.] That from and after the first day of July, eighteen hundred and seventy-four, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury: *Provided*, That this provision shall not apply to permanent specific appropriations, appropriations for rivers and harbors, light-houses, fortifications, public buildings, or the pay of the navy and marine corps; but the appropriations named in this proviso shall continue available until otherwise ordered by Congress. * * * [18 Stat. L. 110.]

The above paragraph is part of section 5 of the Legislative, Executive, and Judicial Appropriation Act of June 20, 1874, ch. 328. The remainder of the section, in part temporary, is given in the note to the next paragraph of the text, which repeals so much of it as was permanent.

Further provisions relating to unexpended appropriations were made by R. S. sec. 3691, *supra*, p. 151, and the next paragraph of the text.

"Permanent specific appropriations."—An appropriation to enable the secretary of agriculture to prepare certain property for an experimental station and for expenses incurred in the removing of a previous experimental station to such

property, was deemed to be a permanent specific appropriation within the meaning of the proviso in the above enactment, and therefore continued available until otherwise ordered by Congress. (1893) 20 Op. Atty-Gen. 599.

SEC. 4. [Claims under exhausted appropriations, to be examined, etc.] That so much of section five of the act approved June twentieth, eighteen hundred and seventy-four, as directs the Secretary of the Treasury at the beginning of each session to report to Congress with his annual estimates any balances of appropriations for specific objects affected by said section that may need to be reappropriated, be, and hereby is, repealed. And it shall be the duty of the several accounting-officers of the Treasury to continue to receive, examine, and consider the justice and validity of all claims under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of said section that may be brought before them within a period of five years. And the Secretary of the Treasury shall report the amount due each claimant, at the commencement of each session, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration: *Provided*, That nothing in this act shall be construed to authorize the re-examination and payment of any claim or account which has been once examined and rejected, unless reopened in accordance with existing law. [20 Stat. L. 130.]

This section is from the Deficiencies Appropriation Act of June 14, 1878, ch. 191. The unrepealed portion of section 5 of the Act of June 20, 1874, is given in the

preceding paragraph of the text. It was followed by the portion of said section 5 repealed by the above section, which was as follows: "And this provision shall not apply to any unexpended balance of the appropriation made by the act approved December twenty-first, eighteen hundred and seventy-one, for expenses that may be incurred under articles one to nine of the treaty with Great Britain concluded May eighth, eighteen hundred and seventy-one, which balance the act approved March third, eighteen hundred and seventy-three, authorized to be expended to enable the President to fulfill the stipulations contained in the twentieth, twenty-second, twenty-third, twenty-fourth, and twenty-fifth articles of said treaty: *And provided further*, That this section shall not operate to prevent the fulfillment of contracts existing at the date of the passage of this act; and the Secretary of the Treasury shall, at the beginning of each session, report to Congress, with his annual estimates, any balances of appropriations for specific objects affected by this section that may need to be re-appropriated." [18 Stat. L. 111.]

See the notes to the preceding paragraph of the text.

[SEC. 1.] [Footing of paragraphs to determine amount appropriated.]

• • • That hereafter the total amount appropriated in the various paragraphs of an appropriation Act shall be determined by the correct footing up of the specific sums or rates appropriated in each paragraph contained therein unless otherwise expressly provided. [29 Stat. L. 148.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 28, 1896, ch. 252, and follows appropriations for the Department of State.

SEC. 3. [Restrictions on purchases of books and periodicals.] That hereafter law books, books of reference, and periodicals for use of any Executive Department, or other Government establishment not under an Executive Department, at the seat of Government, shall not be purchased or paid for from any appropriation made for contingent expenses or for any specific or general purpose unless such purchase is authorized and payment therefor specifically provided in the law granting the appropriation. [30 Stat. L. 316.]

This section is from the Legislative, Executive, and Judicial Appropriation Act of March 15, 1898, ch. 68.

SEC. 9. [Appropriations to be specifically made.] No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed. [34 Stat. L. 764.]

This is from Sundry Civil Appropriation Act, June 30, 1906, ch. 3914.

A similar provision in the Deficiencies Appropriation Act of July 1, 1902, ch. 1351, § 1, 32 Stat. L. 560, was superseded by the text.

SEC. 6. [Contingent funds, etc.—apportionment of amount to be expended by each office or bureau—no change except on written order—purchases limited to contingent funds.] That in addition to the apportionment required by the so-called antideficiency Act, approved February

twenty-seventh, nineteen hundred and six (Statutes at Large, volume thirty-four, page forty-nine), the head of each executive department shall, on or before the beginning of each fiscal year, apportion to each office or bureau of his department the maximum amount to be expended therefor during the fiscal year out of the contingent fund or funds appropriated for the entire year for the department, and the amounts so apportioned shall not be increased or diminished during the year for which made except upon the written direction of the head of the department, in which there shall be fully expressed his reasons therefor; and hereafter there shall not be purchased out of any other fund any article for use in any office or bureau of any executive department in Washington, District of Columbia, which could be purchased out of the appropriations made for the regular contingent funds of such department or of its offices or bureaus. [37 Stat. L. 414.]

This section and the following section 7 are from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

The Act of Feb. 27, 1906, ch. 510, mentioned in the text amended R. S. sec. 3679, *supra*, p. 138.

SEC. 7. [Expenditure of appropriations for private telephone service forbidden.] That no money appropriated by this or any other Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed. [37 Stat. L. 414.]

See the note to the preceding section.

SEC. 7. [Regular appropriations restricted to fiscal year — exceptions.] No specific or indefinite appropriation made hereafter in any regular annual appropriation Act shall be construed to be permanent or available continuously without reference to a fiscal year unless it belongs to one of the following five classes: "Rivers and harbors," "lighthouses," "fortifications," "public buildings," and "pay of the Navy and Marine Corps," last specifically named in and excepted from the operation of the provisions of the so-called "covering-in Act" approved June twentieth, eighteen hundred and seventy-four, or unless it is made in terms expressly providing that it shall continue available beyond the fiscal year for which the appropriation Act in which it is contained makes provision. [37 Stat. L. 487.]

The above section is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

The Act of June 20, 1874, ch. 328, § 5, mentioned in the text is given *supra*, p. 152.

SEC. 7. [Lump sum appropriations — restriction on salaries paid from.] That no part of any money contained herein or hereafter appropriated in

lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced: *Provided*, That this section shall not apply to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the Government. [37 Stat. L. 626, as amended by 37 Stat. L. 790.]

The above section 7 is from the Deficiencies Appropriation Act of Aug. 26, 1912, ch. 408. It was amended to read as here given by the Legislative, Executive, and Judicial Appropriation Act of March 4, 1913, ch. 142. Originally this section was as follows:

"SEC. 7. No part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the fiscal year nineteen hundred and twelve; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced." [37 Stat. L. 626.]

By a provision of the Act of March 4, 1913, ch. 145, § 1, 37 Stat. L. 854, the restrictions of the text were not to apply to certain payments from the lump sum appropriations for the Department of Agriculture. See AGRICULTURE, vol. 1, p. 205.

SEC. 5. [Expenditure of appropriations for automobiles and carriages.]

No appropriation made in this or any other Act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the executive departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor, and after the close of the fiscal year nineteen hundred and fifteen there shall not be expended out of any appropriation made by Congress any sum for purchase, maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles for any branch of the public service of the United States unless the same is specifically authorized by law, and in the estimates for the fiscal year nineteen hundred and sixteen and subsequent fiscal years there shall be submitted in detail estimates for such necessary appropriations as are intended to be used for purchase, maintenance, repair, or operation of all motor-propelled or horse-drawn passenger-carrying vehicles, specifying the sums required, the public purposes for which said vehicles are intended, and the officials or employees by whom the same are to be used. [38 Stat. L. 508.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 16, 1914, ch. 141.

SEC. 4. [Reappropriation of unexpended balance — how construed.]

That the reappropriation and diversion of the unexpended balance of any appropriation to a purpose other than that for which it was originally

made shall be construed and accounted hereafter as a new appropriation and the unexpended balance shall be reduced by the sum proposed to be so diverted. [38 Stat. L. 1161.]

This is from the Deficiencies Appropriation Act of March 4, 1915, ch. 147.

III. REPORTS

Sec. 193. [Annual report by heads of departments of expenditure of contingent funds.] The head of each Department shall make an annual report to Congress, giving a detailed statement of the manner in which the contingent fund for his Department, and for the Bureaus and offices therein, has been expended, giving the names of every person to whom any portion thereof has been paid; and if for anything furnished, the quantity and price; and if for any service rendered, the nature of such service, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary; and the amount of all former appropriations in each case on hand, either in the Treasury or in the hands of any disbursing officer or agent. And he shall require of the disbursing officers, acting under his direction and authority, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time during the next preceding year expended by them, and shall communicate the results of such returns and the sums total, annually, to Congress. [R. S.]

Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 527.

R. S. sec. 194 was repealed by the Act of March 2, 1895, ch. 177, § 8, 28 Stat. L. 808, and is noted under section 7 of said Act, *infra*, p. 157, which furnished substitute provisions thereof.

Sec. 195. [Time of making annual reports by heads of departments.] Except where a different time is expressly prescribed by law, the various annual reports required to be submitted to Congress by the heads of Departments shall be made at the commencement of each regular session, and shall embrace the transactions of the preceding year. [R. S.]

See all Acts requiring reports.

Sec. 196. [Department reports, when to be furnished to printer.] The head of each Department, except the Department of Justice, shall furnish to the Congressional Printer copies of the documents usually accompanying his annual report, on or before the first day of November in each year, and a copy of his annual report on or before the third Monday of November in each year. [R. S.]

Act of June 25, 1864, ch. 155, 13 Stat. L. 184, 185; Act of June 22, 1870, ch. 150, 16 Stat. L. 164.

[SEC. 1.] [Contingent expenses to be annually reported by heads of departments.] * * * And hereafter a detailed statement of the expenditure for the preceding fiscal year of all sums appropriated for contingent

expenses of the Independent Treasury, or in any department or bureau of the Government shall be presented to Congress at the beginning of each regular session. [19 Stat. L. 306.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1877, ch. 102. The same provision, omitting mention "of the Independent Treasury," occurs in previous appropriation Acts. See 18 Stat. L. 96, 355.

SEC. 2. [Annual reports by heads of departments of number and salaries of employés below standard of efficiency.] * * * That hereafter it shall be the duty of the heads of the several executive Departments of the Government to report to congress each year in the annual estimates the number of employees in each bureau and office and the salaries of each who are below a fair standard of efficiency. [26 Stat. L. 268.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 11, 1890, ch. 667. Section 3 of that Act repealed "all acts or parts of acts inconsistent or in conflict with the provisions of this act."

SEC. 7. [Statement of condition of business to be submitted in estimates by heads of departments.] It shall be the duty of the head of each Executive Department or other Government establishment in the city of Washington to submit to the first regular session of the Fifty-fourth Congress, and annually thereafter, in the Annual Book of Estimates, a statement as to the condition of business in his Department or other Government establishment, showing whether any part of the same is in arrears, and, if so, in what divisions of the respective bureaus and offices of his Department or other Government establishment such arrears exist, the extent thereof, and the reasons therefor, and also a statement of the number and compensation of employees appropriated for in one bureau or office who have been detailed to another bureau or office for a period exceeding one year. [28 Stat. L. 808.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 2, 1895, ch. 177.

Section 8 of this Act repealed R. S. sec. 194 which read as follows: "The head of each Department shall make an annual report to Congress of the names of the clerks and other persons that have been employed in his Department and the offices thereof; stating the time that each clerk or other person was actually employed, and the sums paid to each; also, whether they have been usefully employed; whether the services of any of them can be dispensed with without detriment to the public service, and whether the removal of any individuals, and the appointment of others in their stead, is required for the better dispatch of business." Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 525.

SEC. 5. [Report of exchanges of labor saving devices.] That the executive departments and other Government establishments and all branches of the public service may hereafter exchange typewriters, adding machines, and other similar labor saving devices in part payment for new machines

used for the same purpose as those proposed to be exchanged. There shall be submitted to Congress, on the first day of the session following the close of each fiscal year, a report showing, as to each exchange hereunder, the make of the article, the period of its use, the allowance therefor, and the article, make thereof, and price, including exchange value, paid or to be paid for each article procured through such exchange. [38 Stat. L. 1161.]

This is from the Deficiencies Appropriation Act of March 4, 1915, ch. 147.

EVARTS ACT (Circuit Court of Appeals Act)

See JUDICIARY

EVIDENCE

- R. S. 724. *Power to Order Production of Books and Writings in Actions at Law*, 160.
- R. S. 859. *Testimony of Witnesses before Congress Not Admissible against Them in Criminal Prosecutions*, 166.
- R. S. 861. *Mode of Proof in Common-law Actions*, 168.
- R. S. 862. *Mode of Proof in Equity and Admiralty Causes*, 171.
- R. S. 863. *Depositions De Bene Esse*, 172.
- R. S. 864. *Mode of Taking Depositions De Bene Esse*, 184.
- R. S. 865. *Transmission to the Court of Depositions De Bene Esse*, 185.
- R. S. 866. *Depositions under a Dedimus Potestatem and in Perpetuam, etc.*, 189.
- R. S. 867. *Depositions in Perpetuam, etc., Admissible at Discretion of the Court*, 192.
- R. S. 868. *Deposition under a Dedimus Potestatem, How Taken*, 193.
- R. S. 869. *Subpoena Duces Tecum under a Dedimus Potestatem*, 194.
- R. S. 870. *Witness under a Dedimus Potestatem, When Required to Attend*, 195.
- R. S. 871. *Depositions in District of Columbia in Suits Pending Elsewhere*, 195.
- R. S. 872. *Same Subject; When No Commission or Notice*, 195.
- R. S. 873. *Same Subject; Manner of Taking and Transmitting the Deposition*, 196.
- R. S. 874. *Same Subject; Witness Fees*, 196.
- R. S. 875. *Letters Rogatory from United States Courts*, 196.
- R. S. 882. *Copies of Department Records and Papers*, 197.
- R. S. 883. *Copies of Records, etc., in Office of Solicitor of the Treasury*, 199.
- R. S. 884. *Instruments and Papers of Comptroller of the Currency*, 199.
- R. S. 885. *Organization Certificates of National Banks*, 199.
- R. S. 886. *Transcripts from Books, etc., of the Treasury, in Suits against Delinquents*, 199.
- R. S. 887. *Transcripts from Books of the Treasury in Indictments for Embezzlement of Public Moneys*, 203.
- R. S. 888. *Copies of Returns in Returns Office*, 204.
- R. S. 889. *Copies of Post Office Records and of Auditor's Statement of Accounts*, 204.
- R. S. 890. *Copies of Statements of Demands by Post Office Department*, 205.
- R. S. 891. *Copies of Records, etc., of General Land Office*, 205.
- R. S. 892. *Copies of Records, etc., of Patent Office*, 206.
- R. S. 893. *Copies of Foreign Letters Patent*, 207.
- R. S. 894. *Printed Copies of Specifications and Drawings of Patents*, 208.
- R. S. 895. *Extracts from the Journals of Congress*, 208.
- R. S. 896. *Copies of Records, etc., in Offices of United States Consuls, etc.*, 209.
- R. S. 897. *Certain Books and Papers in Offices of District and Circuit Courts in Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas*, 209.
- R. S. 898. *Transcribed Records in the Clerks' Offices of Western District of North Carolina*, 209.
- R. S. 899. *When Original Records Are Lost or Destroyed*, 210.
- R. S. 900. *Same Subject*, 210.

- R. S. 901. *Same Subject*, 210.
 R. S. 902. *Same Subject*, 211.
 R. S. 903. *Same Subject*, 211.
 R. S. 904. *Same Subject*, 212.
 R. S. 905. *Authentication of Legislative Acts and Proof of Judicial Proceedings of States, etc.*, 212.
 R. S. 906. *Proofs of Records, etc., Kept in Offices Not Pertaining to Courts*, 220.
 R. S. 907. *Copies of Foreign Records, etc., Relating to Land Titles in the United States*, 221.
 R. S. 2469. *Copies of Records, etc., to Be Certified*, 222.
 R. S. 2470. *Exemplifications Valid without Names of Officers Signing and Countersigning*, 222.
 R. S. 4071. *Taking Testimony to Be Used in Foreign Countries*, 222.
 R. S. 4072. *Witness Need Not Criminate Himself*, 223.
 R. S. 4073. *Punishment of Witness for Contempt*, 223.
 R. S. 4074. *Fees and Mileage of Witnesses*, 224.
Act of June 22, 1874, ch. 391, 224.
 Sec. 5. Books, Invoices, and Papers Required in Civil Suits under Revenue Laws, 224.
 8. Officers and Persons Claiming Compensation and Defendants May Be Witnesses, 225.
Act of Aug. 5, 1886, ch. 928, 225.
 Sec. 9. Transcribed Records in Former District of California, 225.
Act of March 9, 1892, ch. 14, 225.
 Depositions for United States Courts May Follow State Usage, 225.
Act of July 31, 1894, ch. 174, 227.
 Sec. 17. Transcripts and Copies from Treasury Department, How Certified, 227.
Act of Feb. 26, 1913, ch. 79, 227.
 Admitted Handwriting Allowed as Evidence, 227.

CROSS-REFERENCES

- In Bankruptcy Cases*, see **BANKRUPTCY**.
In Claim Cases, see **CLAIMS**.
In Congressional Investigations and Contested Elections, see **CONGRESS**.
In Consular Courts, see **DIPLOMATIC AND CONSULAR OFFICERS**.
In Extradition Cases, see **EXTRADITION**.
Statutes as Evidence, see **STATUTES**.
 See generally **WITNESSES**.

Sec. 724. [Power to order production of books and writings in actions at law.] In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant

fails to comply with such order, the court may, on motion, give judgment against him by default. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 82.

Further provisions relating to the production of books and papers in civil suits under the revenue laws were made by the Act of June 22, 1874, ch. 391, § 5, *infra*, p. 224. And see the notes thereto.

R. S. sec. 858 relating to witnesses is given under WITNESSES.

The only power of discovery or inspection conferred by Congress is contained in the above section. *Union Pac. R. Co. v. Botsford*, (1891) 141 U. S. 250, 11 S. Ct. 1000, 35 U. S. (L. ed.) 1734, wherein it was held that in an action for damages for personal injuries the person injured could not be compelled to submit to a surgical examination before trial.

The purpose of this section was to give courts of law the power to do what courts of equity could do in the matter of using documents, without the formality of going into a court of equity with a bill of discovery in aid of an action at law. *Carpenter v. Winn*, (1911) 221 U. S. 533, 31 S. Ct. 683, 55 U. S. (L. ed.) 842; *Gregory v. Chicago, etc., R. Co.*, (1882) 10 Fed. 529; *Crandall v. Piano Mfg. Co.*, (1885) 24 Fed. 738; *Ryder v. Bateman*, (1898) 93 Fed. 31; *Owyhee Land, etc., Co. v. Tautphaus*, (C. C. A. 1901) 109 Fed. 547, 48 C. C. A. 535; *Hylton v. Brown*, (1906) 1 Wash. 298, 12 Fed. Cas. No. 6,981.

Federal and not state legislation as controlling practice.—Although the practice which prevails in the highest courts of the state ordinarily prevails in the federal courts, yet when Congress has legislated upon a matter of practice for the federal courts, as in the case of the production of books and writings in actions at law, such legislation becomes the sole and supreme guide, to the exclusion of the state code. *Gregory v. Chicago, etc., R. Co.*, (1882) 10 Fed. 529; *Paine v. Warren*, (S. D. N. Y. 1888) 33 Fed. 357; *Lucker v. Phoenix Assur. Co.*, (C. C. S. D. 1895) 67 Fed. 18; *U. S. v. National Lead Co.*, (1896) 75 Fed. 94; *Kaiser v. Chicago, St. P., M. & O. Ry. Co.*, (D. C. Minn. 1912) 192 Fed. 1013; *Schatz v. Winton Motor Carriage Co.*, (S. D. N. Y.) 197 Fed. 777; *Cheatham Electric Switching Device v. American Automatic Switch Co.*, (S. D. N. Y. 1912) 198 Fed. 496. See *contra*, *Frescole v. Lancaster*, (E. D. Pa. 1895) 70 Fed. 337; *Gray v. Schneider*, (S. D. N. Y. 1902) 119 Fed. 474.

"Actions at law."—The section relates to actions at law only, and has therefore no application to suits in equity. *Bischoffsheim v. Brown*, (1886) 29 Fed. 341; *Havermeyers, etc., Sugar Refining Co. v. Compania Transatlantica Espanola*, (1890) 43 Fed. 90; *Ryder v. Bateman*, (W. D. Tenn. 1898) 93 Fed. 31; *Oro Water, etc., Co. v. Oroville*, (N. D. Cal. 1908) 162 Fed. 975; *Childs v. Missouri*,

etc., R. Co., (C. C. A. 8th Cir. 1915) 221 Fed. 219, 136 C. C. A. 629. But in actions at law, proceedings for obtaining inspection of documents on the trial are regulated by this section. *Kirkpatrick v. Pope Mfg. Co.*, (C. C. Conn. 1894) 61 Fed. 46.

A proceeding *in rem* is not within the provisions of this section. *U. S. v. Twenty-eight Packages Pins*, (1832) Gilp 396, 28 Fed. Cas. No. 16,561.

Necessity that circumstances be such as would have justified discovery in chancery. This section restricts the proceedings to cases and under circumstances where the parties might be compelled to produce the books and writings by the ordinary rules of procedure in chancery. *Boyd v. U. S.*, (1886) 116 U. S. 616, 6 S. Ct. 501, 29 U. S. (L. ed.) 746; *Owyhee, etc., Iron Co. v. Tautphaus*, (C. C. A. 9th Cir. 1901) 109 Fed. 547, 48 C. C. A. 535; *Finch v. Rikeman*, (1851) 2 Blatchf. 301, 9 Fed. Cas. No. 4,788.

Where the evidence sought for will not only have the effect of enabling the plaintiff to recover his entire damages, but its direct consequence will be to subject the defendant to a penalty, and the plaintiff has not relinquished his claim to such penalty, the order will not be granted, because the authority conferred by the section can be exercised only in cases where the relief might be had by a bill of discovery, and as a substitute for that proceeding, and a bill of discovery will not be allowed in any case where the discovery will subject the defendant to a penalty unless the bill relinquishes all claim to the penalty. *U. S. v. National Lead Co.*, (1896) 75 Fed. 94; *Finch v. Rikeman*, (1851) 2 Blatchf. 301, 9 Fed. Cas. No. 4,788.

It has been held that where a *qui tam* action is instituted under R. S. sec. 4901 (see PATENTS) for the recovery of penalties for the alleged false marking of certain articles as patented, the defendant cannot be compelled to produce his books and papers before trial for examination by the plaintiff for the purpose of showing the number of penalties alleged to have been incurred; for such an action is a penal action, and the provision of this section expressly limits its application to cases and circumstances where the party might be compelled to produce the books and papers "by the ordinary rules of proceedings in chancery;" and "a bill of

discovery will not lie in a case which involves a penalty or a forfeiture." *New-gold v. American Electrical Novelty, etc., Co.*, (1901) 108 Fed. 341. Compare *American Banana Co. v. United Fruit Co.*, (S. D. N. Y. 1907) 153 Fed. 943, wherein it was held in a penal action instituted by a person to recover treble damages under the Sherman Anti-Trust Act that a motion would lie under this section to require the corporation to produce certain books and papers.

In *L. Bucki, etc., Lumber Co. v. Atlantic Lumber Co.*, (C. C. A. 5th Cir. 1903) 121 Fed. 233, 57 C. C. A. 469, which was an action for damages for maliciously suing out two writs of attachment and the levying and maintaining the levy of such writs upon the properties of the plaintiff in error, the court said: "The second assignment of error is to a ruling and order of the court requiring plaintiff to produce certain of its books kept in New York and certain other books specified in the exception in advance of the trial. Section 724 of the Revised Statutes provides for such orders in cases and under circumstances where parties might be compelled to produce the same by ordinary rules of proceeding in chancery. The grounds of the motion to produce in this instance were that the defendants expected to obtain from said books evidence tending to show that the plaintiff was on October 1, 1897, insolvent, and not realizing any profit out of its business; and it was alleged that said books contained statements which would show that the plaintiff was, on October 1, 1897, actually unable to meet its accrued obligations. The reasons given for producing the books appear to us to be insufficient, for neither the defendants' insolvency nor inability to actually meet its accrued obligations constituted any defense in the present suit."

Existence of statutory remedy as bar to issuance of subpoena duces tecum.—It has been held that the power of a federal court to require the production of documentary evidence is not limited to an order made on motion, as provided by this section, but it has inherent power, as well as express authority, under R. S. sec. 716 (embodied in Judicial Code, sec. 267, and repealed by section 297 thereof; see JUDICIARY), to issue a subpoena duces tecum and to enforce obedience thereto by proceedings for contempt. *American Lith. Co. v. Werckmeister*, (C. C. A. 1908) 165 Fed. 426, 91 C. C. A. 376. But in *Kirkpatrick v. Pope Mfg. Co.*, (C. C. Conn. 1894) 61 Fed. 46, a subpoena duces tecum was held inadequate as a substitute for the statutory remedy in an action to recover royalties.

Existence of statutory remedy as bar to bill of discovery.—The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either

by means of the oath of a party or by the production of deeds, books, and writings in his possession or control. But there is authority that it does not follow, because courts of law now have power to extend such relief, that a court of equity should forego the exercise of an ancient and well-settled jurisdiction. No principle, it has been said, is more vigorously asserted by courts of equity than that they will not yield a jurisdiction once legitimately exercised because an enlargement of the ordinary powers of courts of law has rendered a resort to equity no longer necessary. There can be no ebb and flow of jurisdiction dependent upon external changes. Being once legitimately vested in the court, it must remain there until the legislature shall abolish or limit it; for without some positive act the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations. Accordingly, it has been held that a court of equity should not refuse to entertain a bill for discovery, although, by the enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law. *Colgate v. Compagnie Francaise, etc.*, (S. D. N. Y. 1885) 23 Fed. 82. See to the same effect *Paine v. Warren*, (S. D. N. Y. 1888) 33 Fed. 357.

There is also authority that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the United States because under this section it is no longer generally needed: in other words, in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be maintained. *Safford v. Ensign Mfg. Co.*, (C. C. A. 4th Cir. 1903) 120 Fed. 480, 56 C. C. A. 630, citing *Ex p. Boyd*, (1881) 105 U. S. 647, 26 U. S. (L. ed.) 1200; *U. S. v. McLaughlin*, (C. C. Cal. 1885) 24 Fed. 923; *Preston v. Smith*, (E. D. Mo. 1886) 26 Fed. 884; *Rindskopf v. Platto*, (E. D. Wis. 1886) 29 Fed. 130; *Paton v. Majors*, (E. D. La. 1891) 46 Fed. 210.

It has been held that by virtue of the above section there seems to be no longer any occasion to resort to equity to obtain a discovery and accounting where the payment of royalties is sought, as there is now an adequate remedy at law. *Washburn, etc., Mfg. Co. v. Freeman Wire Co.*, (E. D. Mo. 1890) 41 Fed. 410.

Filing bill of discovery as bar to statutory remedy.—In *Iasigi v. Brown*, (1853) 1 Curt. 401, 12 Fed. Gas. No. 6,993, there was a motion, grounded on affidavit, to compel the production and delivery to the clerk of the court of certain papers alleged to be material on a trial at law of the action. The existence of the papers and their materiality were not denied.

But the motion was resisted on the ground that the party moving had already filed a bill of discovery, covering many of the facts of the case, and, among others, these documents; and though copies of them had not been annexed to the answer, yet their contents were described; and it was urged that, having resorted to this mode of discovery, the party must read the answer, and could not have the benefit of the order under the Act of Congress. But the court said: "I think such an order should be made in this case. The fact that a bill of discovery was filed is not a bar. If the answer contained what it alleged to be copies of the papers, the party would still have a right to use the originals. He is not bound to act upon the assumption that the copies are correct; and, in some cases, correct copies are not equivalent to originals. Under the laws of the United States, both the remedy by a bill of discovery, and by an order to produce, are given. If a party chooses to go to the expense of both, the court cannot deprive him of one of them, unless it can clearly see that the other has been completely effectual, so that any further proceeding must be simply useless, or intended to harass the other party. That is not so here. The answer does not contain or annex even copies of the papers called for. Let an order be entered to produce at the trial the papers described in the motion, or show cause at the trial why the same are not produced."

Documents described in pleadings.—The practice in equity permits a motion for production to be made only after the defendant has answered and admitted the possession of the documents. But this section should not be construed so narrowly as to authorize a motion to produce only when the documents have been described in the pleadings, because in actions at law such descriptive allegations in the pleadings would not ordinarily be permissible. While equity pleadings set out to a greater or less extent matters of evidence for purposes of discovery and proof, such matters would be redundant and improper in pleadings at law. *Paine v. Warren*, (S. D. N. Y. 1888) 33 Fed. 357.

Production "in the trial" as meaning "on or at the trial."—For more than a century trial courts have disagreed as to whether, under this enactment, the procedure is limited to a requirement that the books, documents, and writings be produced at the trial, or, in the discretion of the court, before the trial, for such investigation and examination as the party obtaining the order might desire. The question has at last been authoritatively settled by the United States Supreme Court, which has decided that a court of law is not empowered to compel one party to an action to produce books and papers in advance of trial for his adversary's examination and inspection, by the pro-

visions of this section; as the words "in the trial" mean "on or at the trial" and the statute may well be regarded as affording a short and quick way of obtaining documentary evidence for use "in the trial" of an action at law, leaving the parties to a bill of discovery if they desire the production before the trial for the purpose of preparing for it. *Carpenter v. Winn*, (1911) 221 U. S. 533, 31 S. Ct. 683, 55 U. S. (L. ed.) 842, *reversing* (1908) 165 Fed. 636, 91 C. C. A. 301. The case is followed in *Kaiser v. Chicago, St. P., M. & O. Ry. Co.*, (D. C. Minn. 1912) 192 Fed. 1013; *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, (C. C. A. 4th Cir. 1912) 194 Fed. 947, 114 C. C. A. 583; *Cheatham Electric Switching Device v. American Automatic Switch Co.*, (S. D. N. Y. 1912) 198 Fed. 496; *Schatz v. Winton Motor Carriage Co.*, (S. D. N. Y. 1912) 197 Fed. 777; *General Film Co. v. Sampliner*, (C. C. A. 6th Cir. 1916) 232 Fed. 95, 146 C. C. A. 287.

The following cases decided prior to *Carpenter v. Winn*, *supra*, hold that the federal courts had, under this section, power to order the production of books and papers at the trial, and also before the trial, when issue was joined, for inspection, in order to prepare for trial. *Gray v. Schneider*, (1902) 119 Fed. 474; *Victor G. Bloede Co. v. Joseph Bancroft, etc., Co.*, (1899) 98 Fed. 175; *Henszey v. Langdon-Henszey Coal Min. Co.*, (1897) 80 Fed. 178; *Lucker v. Phoenix Assur. Co.*, (1895) 67 Fed. 18; *Exchange Nat. Bank v. Washita Cattle Co.*, (1894) 61 Fed. 190; *Brewster v. Tuthill Spring Co.*, (1888) 34 Fed. 769; *Paine v. Warren*, (1888) 33 Fed. 357; *Gregory v. Chicago, etc., R. Co.*, (1882) 10 Fed. 529; *Coit v. North Carolina Gold Amalgamating Co.*, (1881) 9 Fed. 577; *Geyger v. Geyger*, (1795) 2 Dall. 332, 10 Fed. Cas. No. 5,375; *Central Bank v. Tayloe*, (1823) 2 Cranch C. C. 427, 5 Fed. Cas. No. 2,548; *Jacques v. Collins*, (1846) 2 Blachf. 23, 13 Fed. Cas. No. 7,167; *Finch v. Rikeman*, (1851) 2 Blachf. 301, 9 Fed. Cas. No. 4,788; *U. S. v. Youngs*, (1879) 10 Ben. 264, 28 Fed. Cas. No. 16,783; *U. S. v. Hutton*, (1879) 10 Ben. 268, 26 Fed. Cas. No. 15,433; *Easton v. Hodges*, (1877) 7 Biss. 324, 8 Fed. Cas. No. 4,258; *Cameron Lumber Co. v. Droney*, (1904) 132 Fed. 304; *American Banana Co. v. United Fruit Co.*, (1907) 153 Fed. 943; *Shaefer v. International Power Co.*, (1907) 157 Fed. 896; *Rosenberger v. Shubert*, (1910) 182 Fed. 411.

Cases decided prior to *Carpenter v. Winn*, *supra*, taking a contrary view to the rule adopted above and in accord with the holding of the United States Supreme Court establishing the correct rule, are as follows: *U. S. v. National Lead Co.*, (1896) 75 Fed. 94, holding that the production must be "at the trial" and at no other time; *Hylton v. Brown*, (1806) 1 Wash. 298, 12 Fed. Cas. No. 6,981; *Triplett v.*

Washington Bank, (1829) 3 Cranch C. C. 646, 24 Fed. Cas. No. 14,178; *Iasigi v. Brown*, (1853) 1 Curt. 401, 12 Fed. Cas. No. 6,993; *Cassatt v. Mitchell Coal, etc., Co.*, (C. C. A. 1907) 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99.

"Parties."—Where an action was brought against a railroad company alone for alleged violation of the Interstate Commerce Act, it was held that the corporation's officers and agents were not "parties" within this section authorizing federal courts, on notice, to require the "parties" to produce books or writings in their possession or power which contain evidence pertinent to the issue, etc. *Cassatt v. Mitchell Coal, etc., Co.*, (C. C. A. 1907) 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99.

Records in possession of others than parties.—Where a complaint alleged that certain nautical charters and contracts had been sold by defendants to a corporation that was not a party to the action, it was held that the complainant, in the absence of anything tending to indicate that such charters, etc., had not been transferred to the corporation, was not entitled to an order directing defendants to produce the same, together with the stock book, minute book, and all papers and bank and check books of the corporation, for plaintiff's inspection before trial, under this section. *Ridgely v. Richard*, (1904) 130 Fed. 387.

Order against United States.—A bill of discovery will not lie against the United States, but, nevertheless, an order will be granted to compel the production by the United States of the official weighers' returns of the weights of certain goods, where there is a suit to recover a balance of duties alleged to be due the United States on such goods; the answer alleging that such duties were fully paid, and the motion being supported by evidence showing that an inspection is, or copies of these returns are, necessary to enable the defendant, by whom the motion is made, to prepare for trial. *U. S. v. Youngs*, (1879) 10 Ben. 264, 28 Fed. Cas. No. 16,783.

Application for order of production—Motion and affidavit.—"The proper practice under this statute is for the party requiring the production of such books or writings to spread on the motion docket a motion for a rule upon the opposite party requiring the production of the books or papers desired. The motion should describe the books or papers with as much certainty as may be, and should further state that, according to the best of the mover's knowledge or information and belief, the books or papers called for will tend to prove the issue in favor of the mover. The motion should further state some fact or facts which the books or papers will tend to prove, pertinent to the issue, which issue should be made up

before the motion is made, so that the court may determine the pertinency of the fact or facts which it is alleged the books or papers will tend to prove. What they will prove can only be determined after their production. The truth of the allegations stated in the motion should be verified by the affidavit of the mover, or his agent, and the materiality of the testimony sought by the production of the books or papers certified to by the counsel of the mover." *Lowenstein v. Carey*, (1882) 12 Fed. 811.

"In view of the discretionary nature of the power of the court under section 724 summarily to give judgment of nonsuit or by default, as the case may be, for noncompliance with an order of production, this court will not favorably act on any application for production ambiguous on its face or which does not clearly conform to the requirements of the section." *Victor G. Bloede Co. v. Joseph Bancroft, etc., Co.*, (1901) 110 Fed. 76.

An affidavit by a party interested, although taken *ex parte* and without cross-examination, is competent to support an application for an order of production under this section. *U. S. v. Twenty-eight Packages Pins*, (1832) Gilp. 306, 28 Fed. Cas. No. 16,561.

Before an order will be made under this section, the party applying therefor must make reasonable proof of the existence of the paper required to be produced, its pertinence to the issue, and that it is in the possession or under the control of the opposite party; and it has been held that the affidavit of the defendant's attorney stating that he believes, from reliable sources of information and inquiry, that there is such a letter (as the one in question) pertinent to the issue and in possession of the plaintiff, is not such reasonable proof of the facts as to authorize the order. *Victor G. Bloede Co. v. Joseph Bancroft, etc., Co.*, (1899) 98 Fed. 175; *Iasigi v. Brown*, (1853) 1 Curt. 401, 12 Fed. Cas. No. 6,993; *Buell v. Connecticut Mut. L. Ins. Co.*, (1875) 1 Cinc. L. Bul. 51, 4 Fed. Cas. No. 2,103.

Where the affidavit accompanying the application goes no further than that the affiant "believes" that the books, the production and inspection of which are desired, "will tend to prove the issue in this action in the mover's favor," an order will not be granted in an action at law before trial for production of private account books. *Caspary v. Carter*, (1897) 84 Fed. 416.

Notice.—No method of proceeding being prescribed by Congress, the formalities of a bill of discovery in chancery are not required; and a mere notice to the opposite party, of the time and place of application, with a plain designation of the documents or pieces of evidence sought for, will be sufficient. *Jacques v.*

Collins, (1846) 2 Blatchf. 23, 13 Fed. Cas. No. 7,167.

"Notice must be given the party required to produce the books or writings, or his attorney, a sufficient length of time for the party to appear and show cause, if any he has, why the rule shall not be made, when he may, in opposition to the rule, show by affidavit that he has no such books or papers under his control, or any other reason he may have why the rule shall not be made. If any issue is made upon the motion, the court will hear proof, and grant or refuse the rule according to the proof and nature of the case." *Lowenstein v. Carey*, (1882) 12 Fed. 811.

The court will always keep the procedure in reference to production under its control "for the purposes of substantial justice, and never suffer either party to be entrapped;" and notice to produce certain deeds having been served upon the attorney of a party living at a great distance, and the deeds being actually on record, an offer by the attorney to refer to the pages, etc., where they are recorded, will be considered sufficient without service upon or transmission of notice to the client himself. *Geyger v. Geyger*, (1795) 2 Dall. 332, 10 Fed. Cas. No. 5,375.

Proper objections to granting of order.—The party against whom an order is sought has the undoubted right to make every objection which he could make were he a defendant in equity to a bill seeking discovery of the same evidence, for the right to compel production is no broader under the statute than under a discovery proceeding in equity. This would include the right to insist that the case, the circumstances and the purpose to be advanced were not such as to justify the order. He must also be heard, if he desires, upon the pertinency of the evidence which is being sought and the right to insist that he be not required to disclose that which pertains only to his side of the case, but only that which is material to make out the case of the party seeking the order. *Carpenter v. Winn*, (1911) 221 U. S. 533, 31 S. Ct. 683, 55 U. S. (L. ed.) 842.

"Evidence pertinent to issue."—The production of the books as writings may be invoked only when the document sought "contains evidence pertinent to the issue." *Carpenter v. Winn*, (1911) 221 U. S. 533, 31 S. Ct. 683, 55 U. S. (L. ed.) 842; *Triplett v. Bank of Washington*, (1829) 3 Cranch C. C. 646, 24 Fed. Cas. No. 14,178.

"An exposure of business details and secrets, not pertinent to the issue, to enable one to discover clues to guide him in conducting an investigation of possible claims or defenses against an adversary, is not to be tolerated." *Victor G.*

Bloede Co. v. Joseph Bancroft, etc., Co., (C. C. Del. 1899) 98 Fed. 175.

Books and papers required by an order of court to be produced by a party on the trial of a cause remain subject to objections to their relevancy as evidence which must be passed upon at the trial. *International Coal Min. Co. v. Pennsylvania R. Co.*, (1907) 152 Fed. 557.

Irrelevant entries in books.—Where the books sought to be produced and inspected may contain other entries with which the party applying for such production and inspection has no concern, and which he ought not to see, the order, while requiring their deposit in the clerk's office, will provide for the attendance of some representative of the opposite party during the examination; and as to entries therein which, it may be contended, are not relevant and should not be disclosed, the same shall be inspected, in the first instance, by the clerk; and if the parties or either of them are or is not satisfied with his decision thereon, application to review it may be made summarily to the judge in chambers. *Gray v. Schneider*, (1902) 119 Fed. 474.

Photographic copies.—Where plaintiffs sued on a document alleged to have been signed by the defendants' decedent, which defendants claimed was a forgery, and alleged that the plaintiffs had in their possession letter purporting to have been signed by the deceased, written in the same handwriting as the document sued on, in which reference was made thereto, it was held that the defendants were entitled to an order under this section requiring plaintiffs to produce such letters for defendants' inspection and to permit photographic copies to be made thereof under proper restrictions. *Newcomb v. Burbank*, (1907) 159 Fed. 568.

Amount of damages.—Where the plaintiff's case includes not only the making and breach of the agreement, but the amount of damages, if any, to which he is entitled, evidence tending to ascertain such amount is pertinent to the issue. *Victor G. Bloede Co. v. Joseph Bancroft, etc., Co.*, (1899) 98 Fed. 175.

Application to inspect a mine.—Where a petition, the purpose whereof was to secure the removal of a receiver in charge of an insolvent company, was made to inspect a mine by a stockholder and bondholder, either personally or by an agent, such application was "analogous to the motion made for the production, by parties, of books or writings in their possession, which contain evidence pertinent to the issue, . . . and to the motions under the code practice for admission or inspection of writings or examination of the parties, before trial;" and, the petitioner being a party in interest, the application was granted. *Henszey v.*

Langdorn-Henszey Coal Min. Co., (1897) 80 Fed. 178.

Where the inconvenience or expense of producing books and papers is very great, and a sworn copy of the entries from the books is given, or proposed to be given, a very strong case of the necessity of the production of the books themselves should be made out to compel their production or to subject the delinquent to the penalty prescribed. *Lowenstein v. Carey*, (1882) 12 Fed. 811.

Penalty for noncompliance with order.—The penalty for failing to comply with an order to produce a document is exceedingly stringent, that of a nonsuit or a judgment by default. *Carpenter v. Winn*, (1911) 221 U. S. 533, 31 S. Ct. 683, 55 U. S. (L. ed.) 842. But "by the common law, a notice to produce a paper merely enables the party to give parol evidence of its contents if it be not produced. Its nonproduction has no other legal consequence. This act of Congress has attached to the nonproduction of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default." *Isaigi v. Brown*, (1853) 1 Curt. 401, 12 Fed. Cas. No. 6,993. See to the same effect *Kirkpatrick v. Pope Mfg. Co.*, (C. C. Conn. 1894) 61 Fed. 46.

"In case of noncompliance by one party, the remedy of the other is restricted to the obtaining, in the discretion of the court, of a judgment of nonsuit or by default, as the case may be," the court not having power to compel jurisdiction by attachment. *Victor G. Bloede Co. v. Joseph Bancroft, etc., Co.*, (1901) 110 Fed. 76 [citing with approval, *Isaigi v. Brown*, (1853) 1 Curt. 401, 12 Fed. Cas. No. 6,993; *Merchants Nat. Bank v. State Nat. Bank*, (1868) 3 Cliff. 201, 17 Fed. Cas. No. 9,448.]

In order to obtain a nonsuit of a judgment by default there must be a notice of motion for an order for discovery, followed by an order which has been dis-

obeyed. *Thompson v. Selden*, (1857) 20 How. 194, 15 U. S. (L. ed.) 1001; *Owyhee Land, etc., Co. v. Tautphaus*, (C. C. A. 1901) 109 Fed. 547, 48 C. C. A. 535; *U. S. Bank v. Kurtz*, (1822) 2 Cranch C. C. 342, 2 Fed. Cas. No. 920; *Bas v. Steele*, (1818) 3 Wash. 381, 2 Fed. Cas. No. 1,088; *Maye v. Carbery*, (1822) 2 Cranch C. C. 336, 16 Fed. Cas. No. 9,339; *Dunham v. Riley*, (1821) 4 Wash. 126, 8 Fed. Cas. No. 4,155, holding also that the order need not be absolute in the first instance, but may be *nisi*.

Sufficient compliance with order.—In *American Banana Co. v. United Fruit Co.*, (S. D. N. Y. 1907) 153 Fed. 943, the court said: "The motion is granted to the extent of requiring the defendant to get together all the books and papers enumerated with sufficient definiteness, and have them present at the trial. Defendant need be under no apprehension by reason of failure to produce any books and papers called for which do not exist. Proof that they did not exist, when notice of motion was served, will be sufficient compliance with the order. But it should comply with the terms of the order frankly and fully. It should have in court all the documents fairly within the enumeration and which would enable plaintiff to show defendant's past conduct touching the matters complained of. It will be no sufficient response to the order to state upon the trial that some contract, letter, or what not, manifestly material, is not at hand, but in Venezuela or elsewhere."

Review of order.—An order made by a Circuit Court under this section, requiring a party to an action at law to produce books or writings at the trial, is an interlocutory and not a final order, and is therefore not reviewable on a writ of error prior to final judgment in the cause. *Pennsylvania R. Co. v. International Coal Min. Co.*, (C. C. A. 1907) 156 Fed. 765, 84 C. C. A. 421.

Sec. 859. [Testimony of witnesses before Congress not admissible against them in criminal prosecutions.] No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. [R. S.]

Act of Jan. 24, 1862, ch. 11, 12 Stat. L. 333; Act of Jan. 24, 1857, ch. 19, 11 Stat. L. 156.

Sections 858 to 910 constitute chapter 17 (Evidence) of title XIII (Judiciary) of the Revised Statutes.

Witnesses and testimony on congressional investigations, see CONGRESS, vol. 2, p. 494.

R. S. sec. 860. This section was as follows:

"SEC. 860. [Pleadings, disclosures, etc., not to be used in criminal proceedings.] No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or

forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." Act of Feb. 25, 1868, ch. 13, 15 Stat. L. 37.

It was repealed by an Act of May 7, 1910, ch. 216, 36 Stat. L. 352, entitled "*An Act to repeal section eight hundred and sixty of the Revised Statutes.*"

The repeal did not have any retrospective effect.—*Cameron v. U. S.*, (1914) 231 U. S. 710, 34 S. Ct. 244, 58 U. S. (L. ed.) 448; *Frisby v. U. S.*, (1912) 38 App. Cas. (D. C.) 22, 37 L. R. A. (N. S.) 96. See also *U. S. v. Halstead*, (1912) 38 App. Cas. (D. C.) 69.

"Pleading of a party," etc.—Where an affidavit was made by an indicted party under R. S. sec. 878 [see *WITNESSES*], setting forth that there were witnesses whose evidence was material to his defense, and that he was actually unable to procure the attendance of said witnesses, and it appearing that they might be summoned at the expense of the United States, it was held that such affidavit is not a "pleading of a party" nor "discovery or evidence obtained from a party or witness by means of a judicial proceeding," within the meaning of section 860. *Tucker v. U. S.*, (1894) 151 U. S. 164, 14 S. Ct. 299, 38 U. S. (L. ed.) 112.

The "discovery or evidence" referred to in this section is of a personal nature to which the party can make oath, the statute contemplating "a case where he should make discovery, or give evidence, in such form that he could swear to the truth of his statements, that those statements should not be given in evidence against him, when prosecuted criminally, or for a penalty, but that, if he testified or made discovery upon oath falsely, he should suffer the punishment due to a perjurer." *U. S. v. Hughes*, (1875) 12 Blatchf. 553, 26 Fed. Cas. No. 15,417.

"Evidence obtained from a party."—Where, pursuant to section 2 of the Act of March 2, 1867, ch. 188, 14 Stat. L. 546 (repealed by the Act of June 22, 1874, ch. 391, § 1, 18 Stat. L. 186; see *CUSTOMS DUTIES*), a warrant had been issued for the seizure of partnership books and papers, in a suit by the United States against a firm for the value of certain imports alleged to have been forfeited under the Customs Revenue Law, it was held that section 860 did not preclude the offering at the trial of the books and papers so seized on the part of the plaintiffs, as the evidence thus offered was not obtained from the party, within the meaning of this section. *U. S. v. Hughes*, (1875) 12 Blatchf. 553, 26 Fed. Cas. No. 15,417, *reversing* (1875) 21 Int. Rev. Rec. 76, 26 Fed. Cas. No. 15,419.

Disclosure of a fact upon which a claim for penalties under R. S. secs. 4963, 4965, Fed. 156.

may depend.—Defendants in an action upon an alleged infringement of a copyright on a photograph cannot be required to make a disclosure, by answer or otherwise, of any fact upon which a claim against them for penalties for the violation of R. S. secs. 4963, 4965 (repealed by Act. of March 4, 1909, ch. 320; see *COPYRIGHT*, vol. 1, pp. 589, 583) may depend; nor can they be required to produce any books or papers which would subject them to a penalty. *Snow v. Mast*, (1894) 63 Fed. 623, *citing* *Johnson v. Donaldson*, (1880) 3 Fed. 22.

Judicial proceeding.—Where, upon the order of the executive departments of the government, made in a legitimate exercise of its powers for the enforcement of the laws, a collector of internal revenue has seized the books of a distillery, which are kept pursuant to R. S. secs. 3303, 3304 (see *INTERNAL REVENUE*), false entries wherein, or an omission to make such entries as the law requires, or a refusal to produce which upon proper demand, will subject the distiller to forfeiture, it was held that such seizure is not "a judicial proceeding" within the meaning of this section, and the government may use the books as evidence at the trial for forfeiture. *U. S. v. Distillery at Petersburg*, (1876) 1 Hughes 533, 25 Fed. Cas. No. 14,961.

This section does not "make it incompetent to contradict a party who testifies in his own behalf, by showing that on another occasion, in a prosecution against another party, he, as a witness, gave a different account of the transaction, such account of itself having no tendency to criminate the witness, but rather to place the responsibility wholly upon another." *U. S. v. Smith*, (1891) 47 Fed. 501.

It is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. *U. S. v. McCarthy*, (1883) 18 Fed. 87; *Wyckoff v. Wagner Typewriter Co.*, (1899) 99 Fed. 158, *citing* *Ex p. Irvine*, (1896) 74 Fed. 954.

Vote of grand jury.—"After evidence has been taken in an investigation, and the [grand] jury votes upon the question whether this shows that A has probably committed an offense, its vote is taken in the same proceeding, and the evidence taken is not used elsewhere," within this section. *U. S. v. Kimball*, (1902) 117

The protection of this section is not coextensive with the constitutional provision of the Fifth Amendment declaring that "no person . . . shall be compelled in any criminal case to be a witness against himself," as the section "does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition," affording "no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." *Counselman v. Hitchcock*, (1892) 142 U. S. 547, 12 S. Ct. 195, 35 U. S. (L. ed.) 1110, *reversing In re Counselman*, (1890) 44 Fed. 268; *U. S. v. Bell*, (1897) 81 Fed. 830; *Ex p. Irvine*, (1896) 74 Fed. 954; *La Bourgogne*, (1900) 104 Fed. 823.

But see *U. S. v. Brown*, (1871) 1 Sawy. 531, 24 Fed. Cas. No. 14,671, where the court held that, under this section, a witness "may be compelled to answer, when inquiry is pertinent to any judicial proceeding, because it may be necessary to the ends of justice as to others," and his answer cannot be used against himself.

And see *U. S. v. McCarthy*, (1883) 21 Blatchf. (U. S.) 469, wherein it was held that, where there was a complaint against a certain party for perjury, a witness against whom no charge was pending when prosecution threatened was not relieved from answering certain questions on the ground that his answer thereto might incriminate himself, although he did not specify or indicate any offense in regard to which his answers might tend to such incrimination, as it was held that this section would give him complete protection.

Constitutionality of immunity proviso.—"Whether the proviso to R. S. sec. 860, that the immunity shall not operate to protect the witness against prosecutions for perjury committed in the examination itself, is consistent with the constitutional guaranty," *quære*. *U. S. v. Bell*, (1897) 81 Fed. 830.

Partial repeal in revenue law cases.—So much of this section as relates to the use of evidence against a party for the

enforcement of a penalty or forfeiture is repealed by the Act of June 22, 1874, ch. 391, § 5, *infra*, p. 224, requiring the production of books and papers by compulsory process, in any proceeding other than criminal arising under the revenue laws. *U. S. v. Three Tons Coal*, (1875) 6 Biss. 379, 28 Fed. Cas. No. 16,515. But such section 5 has been held unconstitutional. See *infra*, p. 224.

One examined in bankruptcy proceeding held immune from having evidence used against him. *Cameron v. U. S.*, (1914) 231 U. S. 710, 34 S. Ct. 244, *reversing* (C. C. A. 2d Cir. 1911) 192 Fed. 548, 113 C. C. A. 20.

Accused voluntarily testifying.—This section had no bearing where the accused voluntarily testified in his own behalf in the course of the same proceeding, thereby himself opening the door to legitimate cross-examination. *Powers v. United States*, (1912) 223 U. S. 303, 32 S. Ct. 281, 56 U. S. (L. ed.) 448.

Not applicable to state courts.—This section (since repealed by Act of May 7, 1910, ch. 216, 36 Stat. L. 352, as noted, *supra*, p. 167) by its own terms was limited to criminal proceedings "in any court of the United States," and constituted no limitation upon the procedure of the state courts. *Ensign v. Commonwealth of Pennsylvania*, (1913) 227 U. S. 592, 33 S. Ct. 321, 57 U. S. (L. ed.) 658.

Waiver of privilege.—The privilege given by this section could be waived. *Buckeye Powder Co. v. Hazard Powder Co.*, (D. C. Conn. 1913) 205 Fed. 827.

Further cases under section 860.—*American Lith. Co. v. Werckmeister*, (1911) 221 U. S. 603, 31 S. Ct. 676, 55 U. S. (L. ed.) 873; *Radford v. U. S.*, (C. C. A. 1904) 129 Fed. 49, 63 C. C. A. 491; *Hammond Lumber Co. v. Sailors' Union*, (1906) 149 Fed. 577; *Johnson v. U. S.*, (C. C. A. 1908) 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194; *Alkon v. U. S.*, (C. C. A. 1908) 163 Fed. 810, 90 C. C. A. 116; *Hammond Lumber Co. v. Sailors' Union*, (1909) 167 Fed. 809; *Cohen v. U. S.*, (C. C. A. 1909) 170 Fed. 715, 96 C. C. A. 35; *Kerrich v. U. S.*, (C. C. A. 1909) 171 Fed. 366, 93 C. C. A. 258; *Foster v. U. S.*, (C. C. A. 1910) 178 Fed. 165, 101 C. C. A. 485; *Com. v. Ensign*, (1910) 228 Pa. St. 400, 77 Atl. 657.

Sec. 861. [Mode of proof in common-law actions.] The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 88; Act of Feb. 20, 1812, ch. 25, 2 Stat. L. 682; Act of Jan. 24, 1827, ch. 4, 4 Stat. L. 197, 199.

Introductory.—Section 861 establishes a general rule and the subsequent sections specify exceptions to it. Every case must

therefore fall under the rule or under one of the exceptions. *Ex p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S.

(L. ed.) 117; National Cash Register Co. v. Leland, (C. C. A. 1st Cir. 1899) 94 Fed. 502, 37 C. C. A. 372, *reversing* (C. C. Mass. 1896) 77 Fed. 242; Salt Lake City v. Smith, (C. C. A. 8th Cir. 1900) 104 Fed. 457, 43 C. C. A. 637.

Examination of witness in open court.—Under the express terms of this section, in common-law actions in the United States courts the witnesses must appear in open court, unless the case falls within one of the statutory exceptions. *Compania Azucarera Cubana v. Ingraham*, (1910) 180 Fed. 516.

State statutes permitting a mode of proof different from that prescribed by this section may not be followed. The leading case laying down this proposition is *Ex p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117, wherein it appeared that the Circuit Court for the southern district of New York had imprisoned for contempt a defendant who refused to answer interrogatories propounded before trial by the plaintiff in the manner prescribed by Code Civ. Proc. N. Y. § 870 *et seq.* On habeas corpus it was held that the imprisonment was unlawful. The court said: "The general doctrine that remedies, whose foundations are statutes of the state, are binding upon the courts of the United States within its limits, is undoubted. This well-known rule of the federal courts, founded on the Act of 1789, 1 Stat. L. 92, R. S. sec. 721 [see JUDICIARY], that the laws of the several states, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, was enlarged in 1872 by the provision found in section 924 [see JUDICIARY] of the Revision. This enacts that 'the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, anything in the rules of court to the contrary notwithstanding.' In addition to this, it has been often decided in this court that in actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the states prevail in those courts. The matter in question here occurred in the court below in regard to a common-law action. It was in regard to a method of procuring and using evidence, and it was a proceeding in a civil cause other than equity or admiralty. We entertain no doubt of the decision of the Court of Appeals of New York, that it was a proceeding authorized by the statutes of New York, under which, in a New

York court, defendant was bound to answer. The case, as thus stated, is a strong one for the enforcement of this law in the courts of the United States. *Ex p. Boyd*, (1881) 105 U. S. 647, [28 U. S. (L. ed.) 1200]. But the Act of 1789, which made the laws of the states rules of decision, made an exception when it was 'otherwise provided by the Constitution, treaties, or statutes of the United States.' The Act of 1872 evidently contemplates the same exception by requiring the courts to conform to state practice as near as may be. No doubt it would be implied, as to any act of Congress adopting state practice in general terms, that it should not be inconsistent with any express statute of the United States on the same subject."

See to the same effect *Hanks Dental Ass'n v. International Tooth Crown Co.*, (1904) 194 U. S. 303, 24 S. Ct. 700, 48 U. S. (L. ed.) 989; *National Cash Register Co. v. Leland*, (C. C. A. 1st Cir. 1899) 94 Fed. 502, 37 C. C. A. 372, *reversing* (C. C. Mass. 1896) 77 Fed. 242; *General Film Co. v. Sampliner*, (C. C. A. 8th Cir. 1916) 232 Fed. 95, 146 C. C. A. 287.

Exclusion of evidence recognized by common law.—The federal courts are not required by this section to exclude evidence which, although not within the terms of such section or of the following provisions relating to depositions, is still admissible under the principles of evidence recognized by the common law before and at the time of its enactment. *Toledo Traction Co. v. Cameron*, (C. C. A. 1905) 137 Fed. 48, 69 C. C. A. 28.

Examination of party before trial—In general.—A party to an action at law in a federal court cannot be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized. *Easton v. Hodges*, (1877) 7 Biss. 324, 8 Fed. Cas. No. 4,258.

The fact that there is provision for such examination by a state statute in state courts does not authorize such examination in any federal court. *Ex p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117; *Beardsley v. Littell*, (1877) 14 Blatchf. 102, 2 Fed. Cas. No. 1,185; *Colgate v. Compagnie Francaise*, etc., (1885) 23 Fed. 82. But see *Bryant v. Leyland*, (1881) 6 Fed. 125.

The examination of a party before trial commenced in a suit in a state court cannot be continued after the removal of such suit to the federal court. *Ex p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117, *reversing* *Fogg v. Fisk*, (1884) 19 Fed. 235.

Bill of particulars.—As a bill of particulars is applicable only to the pleadings, it follows, in the absence of a statute providing otherwise, that it cannot be used to secure evidence in advance of

the trial. *Green v. Delaware, etc., R. Co.*, (D. C. N. J. 1914) 211 Fed. 774.

Order for surgical examination.—A state statute, giving the court in personal injury cases the right to order a surgical examination of the plaintiff, does not conflict with this section, and a federal court in a state where such statute prevails may order such an examination. *Camden, etc., R. Co. v. Stetson*, (1900) 177 U. S. 172, 20 S. Ct. 617, 44 U. S. (L. ed.) 721. In the absence of such a state statute, however, the court has no power to make the order. *Union Pac. R. Co. v. Botsford*, (1891) 141 U. S. 250, 11 S. Ct. 1000, 35 U. S. (L. ed.) 734.

Depositions.—"In determining . . . whether the right exists to take testimony by depositions in common-law causes pending in the federal courts, reference must be had to the statutes of the United States. When, however, the facts are such in a given case that, under the provisions of the statutes of the United States, the right to take the testimony of witnesses by depositions exists, then, as to the mere mode of procuring the deposition, parties may follow at their election either the provisions of the state law or of the Act of Congress." *McLennan v. Kansas City, etc., R. Co.*, (1884) 22 Fed. 198.

But where the mode of proceeding prescribed by the laws of the state conflicts with the laws of the United States, in reference to the taking of depositions, depositions taken according to the mode prescribed by the state statutes cannot be admitted in an action at law in a federal court. *Randall v. Venable*, (1883) 17 Fed. 162.

This section does not prevent the use of depositions on a hearing of a rule to show cause when there is no local practice forbidding the use of depositions in such cases. *Importers', etc., Nat. Bank v. Lyons*, (1905) 134 Fed. 510.

The Act of March 9, 1892, ch. 14, 27 Stat. L. 7, *infra*, p. 225, which permits the taking of depositions in the mode prescribed by the laws of the state in which the courts are held, was intended only to simplify the practice of taking depositions by providing that the mode of taking in instances authorized by the federal laws might conform to the mode prescribed by the laws of the state in which federal courts were held, and not to authorize the taking of depositions in instances not heretofore authorized by the federal statutes, and to confer additional rights to obtain proofs by interrogatories addressed to the adverse party in actions at law. *National Cash-Register Co. v. Leland*, (C. C. A. 1st Cir. 1899) 94 Fed. 502, 37 C. C. A. 372, *affirming* as to this point (C. C. Mass. 1896) 77 Fed. 242; *Despeaux v. Pennsylvania R. Co.*, (E. D. Pa. 1897) 81 Fed. 897; *Shellabarger v. Oliver*, (C. C. Kan. 1894) 64 Fed. 306.

Interrogatories.—Where interrogatories to the opposite party had been filed in the manner and form prescribed by state statute, it was held that, under this section, these could not be allowed in legal actions in the federal courts. *National Cash-Register Co. v. Leland*, (C. C. A. 1899) 94 Fed. 502, 37 C. C. A. 372, (1896) 77 Fed. Rep. 242, wherein the court said: "It is further contended by the plaintiff that the interrogatories in question are admissible as a statutory substitute for a bill of discovery in aid of an action at law, and are thus brought within the provision of section 914 of the Revised Statutes [see JUDICIARY]. This view of the Massachusetts interrogatories was taken by the circuit court for this district in *Bryant v. Leyland*, [C. C. Mass. 1881] 6 Fed. 126. We think the contention unsound. The supreme court has constantly maintained the distinction between the systems of law and equity, and has refused to adopt into the practice of the federal courts any part of the practice of the state courts which confounds the two systems. Moreover, the provisions of section 914 apply only to suits at law in the federal courts, and, in the absence of express language, can hardly be intended to introduce into the practice and procedure of such suits statutory procedure which is in its nature plainly equitable. We find, therefore, that it has been decided by the supreme court that, if the statutory interrogatories are to be treated as laying the foundation for a deposition, they are inadmissible in federal practice, because a deposition is not authorized to be taken in such a case by the statutes of the United States; that an examination authorized by state statutes has been excluded on this ground when such examination, though not altogether similar, was yet in most respects similar to the interrogatories in the case at bar, the grounds for the exclusion, as stated by the supreme court, being largely applicable to the interrogatories in this case. We find, furthermore, that if these interrogatories are to be treated not as questions put to a deponent, but as a statutory substitute for a bill of discovery, they are excluded as an encroachment upon that control of equity procedure which belongs to the federal courts except when regulated in express terms by an Act of Congress. For these reasons we think that the interrogatories were forbidden by Revised Statutes, and not authorized by section 914 of the Revised Statutes, or any other federal law."

Where an action was removed from a state to a federal court and interrogatories were attached to the petition, in accordance with the statutory provisions of the state, it was held that, relying upon this section, the defendant need not file answers to such interrogatories. *Pierce v. Union Pac. R. Co.*, (1891) 47

Fed. 709, following *Ho p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117.

Discovery.—This section does not appear to refer to discovery, whether by bill or interrogatory. *Bryant v. Leyland*, (1881) 6 Fed. 125.

Testimony given at former trial.—Testimony given at a former trial by a witness who is not shown to be dead, insane or without the jurisdiction of the court, or whose presence is neither impossible nor impracticable, is not admissible under this section. *Salt Lake City v. Smith*, (C. C. A. 1900) 104 Fed. 457, 43 C. C. A. 637.

It is competent for a party, on the second trial of an action in a federal court, under the general rule, to prove the testimony given on the former trial by a witness who has since died, there being no federal statute on the subject. *Nome Beach Lighterage, etc., Co. v. Standard Marine Ins. Co.*, (1907) 156 Fed. 484, affirming (C. C. A. 1909) 167 Fed. 119, 92 C. C. A. 571.

In *Toledo Traction Co. v. Cameron*, (1905) 137 Fed. 48, 69 C. C. A. 28, it was held that Rev. Stat. Ohio, § 5343a, which authorizes the admission in evidence of the testimony given by a witness on a former trial of the same case when the witness is dead or beyond the jurisdiction of the court, is in conformity with the rule recognized at common law, which permits the use of such evidence generally where it is impossible to obtain a *viva voce* examination of the witness, and is not in conflict with R. S. sec. 861, and may properly be applied in an action at law in a federal court sitting within the state, where the witness is without the district and more than one hundred miles distant from the place of trial.

But in a case from the Eighth Circuit it appeared that on a former trial a witness had testified for the plaintiff, and on the record trial on proof that this witness was about two hundred miles distant from the place of trial, but without proof of any effort to procure his attendance, or that it was not practicable to have obtained his testimony by deposi-

tion *de bene esse*, or otherwise as provided by R. S. secs. 863-867, *infra*, pp. 172-192, the plaintiff offered the testimony of this witness given on the former trial, to be read from the stenographer's notes. It was held that the evidence was not admissible. *Diamond Coal, etc., Co. v. Allen*, (C. C. A. 1905) 137 Fed. 705, 71 C. C. A. 107.

Where an action in a state court had been discontinued and an action was subsequently instituted in a federal court between the same parties and for the same claim, it was held that depositions taken for the purpose of the first action could not be used in the second action; notwithstanding the fact that the practice in the state permitted the use of depositions taken in a pending action to be used in a renewed suit on the same cause of action and between the same parties. *Seeley v. Kansas City Star Co.*, (1896) 71 Fed. 554.

Right to trial by jury.—Rule No. 73 of the Supreme Court of the District of Columbia, providing that "in any action arising *ex contractu*, if the plaintiff or his agent shall have filed . . . an affidavit setting out distinctly his cause of action, . . . and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, . . . unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense," does not deprive the defendant who has filed a plea in bar, and has claimed the benefit of trial by jury, but who has not filed the affidavit of defense pursuant to the rule, of his right to a trial by jury; as the rule simply "prescribes the means of making an issue," and the issue having been made as prescribed, the right of trial by jury accrues. *Fidelity, etc., Co. v. U. S.*, (1902) 187 U. S. 315, 23 S. Ct. 120, 47 U. S. (L. ed.) 194, citing and following *Smoot v. Rittenhouse*, decided by the Supreme Court Jan. 10, 1876, and reported in 27 Wash. L. Rep. 741.

Sec. 862. [Mode of proof in equity and admiralty causes.] The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided. [*R. S.*]

Act of Aug. 23, 1842, ch. 188, 5 Stat. L. 518.

Constitutionality.—The delegation by Congress to the Supreme Court of the power set out in this section is constitutional; and the amendment of the 67th Rule of Equity, which was adopted by virtue of the power so conferred, gives United States courts the right to appoint examiners to take testimony orally in dis-

tricts and circuits other than those in which suits are pending, and the courts in the districts to which the examiners are sent have power to compel the attendance of witnesses. *White v. Toledo, etc., R. Co.*, (C. C. A. 1897) 79 Fed. 133, 51 U. S. App. 54, 24 C. C. A. 467 [citing *Wayman v. Southard*, (1825) 10 Wheat. 1, 6 U. S.

(L. ed.) 253; *Beers v. Haughton*, (1835) 9 Pet. 329, 9 U. S. (L. ed.) 145; *U. S. Bank v. Halstead*, (1825) 10 Wheat. (U. S.) 51, 6 U. S. (L. ed.) 264].

Exclusiveness of Supreme Court regulations.—The Supreme Court, under its power to prescribe rules, "having proceeded to regulate this subject-matter, their regulation must be regarded complete and exclusive, inhibiting what it does not allow, as well as governing what is fixed by positive appointment." *The Sloop Merchant*, (1847) Abb. Adm. 1, 17 Fed. Cas. No. 9,434, citing *Gibbons v. Og-*

den, (1824) 9 Wheat. 1, 6 U. S. (L. ed.) 23.

Repeal of Judiciary Act of 1789.—The Judiciary Act of 1789 (1 Stat. L. 88, ch. 20, § 30), in relation to the oral examination of witnesses in equity causes, "was not expressly repealed until the adoption of the Revised Statutes." *Blease v. Garlington*, (1875) 92 U. S. 1, 23 U. S. (L. ed.) 521; *Coosaw Min. Co. v. Farmers' Min. Co.*, (1895) 67 Fed. 31; *Hyams v. Federal Coal, etc., Co.*, (C. C. A. 4th Cir. 1907) 152 Fed. 970, 82 C. C. A. 324.

Sec. 863. [Depositions de bene esse.] The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 88; Act of March 1, 1817, ch. 30, 3 Stat. L. 350; Act of Feb. 26, 1853, ch. 80, 10 Stat. L. 168; Act of July 29, 1854, ch. 159, 10 Stat. L. 315; Act of May 9, 1872, ch. 146, 17 Stat. L. 89.

For other statutory provisions relative to depositions, see the General Index of this work.

By the Judicial Code, §§ 289–291, the Circuit Courts were abolished and their powers and duties conferred on the District Courts. See JUDICIARY.

Notaries public of states may take depositions, see NOTARIES PUBLIC.

"De bene esse" means "conditionally; provisionally; in anticipation of future need." *Black's Law Dict.* 321.

This section is a combination or codification of the several Acts of Congress passed before that time in relation to taking depositions in equity cases, and especially a codification of the Acts of Con-

gress of Feb. 26, 1853, July 29, 1854, May 9, 1872. *Stevens v. Missouri, etc., R. Co.*, (E. D. Mo. 1900) 104 Fed. 934.

Limitations of the provisions of the section.—The provisions of this section are not only limited by its terms to depositions de bene esse, but its provisions are expressly made inapplicable to R. S. sec.

866 set out *infra*, p. 189. North American Transp., etc., Co. v. Howells, (C. C. A. 1903) 121 Fed. 694, 58 C. C. A. 442.

Not repealed by R. S. sec. 914.—R. S. secs. 863-865 (see *infra*, pp. 184, 185), give all the requirements which must be followed in all examinations *de bene esse* in federal courts; and R. S. sec. 914, set out in the title JUDICIARY, does not repeal them. Sage v. Tauszky, (1877) 6 L. J. 7, 21 Fed. Cas. No. 12,214.

Methods for taking depositions.—“There are two general methods for taking depositions to be used on the trial of law cases provided for in the Revised Statutes; the one being the mode pointed out in section 863, and the other in section 866 [*infra*, p. 189]. When taken under the provisions of the former section, a commission to the officer is not sued out from the court in which the cause is pending, but the party desiring to take the testimony gives notice to the opposite party or his attorney of the time and place when and where the testimony is to be taken, and selects as the commissioner any one of the parties named in the section. When depositions are thus taken, no opportunity is afforded to the opposite party to be heard upon the matter of the selection of the commissioner. Hence it is required of the party taking the deposition that he shall select a disinterested commissioner, and the statute requires the party selected to certify that he is not of counsel for either party, nor interested in the event of the suit. If, however, the depositions are not taken under section 863, but under the authority granted in section 866 [*infra*, p. 189], then by the express terms of the latter section, the provisions of sections 863, 864, and 865 [*infra*, pp. 184, 185] are not applicable thereto. Section 866 [*infra*, p. 189] provides for the court granting a *dedimus*, and in so doing it is presumed that the court will elect a proper person to act as the commissioner, and the parties can be heard upon the question of the appointment before the commission issues. The authority conferred by section 866 [*infra*, p. 189], is the granting a *dedimus* to take depositions according to common usage. . . . In other words, if the right to take depositions existed, then the party desiring to take the same might do so under the provisions of section 863, or according to common usage, which, in an action at law, would be deemed to be in accordance with the mode provided for by the statutes of the state.” Giles v. Paxson, (1888) 36 Fed. 882.

In Henning v. Boyle, (S. D. N. Y. 1901) 112 Fed. 397, the court said: “The method of taking testimony by commission is cumbersome and unsatisfactory and not resorted to when the convenient method of taking proof prescribed by section 863, Rev. St. U. S., is available.”

State practice.—When the facts are

such in a common-law case that under the statutes of the United States the right to take the testimony of witnesses by depositions exists, then, by reason of R. S. sec. 914 (see JUDICIARY), as to the mere mode of procuring the depositions, parties may follow at their own election either the provisions of the state law or of the Act of Congress. McLennan v. Kansas City, etc., R. Co., (1884) 22 Fed. 198. See also U. S. v. Fifty Boxes, etc., Lacey, (1899) 92 Fed. 601; U. S. Life Ins. Co. v. Ross, (C. C. A. 1900) 102 Fed. 722, 42 C. C. A. 601; Flint v. Crawford County, (1879) 5 Dill. 481, 9 Fed. Cas. No. 4,871.

This view has been confirmed by statute, see Act of March 9, 1892, ch. 14, 27 Stat. L. 7, given *infra*, p. 225.

But in adopting a state practice as to the taking of depositions the court does not dispense with the requirements of the Act of Congress, such adoption of the state law referring only to the form and mode of taking depositions. Curtis v. Central Ry., (1855) 6 McLean 401, 6 Fed. Cas. No. 3,501.

This section authorizes the taking of testimony of any witness in a civil case pending in a federal district of the Circuit Court by depositions *de bene esse*, when the witness lives a greater distance from the place of trial than one hundred miles, etc., and Act Cong. March 9, 1892, ch. 14, 27 Stat. L. 7 (see *infra*, p. 225), provides that, in addition to the taking of depositions in a federal court, depositions may be taken as prescribed by the laws of the state in which such courts are held. It has been held that where a party to a suit in the federal court applied to take a deposition on the ground that the witness resided more than one hundred miles from the place of trial, he was not limited by the Act of 1892 to the mode of taking the deposition orally before an authority named in the notice, but was entitled to take it in the mode prescribed by the laws of the state in which the court was held. Magone v. Colorado Smelting, etc., Co., (1905) 135 Fed. 846.

Where a deposition was taken of a witness who resided within a hundred miles of the place of trial of a cause pending in a state court, pursuant to the state laws, it was held that, under this section and under the Act of Congress of March 9, 1892, *infra*, p. 225, providing that it shall be lawful to take the deposition or testimony of witnesses in the mode prescribed by the laws of the state in which the court is held, the deposition was admissible when the cause was taken to the federal court, the witness being dead when the motion for removal thereof was made. U. S. Life Ins. Co. v. Ross, (C. C. A. 1900, 102 Fed. 722, 42 C. C. A. 601.

Deprivation of rights accorded by section.—It is not within the power of the District Court, or of any judge, to deprive a party of the rights accorded him

by this section. *In re* National Equipment Co., (C. C. A. 2d Cir. 1912) 195 Fed. 488, 115 C. C. A. 398.

Strict construction.—The authority to take testimony under the Act, "being in derogation of the rules of the common law, has always been construed strictly; and therefore it is necessary to establish that all the requisites of the law have been complied with before such testimony is admissible." *Bell v. Morrison*, (1828) 1 Pet. 351, 7 U. S. (L. ed.) 174; *Patapasco Ins. Co. v. Southgate*, (1831) 5 Pet. 604, 8 U. S. (L. ed.) 243; *Carrington v. Stimson*, (1853) 1 Curt. 437, 5 Fed. Cas. No. 2,450; *Harris v. Wall*, (1849) 7 How. 693, 12 U. S. (L. ed.) 875; *Shankwiker v. Reading*, (1847) 4 McLean 240, 21 Fed. Cas. 12,704; *Wilkinson v. Yale*, (1853) 6 McLean 16, 29 Fed. Cas. No. 17,678; *Luther v. The Schooner Merritt Hunt*, (1853) Newb. Adm. 4, 15 Fed. Cas. 8,610; *Merrill v. Dawson*, (1848) Hempst. 563, 17 Fed. Cas. No. 9,469; *U. S. v. Tilden*, (1879) 10 Ben. 568, 28 Fed. Cas. No. 16,522, where the court added that the statute "must have a fair and reasonable construction, having regard to the particular purpose it was intended to subserve and the special evils it was designed to remedy;" *Jones v. Neale*, (1796) 2 Mart. (N. C.) 81, 13 Fed. Cas. No. 7,483; *Lunkle v. Worcester*, (1869) 5 Biss. 102, 8 Fed. Cas. No. 4,162; *Jones v. Greenolds*, (1806) 1 Cranch C. C. 339, 13 Fed. Cas. No. 7,464; *Thorpe v. Simmons*, (1819) 2 Cranch C. C. 195, 23 Fed. Cas. No. 14,007; *Russell v. Ashley*, (1847) Hempst. 546, 21 Fed. Cas. No. 12,150; *Wilson Sewing Mach. Co. v. Jackson*, (1877) 1 Hughes 295, 30 Fed. Cas. No. 17,853; *Stein v. Bowman*, (1839) 13 Pet. 209, 10 U. S. (L. ed.) 129; *Cook v. Burnley*, (1867) 11 Wall. 659, 20 U. S. (L. ed.) 29; *Shuttle v. Thompson*, (1872) 15 Wall. 151, 21 U. S. (L. ed.) 123; *Hunter v. International R. Imp. Co.*, (1896) 28 Fed. 842; *In re Thomas*, (1888) 35 Fed. 822; *Bowie v. Talbot*, (1805) 1 Cranch C. C. 247, 3 Fed. Cas. No. 1,732; *Rutherford v. Geddes*, (1866) 4 Wall. 220, 18 U. S. (L. ed.) 343; *Penns v. Ingraham*, (1811) 2 Wash. 487, 19 Fed. Cas. No. 10,944; *Banert v. Day*, (1814) 3 Wash. 243, 2 Fed. Cas. No. 836; *Read v. Bertrand*, (1825) 4 Wash. 558, 20 Fed. Cas. No. 11,603; *Rhoades v. Selin*, (1827) 4 Wash. 715, 20 Fed. Cas. No. 11,740; *The Samuel*, (1816) 1 Wheat. 9, 4 U. S. (L. ed.) 23.

Taking of deposition as optional with party desiring evidence.—The taking of the deposition under this section is "a privilege to be exercised at the option of the party desiring the evidence of a witness living more than one hundred miles from the place of trial;" and the opposite party has "no right to demand that, under such circumstances, a deposition should be taken;" and "if the litigant

does not exercise the option to take the evidence of his witness by deposition, he can recover for what he is compelled to pay his witness by law as traveling fees." *Hunter v. Russell*, (1894) 59 Fed. 964; *Prouty v. Draper*, (1842) 2 Story 199, 20 Fed. Cas. No. 11,447.

Where a rule for taking depositions has expired, they may be taken under an Act of Congress. *Buckingham v. Burgess*, (1844) 3 McLean 368, 4 Fed. Cas. No. 2,088.

Persons required to give testimony by deposition *de bene esse*—*Parties to suit*.—A plaintiff in a federal court, who is a citizen of another state and resides more than one hundred miles from the place of trial, may be compelled by the defendant to appear and testify by deposition *de bene esse* in advance of the trial, under this section, and such deposition may be taken at any place where he is found and served with subpoena. *Blood v. Morrin*, (1905) 140 Fed. 918.

The same rule is applicable to a defendant in an action at law pending in a Circuit Court of the United States, who resides out of the district, and more than one hundred miles from the place of trial. *Hartman v. Feenaughty*, (1905) 139 Fed. 887.

Witness casually absent from home.—This section "does not apply to a witness who is casually absent from home, although he is found at a place more than one hundred miles from the place of trial of the cause, unless he is about going to sea, or is aged, infirm, etc." *Ex p. Humphrey*, (1851) 2 Blatchf. 228, 12 Fed. Cas. No. 6,867.

"The liability of the witness to be ordered out of the reach of the court is not one of the causes deemed sufficient by the law for taking a deposition *de bene esse*," and therefore it was held that where the witness was a seaman on board a United States gunboat in the harbor of Newport, and liable to be ordered to some other place and not to be able to attend the court at the time of its sitting, this was not a sufficient ground for the taking of the deposition *de bene esse*. *The Samuel*, (1816) 1 Wheat. 9, 4 U. S. (L. ed.) 23.

Witnesses in foreign country.—The provisions of this section "apply to the taking of depositions of witnesses within the United States, and have no application to the taking of depositions of witnesses in a foreign country." *Cortes Co. v. Tannhauser*, (1883) 18 Fed. 667; *Bird v. Halsy*, (1898) 87 Fed. 671; *The Alexandra*, (1900) 104 Fed. 904; *Compania Azucarera Cubana v. Ingraham*, (C. C. Conn. 1910) 180 Fed. 516. But see *Bischoffsheim v. Baltzer*, (1882) 10 Fed. 1.

A person who does not reside within the district where the subpoena is issued cannot be compelled, except under this section, to attend before an examiner as

a witness in an equity cause. *Tomlinson v. Moore*, (S. D. N. Y. 1910) 189 Fed. 845.

Section applicable to what causes.—*Proceedings for deportation of Chinese*.—Proceedings brought under the Chinese Exclusion Act for the deportation of a Chinese person are civil, and not criminal, and therefore a defendant claiming to be a native of the United States may avail himself of the right given by this section to take and use depositions *de bene esse*. *In re Lam Jung Sing*, (1907) 150 Fed. 608.

Bankruptcy proceedings do not fall within the purview of this section. *In re Dunn*, (1874) 9 Nat. Bankr. Reg. 487, 8 Fed. Cas. No. 4,173.

Equity and admiralty cases.—This section applies to equity cases and to admiralty cases, which are coupled with equity cases under section 862. *Stegner v. Blake*, (1888) 36 Fed. 183.

But depositions taken under this section cannot be used as evidence in an equity cause in the Circuit Court of the District of Columbia. *Walker v. Parker*, (1840) 5 Cranch C. C. 639, 29 Fed. Cas. No. 17,082.

Causes pending in the Supreme Court.—In *The Argo*, (1817) 2 Wheat. 287, 4 U. S. (L. ed.) 241, the court was of the opinion that the provision as to taking depositions *de bene esse* did not apply to cases pending in the Supreme Court, depositions for use before such court being regularly taken only under a commission issuing according to its rules.

"Depending" in court.—It has been held that a cause is not "depending" within the meaning of this section prior to the joining of the issues. *Stevens v. Missouri, etc., R. Co.*, (E. D. Mo. 1900) 104 Fed. 934.

"Depending in a District or Circuit Court."—Where a case had gone on appeal to the Supreme Court, it was held to be no longer "depending" in a Circuit Court, and therefore no longer within the provisions of this section. *Richter v. Jerome*, (1885) 25 Fed. 679. As to the abolition of Circuit Courts see JUDICIARY.

Where witness "lives."—"For the purpose of taking a deposition under this statute, a witness 'lives' where he can be found, and is sojourning, residing, or abiding for any lawful purpose." *Mutual Ben. Life Ins. Co. v. Robison*, (C. C. A. 1893) 58 Fed. 723, 19 U. S. App. 266, 7 C. C. A. 444, 22 L. R. A. 325.

A party is not entitled to take the deposition of a witness in a federal court, under this section, where the witness actually lives at the place of trial and expects to remain there, although his legal domicile may be elsewhere. *Frost v. Barber*, (1909) 173 Fed. 848.

Distance of residence.—*How distance measured*.—In the matter of taking the

deposition of a witness who resides more than one hundred miles from the place of trial, "the distance is to be determined by the ordinary, usual, and shortest route of public travel, and not by a mathematically straight line between the place of residence and the place of trial." *Jennings v. Menaugh*, (1902) 118 Fed. 612, following *Ex p. Beebees*, (1851) 2 Wall. Jr. C. C. 127, 3 Fed. Cas. No. 1,220; *Smith v. Ingraham*, (1827) 7 Cow. (N. Y.) 419, and *In re Foster*, (1872) 44 Vt. 570.

Certificate as evidence of distance of residence.—The certificate of the magistrate before whom the deposition is taken is competent evidence as to the distance at which the witness resides from the place of caption, this being a fact proper for the inquiry of the officer taking the deposition. *Merrill v. Dawson*, (1848) Hempst. 563, 17 Fed. Cas. No. 9,469 [citing *Patapsco Ins. Co. v. Southgate*, (1831) 5 Pet. 604, 8 U. S. (L. ed.) 243; *Bell v. Morrison*, (1828) 1 Pet. 351, 7 U. S. (L. ed.) 174].

Where, in his certificate, the person who took the depositions stated that the witnesses lived more than one hundred miles from the place of holding court, and further that the other party had no agent known to him residing within one hundred miles of the place of taking the depositions, it was held that the requirements of the Act were satisfied. *Tooker v. Thompson*, (1842) 3 McLean 92, 24 Fed. Cas. No. 14,097.

Under the Act of Sept. 24, 1789, ch. 20, sec. 30, 1 Stat. L. 88 (now R. S. sec. 863), the person before whom the deposition was taken certified that neither the opposite party nor his counsel resided within one hundred miles of the place of caption, and that, consequently, no notification of the time and place of taking the deposition was made out or served. It was held that such certificate was sufficient, it not being necessary for the commissioner to certify that the parties were not actually within that distance, and if they had been temporarily within such distance, and the commissioner was not aware thereof, the certificate would still be sufficient; but the certificate would not be valid if by parol proof it were established either that the party had resided within one hundred miles or that he was, and the commissioner knew him to be, temporarily within such distance. *Dick v. Runnels*, (1847) 5 How. 7, 12 U. S. (L. ed.) 26.

When taken—*Term time*.—The fact that certain depositions "were taken in term time, and without leave of the court, and at a term at which the cause could be tried," has been held not alone a sufficient ground for the suppression thereof, the objection that the depositions were taken in term time not being within the statute. *Union Pac. R. Co. v. Reese*, (C. C. A. 1893) 56 Fed. 288, 15 U. S. App.

92, 5 C. C. A. 510, wherein the court said: "First. That the court erred in refusing the motion of the defendant below to suppress certain depositions taken on behalf of the plaintiff, and permitting the same to be read in evidence, for the reason that the same were taken in term time, and without leave of the court, and at a term at which the cause could be tried. The term of court to which reference is made commenced on May 2, 1892. Plaintiff's notice to take the first deposition was served upon the attorney for the defendant on the 18th day of April, 1892, to take the deposition of a witness on the 25th day of April, 1892, in the town of Irondale, Jefferson county, Ohio. The notice to take the second deposition was served upon the attorney for the defendant on the 23d day of April, 1892, to take the deposition of a witness on the 27th day of April, 1892, in the city of Cheyenne, Wyo. The cases of *Allen v. Blunt*, [1846] 2 Woodb. & M. 121-135, [1 Fed. Cas. No. 217] and *Bell v. Nimmon*, [1849] 4 McLean 539, [3 Fed. Cas. No. 1259] are cited as authority in support of the defendant's contention that these depositions should have been suppressed, because taken in term time. In the first case the deposition was taken by the defendant *ex parte*, and without notice to the plaintiff during the sitting of the court at which the case was tried, under the provisions of section 30 of the Act of September 24, 1789. At the trial the court refused to permit the deposition to be read in evidence, and on a motion for a new trial held that the deposition was properly excluded, on the ground, among other reasons, that depositions taken without notice were very dangerous in their *ex parte* character for the fair trial of the final merits of a cause; citing the case of *Bell v. Morrison*, [1828] 1 Pet. 356, [7 U. S. (L. ed.) 174]. Moreover, it appeared that the plaintiff had counsel at the very place where the deposition was taken. It is true the court stated in its opinion that depositions taken during the session of the court, though over a hundred miles distant, whether with or without notice, were entirely inadmissible; but in the case of *Bell v. Morrison* the Supreme Court did not go that far. The statute involved in both cases was the same, and required, among other things, that the deposition should be reduced to writing by the magistrate taking the deposition, or by the deponent in his presence. The objection was that there was no proof by the certificate of the magistrate or otherwise that the deposition in question was so reduced to writing in the presence of the magistrate. The Supreme Court held that the authority to take depositions in this manner, being in derogation of the rules of the common law, had always been construed strictly, and it was therefore necessary to establish that all the requisites of the

law had been complied with before such testimony would be admissible, and this was all it was necessary to decide in either case. In the case of *Bell v. Nimmon* the deposition had also been taken under the Act of 1789, and it was held that a notice to take a deposition was not good if served on counsel who could not attend to the taking of the deposition without being absent at the commencement of the court. These cases do not establish any rule for the exclusion of a deposition applicable to the case at bar—first, because the facts upon which the objections were based are not the same; and, second, because the deposition in the present case was taken under the Act of May 9, 1872 (section 863, Rev. St.), which prescribes that depositions *de bene esse* may be taken under certain circumstances upon reasonable notice to be given in writing by the party or his attorney proposing to take such depositions to the opposite party or his attorney of record, as either may be nearest. The requirement that a reasonable notice must be given to the opposite party before taking a deposition has to a large extent cured the evils complained of under the former Act."

Absence from court to take depositions.—"It is only by consent of parties, or discretion of the court under peculiar circumstances, that, in ordinary cases of taking depositions, this prior and paramount duty in court should be required to be neglected or suspended, by absence in attending on the taking of depositions. They ought to be all taken and the case prepared before the term begins." *Allen v. Blunt*, (1846) 2 Woodb. & M. 121, 1 Fed. Cas. No. 217.

Rule 47 of the Federal Equity Rules provides as follows: "The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires." It has been held that this rule, limiting as it does the time of taking depositions, is conclusive upon the federal courts, and it must be assumed that in

adopting it the Supreme Court was construing this section. *Victor Talking Mach. Co. v. Sonora Phonograph Corp.*, (S. D. N. Y. 1915) 221 Fed. 676, wherein the court said: "It is urged, however, that rule 47 cannot limit the time of taking depositions in view of section 863 of the United States Revised Statutes, and that where the witness is one within the purview of that section, a deposition may be taken after the time prescribed in rule 47. But rule 47 refers, among other things, to 'all depositions taken under a statute,' and as it must be assumed that the Supreme Court was construing (among others) section 863, the validity of the rule is, of course, conclusive upon this court." Compare *Iowa Washing Mach. Co. v. Ward*, (S. D. N. Y. 1915) 227 Fed. 1004, wherein the court said: "The defendant objected to the admission in evidence of certain depositions taken by plaintiff without first obtaining leave of court. These depositions were taken under section 863, Rev. Stat. U. S. and apparently within the time provided by equity rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi), but without an order of court. I am of opinion that equity rule 47 was not intended to vary or be a limitation upon section 863, because, of course, that section, being a legislative enactment, cannot be changed except by further legislative enactment."

Examination before issue joined.—Under this section, and under R. S. sec. 858 (see WITNESSES), providing that, with certain exceptions in the federal courts, no witness shall be excluded in any civil action because he is a party to or interested in the issue tried, the defendant in an action on a promissory note was held entitled to examine the plaintiff *de bene esse* before issue joined, the plaintiff living outside of the district and at a greater distance from the place of trial than a hundred miles. *Lowrey v. Kusworm*, (1895) 66 Fed. 539, *distinguishing Es p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117.

But this section, together with Supreme Court Rule 68, in reference thereto, does not permit the taking of testimony *de bene esse* in an equity cause before issue joined. *Stevens v. Missouri, etc., R. Co.*, (1900) 104 Fed. 934; *Flower v. MacGinniss*, (C. C. A. 1901) 112 Fed. 337, 50 C. C. A. 291.

Before whom taken—County Court judge.—Where a probate court is organized for each county of the state and is a court of record having a seal, the judge of such probate court is a county judge, within the description of the law, and it is sufficient if the deposition be taken before him. *Fowler v. Merrill*, (1850) 11 How. 375, 13 U. S. (L. ed.) 736; *Merrill v. Dawson*, (1848) Hempst. 563, 17 Fed. Cas. No. 9,469.

3 F. S. A.—7.

City Court.—The court refused to suffer a deposition taken before the judge of the city court of Lexington, Ky., to be read. *Foreman v. Holmead*, (1837) 5 Cranch C. C. 162, 9 Fed. Cas. No. 4,935.

Notary.—A witness may be compelled by process or rule to attend before a notary and answer questions propounded. *Roschynialski v. Hale*, (D. C. Neb. 1913) 201 Fed. 1017.

Justice of peace.—A deposition taken under a rule of court and executed by a justice of the peace may be read. This section relates to depositions taken without a rule of court. *Banert v. Day*, (1814) 3 Wash. 243, 2 Fed. Cas. No. 836.

Attorney or interested person.—Depositions taken by a magistrate who was a partner of the acting counsel to one of the parties will not be allowed. *Nichols v. Harris*, (1854) 18 Fed. Cas. No. 10,243.

Taking depositions outside district where action is pending.—A deposition taken out of the district where the trial is held is admissible. *Patapco Inc. Co. v. Southgate*, (1831) 5 Pet. 604, 8 U. S. (L. ed.) 243; *Russell v. Ashley*, (1847) Hempst. 546, 21 Fed. Cas. No. 12,150. *Thum v. Andrews*, (C. C. Mass. 1892) 53 Fed. 84; *Davis v. Davis*, (C. C. Mass. 1898) 90 Fed. 791, *citing Es p. Judson*, (1853) 3 Blatchf. 89, 14 Fed. Cas. No. 7,561.

Depositions taken without a commission or rule of court, in another state, more than one hundred miles from the place of trial, but conforming in all respects to the Act, have been held admissible in evidence. *Pettibone v. Derringer*, (1818) 4 Wash. 215, 19 Fed. Cas. No. 11,043.

Notice.—*There must be personal service on the adverse party or his attorney;* "no substituted service, by leaving the copy at his dwelling house or usual place of abode, being authorized by the Act." *Carrington v. Stimson*, (1853) 1 Curt. 437, 5 Fed. Cas. No. 2,450.

It was held, however, in *Merrill v. Dawson*, (1848) Hempst. 563, 17 Fed. Cas. No. 9,469, where the notice of taking the deposition was served by delivering a true copy thereof to some of the defendants, by leaving a true copy thereof with a white member of the family of another at his usual place of residence, and on other parties by delivering a true copy thereof to their counsel, they not being residents of the district, that this was good service of the notice.

"No counsel is obliged to receive a notice of taking a deposition while in attendance at court;" and therefore it was held that a notice, which, if attended to, would render it impossible for the counsel to be present on the day the court commenced, was invalid. *Bell v. Nimmon*, (1849) 4 McLean 539, 3 Fed. Cas. No. 1,259.

Attorney's authority to accept service.

—The authority of a certain party, H., to accept, as attorney and agent of the state, service for the defendant, having been revoked, and another attorney not having been as yet appointed for the acceptance of such service, and notice having been served upon H. by the plaintiff of the taking of H.'s deposition, the suppression of such deposition on the ground of want of service on the defendant was refused, inasmuch as the authority of an attorney to accept service cannot be revoked until another attorney has been appointed with power to accept. *U. S. Life Ins. Co. v. Ross*, (C. C. A. 1900) 102 Fed. 722, 42 C. C. A. 601.

Where the plaintiff had counsel in the action who resided in the very city where the deposition was taken, and though his name was not entered on the record, he had acted in the former trial between the same parties in a like cause of action, which fact was known to the parties, it was held that such counsel should have been notified. *Allen v. Blunt*, (1846) 2 Woodb. & M. 121, 1 Fed. Cas. No. 217.

The objection that the notice, directed to the defendant himself, was served only upon his attorney-at-law in the cause, was overruled. *Barrell v. Limington*, (1830) 4 Cranch C. C. 70, 2 Fed. Cas. No. 1,040.

The objection that the judge had not certified that the defendants had no attorney within a hundred miles of the place of caption, he having certified that no notice was given to the adverse parties because they were not within a hundred miles, but having said nothing of their attorney, was overruled, inasmuch as the judge was not required to give any reason for not giving notice, and, if he had, his certificate would not be conclusive evidence of the fact that neither the party nor his attorney was within a hundred miles of the place of caption. *Smith v. Coleman*, (1821) 2 Cranch C. C. 237, 22 Fed. Cas. No. 13,029.

Where the judge did not certify whether the plaintiff was notified of the time and place of caption, nor the precise place of caption, the deposition was rejected. *Pentleton v. Forbes*, (1808) 1 Cranch C. C. 507, 19 Fed. Cas. No. 10,966.

The certificate of a notary before whom the deposition was taken having stated the existence of facts making it under this section unnecessary to give notice, it was held that it was not necessary that the notarial certificate should state those facts to have been the reason why no notice was given. *Dinsmore v. Maroney*, (1859) 4 Blatchf. 416, 7 Fed. Cas. No. 3,920.

*"The question of reasonableness of notice depends, obviously, upon the circumstances of each particular case. * * ** The chief features to be considered in determining whether a certain notice is or is not reasonable are distance, number of

witnesses, and facility of communication and to obtain proper representation." *American Exch. Nat. Bank v. Spokane Falls First Nat. Bank*, (C. C. A. 1897) 82 Fed. 961, 48 U. S. App. 633, 27 C. C. A. 274.

Where the notice did not state the names of the witnesses whose depositions were to be taken, as required by the statutes, but it was presented to the plaintiff's attorneys, and they indorsed their acceptance on it, the notice was held sufficient. *Sage v. Tauszky*, (1877) 6 Cent. L. J. 7, 21 Fed. Cas. No. 12,214.

Examination at place not named in notice.—Where all the parties were present at the examination, either personally or by attorney, the objection that the examination was taken at a place other than that named in the notice was overruled. *Gartside Coal Co. v. Maxwell*, (1884) 20 Fed. 187.

Deposition not taken on day named.—The fact that the deposition was not taken on the day named in the notice is not sufficient reason for suppressing it. *Sage v. Tauszky*, (1877) 6 Cent. L. J. 7, 21 Fed. Cas. No. 12,214.

Heading substantially correct.—Where the heading of the notice to take a deposition was as follows: "United States of America, State of Illinois, County of Cook, ss: In the Circuit Court of the United States," it was held that although not technically correct, perhaps, it was substantially so. *Gormley v. Bunyan*, (1891) 138 U. S. 623, 11 S. Ct. 453, 34 U. S. (L. ed.) 1086.

Length of notice.—It was held in *Nicholls v. White*, (1802) 1 Cranch C. C. 58, 18 Fed. Cas. No. 10,235, and in *Leiper v. Bickley*, (1801) 1 Cranch C. C. 29, 15 Fed. Cas. No. 8,222, that a notice of one hour, and in *Atkinson v. Glenn*, (1831) 4 Cranch C. C. 134, 2 Fed. Cas. No. 610, that a notice of one day, of the taking of a deposition, in Alexandria, Va., was sufficient, where all the parties resided in that town.

Reason for taking deposition.—An objection that the notice did not state the reason for taking the deposition will be overruled. *Sage v. Tauszky*, (1877) 6 Cent. L. J. 7, 21 Fed. Cas. No. 12,214; *U. S. v. Louisville, etc., R. Co.*, (1883) 18 Fed. 481. But see *Harris v. Wall*, (1849) 7 How. 693, 12 U. S. (L. ed.) 875.

Taken before another notary than one named.—Where the notice of the taking of the deposition read that it would be taken "before William G. Peckham, Esq., notary public, or some other officer authorized by law to take depositions;" and the deposition was, as a matter of fact, taken before another notary to be authorized by law so to act, it was held that the notice conformed to this section. *Gormley v. Bunyan*, (1891) 138 U. S. 623, 11 S. Ct. 453, 34 U. S. (L. ed.) 1086.

Depositions in three separate cities on

same day.—Where a notice was served that on the same day the plaintiff would proceed to take the depositions of certain witnesses in three separate cities, the notice was held not to be such as is required by this section, and the depositions were, therefore, suppressed. *Uhle v. Burnham*, (1890) 44 Fed. 729.

Notice sufficient.—An objection that the notice to the opposite party to attend at the time and place of the caption did not require him "to put interrogatories if he should think fit," was overruled. *Bussard v. Catalino*, (1823) 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228.

Irregularity not waived by cross-examination.—The defendants appeared by counsel and objected to the admission of the depositions upon the express ground that the notice given was unreasonable. Thereafter, however, their counsel endeavored as best he could to cross-examine. It was held that by such proceeding the objection was not waived, and that if the plaintiff's counsel persisted in going on, in the face of the objection, he did so at his own risk. *Uhle v. Burnham*, (1890) 44 Fed. 729.

Where, however, the defendants objected to the deposition on the ground that the requirements of the Act as to giving previous notice of the taking thereof had not been complied with, but it appeared that a notice had in fact been served, and that counsel for the defendant had attended and cross-examined the witness, the deposition was admitted in evidence. *Dinsmore v. Maroney*, (1859) 4 Blatchf. 416, 7 Fed. Cas. No. 3,920; *Mechanics Bank v. Seton*, (1828) 1 Pet. 299, 7 U. S. (L. ed.) 152, holding that cross-examination waives irregularities; *Shutte v. Thompson*, (1872) 15 Wall. 151, 21 U. S. (L. ed.) 123, holding that cross-examination without protest and silence until death of witness was a waiver.

In what cases ex parte depositions without notice are taken.—In *Walsh v. Rogers*, (1851) 13 How. 283, 14 U. S. (L. ed.) 147, it was held that under the Act of Sept. 24, 1789, 1 Stat. L. 88, ch. 20, § 30 (now R. S. sec. 863) *ex parte* depositions without notice are to be taken only in cases of mere formal proof or of some isolated fact or in circumstances of absolute necessity.

Where a deposition is taken under the Act, without notice, it may be taken again if the party objecting is not satisfied that it is sufficient, it being no answer to such application that the party objecting to the deposition was not present when it was taken. *Goodhue v. Bartlett*, (1850) 5 McLean 186, 10 Fed. Cas. No. 5,538.

Vacation or extension.—Since this section authorizes the taking of depositions *de bene esse* without any application to or assistance from the court, the court has no jurisdiction to vacate or extend a notice; the party taking the deposition assuming the risk of having it suppressed if the notice does not comply with the

statute. *Kline v. Liverpool, etc., Ins. Co.*, (1911) 184 Fed. 969.

Witnesses.—A notice which is silent as to the witnesses whose depositions are to be taken is fatally defective under this section. *In re Automobile Co-op. Ass'n of America*, (S. D. N. Y. 1915) 222 Fed. 345.

Effect of waiver.—The compulsory character of the proceedings under this section has been held not to be affected by the waiver of notice and the fixing of the time by the agreement. *Parker v. Marco*, (1893) 136 N. Y. 585, 32 N. E. 989, 32 A. S. R. 770, 20 L. R. A. 45, citing *Plimpton v. Winslow*, (1881) 9 Fed. 365.

Necessity for order from court for examination de bene esse.—No order or other direction of the court is required antecedent to the examination *de bene esse*. The right to take it upon notice merely, in the manner prescribed, is given absolutely to the party by the section. *Henning v. Boyle*, (S. D. N. Y. 1901) 112 Fed. 397.

Motion to suppress.—If question is raised as to the reasonableness of a notice or as to the regularity of the proceedings, it may be raised by a motion to suppress. *Henning v. Boyle*, (S. D. N. Y. 1901) 112 Fed. 397.

Subpoena to compel attendance of witness.—In *Henning v. Boyle*, (S. D. N. Y. 1901) 112 Fed. 397, the court in a proceeding brought to obtain a subpoena requiring a witness in Kentucky to submit to an examination *de bene esse*, said: "Nor can this court make an order or issue a subpoena requiring the witness to attend in Kentucky to be examined under section 863. Its process to secure attendance of witnesses does not run more than one hundred miles from the courthouse. The section provides: 'Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.' That manner is as follows: The party wishing to compel the attendance goes to the office of the clerk of the court where the trial is to be had, and obtains from him an original writ of subpoena and a copy, no application to the judge therefor being required. He then has the witness served in the regular way. Should the latter disobey the subpoena and fail to attend, proof is made to the court of the default and of the issuing and service of subpoena, whereupon an attachment is issued, which the marshal executes by taking the witness and producing him in the court room. As was indicated above, this process of subpoena is issued by the clerk of the court where the trial is had. Under the language of section 863, the clerk of the federal court in the district where the witness is to be examined would seem to be the proper person to apply to for such process, and to have abundant authority in the matter. What the practice in other districts is I do not know.

Heretofore in this district, when application was made under section 863, the clerk always issued process of his own motion; but in recent years it has been the practice to require the party applying to submit an affidavit showing that a cause was actually pending, and that notice of examination had been given. Thereupon the issue of subpoena is approved by the court. Plaintiff should give ample notice of the examination, and then should apply to the clerk of the federal court in the district where the witness resides. That officer undoubtedly has power to issue the subpoena. If a similar practice prevails there (as here), an affidavit showing *bona fides* of the application should also be filed."

Compare *Stevens v. Missouri, etc., R. Co.*, (E. D. Mo. 1900) 104 Fed. 934, which holds that the section does not confer upon the clerk of the Circuit Court power to issue subpoenas for the appearance of witnesses and for the taking of their depositions before a notary, such depositions to be used in another federal court.

Mode of compelling answers.—In an action at law the court has no authority to strike out the answer of the defendant unless he answers certain interrogatories propounded by the plaintiff on an examination *de bene esse* initiated by the trees under this section. *Barnes v. Trees*, (S. D. N. Y. 1912) 194 Fed. 230.

Continuance.—Where there was no opportunity to cross-examine the witness whose deposition was taken, a continuance has been granted. *Dade v. Young*, (1803) 1 Cranch C. C. 123, 6 Fed. Cas. No. 3,534.

Claim of privilege.—On the taking of a deposition *de bene esse* in another federal district, under this section, the witness may assert his legal privilege to refuse to give testimony or to produce documents called for the same as though examined in open court, and in such case he has a right to be heard before the court in such district, and to have his claim of privilege determined by such court, before being compelled to answer or produce the documents. *Crocker-Wheeler Co. v. Bullock*, (1904) 134 Fed. 241.

Ruling on materiality of questions asked witness.—It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent, irrelevant, or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material, or relevant, and that it would be an abuse of the process of the court to compel its

production. *Perry v. Rubber Tire Wheel Co.*, (1905) 138 Fed. 836; *Dowagiac Mfg. Co. v. Lochren*, (C. C. A. 1906) 143 Fed. 211, 74 C. C. A. 341, 6 Ann. Cas. 573.

In *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (1905) 139 Fed. 843, it appeared that on the taking of the deposition of a witness in an action at law, in another district, under this section, questions asked by plaintiff were objected to as being irrelevant or immaterial, or as calling for incompetent testimony, or as touching matters about which the witness was privileged not to answer, and the witness having refused to answer the matter was certified to the Circuit Court of the district where the testimony was being taken. It was held that, as the power and duty of such court to pass on the objections was unsettled, it would require the witness to answer all questions in conformity to the equity practice, to enable the question to be taken before the appellate court in contempt proceedings should the witness still refuse to answer.

"The testimony of a witness by deposition *de bene esse* may be compelled by the court of the district in which the witness resides, and where the deposition is to be taken. . . . In such case the court or judge invoked to compel answer determines the materiality of the interrogatory, so far, at least, as involved in the exercise of the power of compulsion." *In re Allis*, (1890) 44 Fed. 216 [citing *Ex p. Peck*, (1853) 3 Blatchf. 113, 19 Fed. Cas. No. 10,885; *In re Judson*, (1853) 3 Blatchf. 148, 14 Fed. Cas. No. 7,563].

Ex parte evidence.—"There is nothing in the law, or in the reason of the case, which supplies a different authority, in respect to *ex parte* evidence taken out of court, from that which legally appertains to the court in proceedings before it. The act places both on the same footing." *In re Judson*, (1853) 3 Blatchf. 148, 14 Fed. Cas. No. 7,563.

Subpoena duces tecum.—The power of a court to order a subpoena *duces tecum* under section 863 was doubted in *Ex p. Peck*, (1853) 3 Blatchf. 113, 19 Fed. Cas. No. 10,885, but it has been unquestioned since the decision of Judge Choate in *U. S. v. Tilden*, (1879) 10 Ben. 566, 28 Fed. Cas. No. 16,522. The power to order the issuance of such a subpoena is also recognized in *Lowrey v. Kusworm*, (N. D. Ill. 1895) 66 Fed. 539; *Davis v. Davis*, (C. C. Mass. 1898) 90 Fed. 791; *Dancel v. Goodyear Shoe Machinery Co.*, (C. O. Mass. 1904) 128 Fed. 753; *Crocker-Wheeler Co. v. Bullock*, (S. D. Ohio 1904) 134 Fed. 241.

The subpoena *duces tecum* can only issue by order of court, and not as matter of course, but upon preliminary proof that the documents called for are in the possession of the witness and are *prima facie* competent and material evidence in the case. A notary public has no power to

issue the subpoena even though he is authorized to examine the witness *de bene esse*. *Danoel v. Goodyear Shoe Machinery Co.*, (C. C. Mass. 1904) 128 Fed. 753. It has been held however that a clerk of court may issue the subpoena *duces tecum* on order of the court. *Crocker-Wheeler Co. v. Bullock*, (S. D. Ohio 1904) 134 Fed. 241, *distinguishing* *Stevens v. Missouri*, etc., R. Co., (E. D. Mo. 1900) 104 Fed. 934.

There is no power under section 863 to issue a subpoena *duces tecum* to compel the production of books and papers for the purpose of refreshing the recollection of the witness. *U. S. v. Tilden*, (1879) 10 Ben. 566, 28 Fed. Cas. No. 16,522.

Attachment against witness.—Where an attachment is sought against a witness refusing to answer questions put to him on his examination *de bene esse* before a United States commissioner on a subpoena *duces tecum* as a witness in a suit pending in the Circuit Court of another district, it must first be made clearly to appear that the commissioner has jurisdiction in the matter, and that the witness resides more than a hundred miles from the place of trial of the action, and also that the witness was called to testify to the facts material and relevant to the issue in the case. *Ex p. Peck*, (1853) 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

Upon a motion by the defendants in a suit pending in a Circuit Court, for an attachment against a witness for his refusal to obey a subpoena issued by such court requiring him to appear before the United States commissioner to be examined *de bene esse* as a witness in that suit, on the ground that he resided more than one hundred miles from the place of trial, the court held that it could not look into the matters set up to impeach the good faith of the proceedings, and was bound to presume that they were carried on in the usual way, and to assume that this matter was a pending litigation, affecting the rights of the parties thereto, who were entitled to all the usual methods of obtaining testimony. *Ex p. Judson*, (1853) 3 Blatchf. 89, 14 Fed. Cas. No. 7,561.

Where a witness has been examined in chief by the party at whose instance the depositions *de bene esse* were taken, and an adjournment is had, such party cannot withdraw the proceedings; and an order will be granted upon application by an interested party, for an attachment to compel the witness to attend upon cross-examination. *In re Rindskopf*, (1885) 24 Fed. 542.

Upon due proof of service of a subpoena upon a witness, requiring his attendance before a commissioner upon an examination *de bene esse*, and a certificate of the commissioner that the witness did not attend before him, it is proper that an attachment should issue therefor. *Ex p. Humphrey*, (1851) 2 Blatchf. 228, 12 Fed. Cas. No. 6,867.

The court refused to grant an attachment against a witness examined *de bene esse* in a pending suit, for refusal to answer a question, where there was no evidence before the court tending to show the connection of the inquiry with the subject-matter of the action or defense. *In re Judson*, (1853) 3 Blatchf. 148, 14 Fed. Cas. No. 7,563.

The subpoena having been issued without any preliminary evidence before the commissioner showing this to be a case in which a *de bene esse* examination could be lawfully had, the want of such proof was held a fatal objection to the issuing of an attachment. *Ex p. Peck*, (1853) 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

A commissioner of the Circuit Court has not the power to issue a writ of habeas corpus to take from jail a prisoner committed by authority of the United States and bring him before the commissioner, for the purpose of giving his deposition before such commissioner, to be used in a cause pending in the District Court. *Ex p. Barnes*, (1846) 1 Sprague 133, 2 Fed. Cas. No. 1,010.

Form and contents of deposition.—*Names of parties in caption.*—The fact that the caption of the depositions fails to state the names of all the parties to the suit, that is, instead of naming each of the copartners as plaintiffs, it follows the style of the case as given in the notice and as docketed, is not a sufficient objection to exclude the use of the depositions, as the strict rule laid down by the Supreme Court as to transcripts of records to that court on error or appeal, upon which judgment or decree may follow, ought not to be pushed to the extreme in reference to depositions where all the parties had notice and knew in what case the testimony was sought. *Egbert v. Citizens' Ins. Co.*, (1881) 7 Fed. 47. See also *Merrill v. Dawson*, (1848) Hempst. 563, 17 Fed. Cas. No. 9,469, where the name of one of the defendants having been omitted in the caption of the deposition, but appearing in the court order appointing commissioners, in the notice served on the defendants, in the caption of the interrogatories which were filed and attached to and issued with the commission, in the commission which issued under the authority of the court, and in the oath of the commissioners to execute the same, the deposition was admitted; and *Buckingham v. Burgess*, (1844) 3 McLean 368, 4 Fed. Cas. No. 2,088, where it was held that although the caption was not correctly stated, yet there could be no doubt or uncertainty in the matter.

But see *contra*, *Smith v. Coleman*, (1821) 2 Cranch C. C. 237, 22 Fed. Cas. No. 13,029, where the court rejected the deposition, inasmuch as the name of one of the defendants had been omitted in the caption; *Waskern v. Diamond*, (1855) Hempst. 701, 29 Fed. Cas. No. 17,248, where it was held to be necessary to

specify the names of all the parties to the suit, in the caption or some other part of the depositions, to the end that it may appear on their face that the testimony was taken in the same suit; *Allen v. Blunt*, (1846) 2 Woodb. & M. 121, 1 Fed. Cas. No. 217, where the fact that the names of the parties to the suit are not given correctly in the caption, it being described as a suit against B., when it is really against B. & S., although the latter has not been served, is "an objection, when the proceedings are to be strictly scrutinized as here, not without some weight;" *Centre v. Keene*, (1820) 2 Cranch C. C. 198, 5 Fed. Cas. No. 2,553, where the objection that the style of cause was not stated in full in the caption was sustained; *Peyton v. Veitch*, (1816) 2 Cranch C. C. 123, 19 Fed. Cas. No. 11,057; and *Murray v. Marsh*, (1803) 3 N. C. 290, 17 Fed. Cas. No. 9,965.

Misspelling and omission in caption.—Neither the misspelling, in the caption, of the name of one of the parties, nor the omission therein of the name of the county in which the action is pending, is a fatal objection. *Van Ness v. Heineke*, (1821) 2 Cranch C. C. 259, 28 U. S. (L. ed.) 16,866.

Parol evidence as to caption.—Where the magistrate before whom the deposition was taken had not certified such a cause of caption as the law requires, parol evidence to disprove what the judge certified as to the caption was not allowed. *Wheaton v. Love*, (1807) 1 Cranch C. C. 451, 29 Fed. Cas. No. 17,485.

Caption not stating distance.—The fact that the caption of the depositions does not state that the city where they are to be taken is more than one hundred miles from the place where the trial is to be held, is not a valid objection thereto, where the distance between the two places is more than one hundred miles, and such fact is well known to the court and to the respective parties. *Egbert v. Citizens' Ins. Co.*, (1881) 7 Fed. 47.

Name of place where depositions taken.—It is sufficient if the person who took the depositions names in the caption the place where they were taken. *Tooker v. Thompson*, (1842) 3 McLean 92, 24 U. S. (L. ed.) 14,097.

Statement not a deposition.—"A statement of facts in writing, without date or venue, purporting to have been signed by a witness, but giving neither age nor residence of such witness, which statement is not shown to have been made under oath, nor the oath waived, nor to have been taken on notice or in the presence of parties, nor to have been taken before any official authorized to administer oaths, and which is not accompanied by a certificate of a competent official, from which compliance with any of the requisites for the taking of depositions in judicial proceedings can be inferred, is not a deposition,

although so labeled and filed in a suit pending in court." *Lutcher v. U. S.*, (C. C. A. 1896) 72 Fed. 968, 41 U. S. App. 54, 19 C. C. A. 259.

Withdrawal and amendment of deposition.—Where there was some informality in the certificate of the mayor before whom a deposition was taken, and without objection being made by the counsel on the other side, and by permission of the court, the deposition was withdrawn from the files in order that the certificate might be amended according to the truth of the case, the objection that such withdrawal and amendment furnished sufficient ground for refusal to receive the deposition as evidence was overruled. *Leatherberry v. Radcliffe*, (1839) 5 Cranch C. C. 550, 15 Fed. Cas. No. 8,163; *Gartside Coal Co. v. Maxwell*, (1884) 20 Fed. 188.

Certificate of authority of officer taking deposition.—The certificate of the proper magistrate to the deposition "is competent evidence to prove the requirements of the Act have been fulfilled in taking and certifying the deposition." *Smith v. Williams*, (1847) 22 Fed. Cas. No. 13,127.

An objection having been made that no proof was given at the trial that the officer before whom the deposition was taken was such officer as he described himself to be in his certificate, it was held that "if, upon the face of the certificate, it appears that the person before whom the deposition was taken was an officer authorized by the Act of Congress to take the same, it was all that could be required in the first instance." *Ruggles v. Bucknor*, (1824) 1 Paine 358, 20 Fed. Cas. No. 12,115.

The certificate and seal of the notary have been held sufficient proof of his authority. *Dinsmore v. Maroney*, (1859) 4 Blatchf. 416, 7 Fed. Cas. No. 3,920.

An objection that it does not appear, otherwise than by his own certificate, that the person before whom the deposition was taken had authority therefor, will be overruled. *Vasse v. Smith*, (1811) 2 Cranch C. C. 31, 28 Fed. Cas. No. 16,896; *Jasper v. Porter*, (1841) 2 McLean 579, 13 Fed. Cas. No. 7,229.

It is not necessary, where a commission for the taking of depositions has been issued to a notary public and they are taken by him, that he should attach his official seal to the certificate. *Brown v. Ellis*, (1900) 103 Fed. 834.

Where the deposition was taken before a mayor, who certified as such but did not affix his seal, the court presumed that he was mayor, as he might not have had any seal as such. *Price v. Morris*, (1849) 5 McLean 4, 19 Fed. Cas. No. 11,414.

But "where the officer taking the deposition has an official seal, and usually certifies his acts under that seal, his certificate (not accompanied by his official seal) that he is such officer is not sufficient." The court intimated, however, that the fact

that he is such officer may be proved by parol testimony, as any other matter *in pais*. *Paul v. Lowry*, (1825) 2 Cranch C. C. 628, 18 Fed. Cas. No. 10,844.

Not of counsel to either party.—The objection that the certificate of the magistrate before whom the deposition was taken did not state that he was not of counsel of either party, nor interested in the event of the cause, was overruled. *Miller v. Young*, (1812) 2 Cranch C. C. 53, 17 Fed. Cas. No. 9,596; *Peyton v. Veitch*, (1816) 2 Cranch C. C. 123, 19 Fed. Cas. No. 11,067.

The notary before whom the deposition was taken having certified that he was not counsel or attorney for either of the parties to the suit, it was held that the omission of the words, "that I am not interested in the event of the suit," was not sufficient to invalidate the deposition, especially as it appeared by his certificate that by consent the testimony in the case was taken in shorthand by a disinterested person under the notary's direction, and that the witnesses were examined by an attorney for the opposite party. *Stewart v. Townsend*, (1890) 41 Fed. 121.

Where a certificate of a notary public contains the following statement, "That I am not of counsel nor interested in any manner whatever in this cause," it was held that there was substantial compliance with this section. *American Exch. Nat. Bank v. Spokane Falls First Nat. Bank*, (C. C. A. 1897) 82 Fed. 961, 48 U. S. App. 633, 27 C. C. A. 274, citing *Donahue v. Roberts*, (1884) 19 Fed. 863, and *Gartside Coal Co. v. Maxwell*, (1884) 20 Fed. 187.

No reason assigned for taking deposition.—The fact that the officer who took the deposition did not, in his certificate, assign any reason for so taking it, was held a fatal objection. *Sage v. Tauszky*, (1877) 6 Cent. L. J. 7, 21 Fed. Cas. No. 12,214.

Use of deposition if deponent available at trial.—This section is so limited by R. S. sec. 865 that if the deponent is available at the trial his deposition cannot be read. *Vagaszki v. Consolidation Coal Co.*, (C. C. A. 2d Cir. 1915) 225 Fed. 913, 141 C. C. A. 37, wherein the court said: "It is further assigned as error that the court erred in permitting the defendant, over the objection and exception of the plaintiff, to read in evidence the deposition of one Joseph Hajduk taken by commission on behalf of the plaintiff. It appears that counsel for plaintiff examined a witness by commission months before trial, and did not call the witness at the trial, and that thereupon the counsel for defendant proposed to read the deposition. When this was proposed, it was admitted that the witness was present and available; but it was insisted that, as the plaintiff did not see fit to place him on the stand, defendant had a right to read the deposi-

tion. The deposition was taken pursuant to section 863 of the Revised Statutes of the United States, . . . which provides that the testimony of any witness may be taken in any civil cause by deposition *de bene esse*, when the witness lives at a greater distance than one hundred miles, from the place of trial, upon reasonable notice by the party or his attorney proposing to take such deposition. Section 865 [*infra*, p. 185] of the statutes . . . also provides that 'unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.' This provision is found in Judiciary Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 90, and has been in force ever since. It is urged that this statutory limitation on the use of depositions is intended to protect the opposite party, and that the party who takes a deposition stands in no position to utilize a restriction which the opposite party does not insist upon. The rule as laid down by Weeks in his *Law of Depositions*, § 466, is as follows: 'It is held by a large preponderance of authorities that, where one of the parties to a cause obtains a commission to examine witnesses, the other party has a right to call for the deposition and make use of it at the trial. And many cases hold that generally a deposition taken by one party may be used in evidence by the other, if the former fails or refuses to read it himself. And it is held that if one party takes a deposition, and declines to read it, the adverse party may read it, although the witness would have been incompetent if offered by him.' The author, however, makes no reference to the act of Congress, and it does not appear that he had it in mind in laying down the rule above quoted. Professor Wigmore, in his excellent work on Evidence (volume 2, § 1416, pp. 1786, 1787), in discussing the use of depositions, although making no reference in this connection to the act of Congress, states his opinion as follows: 'It [the deposition] is offered as the substantive testimony of that witness, whose testimony has not yet been heard. There is, therefore, no reason why one party rather than the other should be allowed to resort to a deposition without showing the deponent unavailable in person; and this the non-taker, as well as the taker, must do before using it.' And he cites in support of his view *Gordon v. Little*, (1822) 8 Serg. & R. (Pa.) 533, 548, 11 Am. Dec. 632; *Sexton v. Brook*, (1854) 15 Ark. 345, 349. *Elliot v. Shultz*, (1848) 10 Humph. 234, 236, also supports the same doctrine. In *Whitford v. Clark County*, (1886) 119 U. S. 522, 7 S. Ct.

306, 30 U. S. (L. ed.) 500, the court held it error to read a deposition, the witness being in the court at the time. But in that case the party who read the deposition was the party who took it. In *Yeaton v. Fry*, (1809) 5 Cranch 335, 3 U. S. (L. ed.) 117, the court had before it a somewhat analogous question. The act of Congress requires that one proposing to take a deposition shall give notice to the opposite party. The deposition was taken by the defendant without notice to the plaintiff. At the trial the plaintiff used the deposition over the defendant's objection. Chief Justice Marshall, speaking for the court, said: "The defendant is not at liberty to except to his own depositions, because he does not produce proof of his having given notice to the plaintiff." In *Smith v. State*, (1911) 145 Wis. 612, 130 N. W. 461, a deposition taken on behalf of an accused person was placed on file in the court. It was held that, whether offered by him or not, it might be used by his adversary at the trial. The court said that "if an accused person sees fit to cause a deposition to be taken in his behalf and made a part of the court files existing at the time of the trial, he

thereby waives his constitutional right to meet the witness face to face, so far as otherwise his adversary would be precluded from using such deposition whether offered by him or not." The case at bar is not analogous with that decided in Wisconsin. The constitutional provision which the Wisconsin court held an accused person could waive simply provided that such person "shall enjoy the right . . . to meet the witness face to face." But the act of Congress involved here does not simply give an adverse party the right to demand that a witness be placed on the stand, if within the court's jurisdiction and available. It positively prohibits the use of the deposition unless it appears to the court that the witness is dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, etc. In the face of this positive prohibition, it is not within the power of the court to allow a deposition to be used which the Act says shall not be used, and such power cannot be given by the consent of this defendant. The deposition clearly should not have been read."

Sec. 864. [Mode of taking depositions de bene esse.] Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. [R. S.]

This section was amended "so as to read as" above given by the Act of May 23, 1900, ch. 541, 31 Stat. L. 182. Originally this section was as follows:

"Sec. 864. Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent." Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 88; Act of May 9, 1872, ch. 146, 17 Stat. L. 89.

"**Cautioned and sworn**" and "**carefully examined.**"—Every person deposing must by virtue of this section be "cautioned and sworn" and "carefully examined," and it must appear from the certificate of the officer before whom the deposition was taken that this was done or the deposition will be rejected. *Luther v. Schooner Merritt Hunt*, (1852) Newb. Adm. 4, 15 Fed. Cas. No. 8,610; *Wilson Sewing Mach. Co. v. Jackson*, (1877) 1 Hughes 295, 30 Fed. Cas. No. 17,853; *In re Thomas*, (1888) 35 Fed. 822, citing *Bell v. Morrison*, (1828) 1 Pet. 351, 7 U. S. (L. ed.) 174, and *Cook v. Burnley*, (1867) 11 Wall. 659, 20 U. S. (L. ed.) 29.

In *Brown v. Piatt*, (1821) 2 Cranch C. C. 253, 4 Fed. Cas. No. 2,026, however, the objection that the magistrate before whom the deposition was taken had not certified that he "cautioned" the witness,

but had only stated that the witness was "examined and solemnly affirmed," was overruled.

See also *Edmondson v. Barrell*, (1821) 2 Cranch C. C. 228, 8 Fed. Cas. No. 4,284, where an objection was taken to the admission of the deposition because the judge taking it did not expressly certify that the deponent was examined, cautioned, and sworn by him, but certified that "the said witness, being of full age, and being carefully examined, and cautioned, and sworn to speak the whole truth, says in manner and form following," etc., and the court overruled the objection and allowed the deposition to be read, because it was plainly to be understood that the deponent was examined, cautioned, etc., by the judge; and *Moore v. Nelson*, (1844) 3 McLean 383, 17 Fed. Cas. No. 9,771, where

the mayor of a city before whom the deposition was taken did not certify that the witness was cautioned, but that he "was sworn in pursuance of the Act," and the deposition was allowed.

Form of oath.—"If there be a statutory form of oath in the place where the witness is examined, that is the form to be used upon an examination under section 864, R. S., unless the deponent expresses conscientious scruples respecting that form." *Wilson Sewing Mach. Co. v. Jackson*, (1877) 1 *Hughes* 295, 30 *Fed. Cas.* No. 17,853.

Witness when sworn.—A witness may be sworn before or after the deposition is reduced to writing. *Tooker v. Thompson*, (1842) 3 *McLean* 92, 24 *Fed. Cas.* No. 14,097. But whether a deposition which was written and signed by the witness before the oath was administered to him is admissible, *quere*. *Dodge v. Israel*, (1822) 4 *Wash.* 323, 7 *Fed. Cas.* No. 3,952.

"Whole truth."—The witness must be cautioned and sworn to testify the whole truth and it is not sufficient that he was sworn to testify "the truth." *Rainer v. Haynes*, (1854) *Hempst.* 689, 20 *Fed. Cas.* No. 11,536; *Pentleton v. Forbes*, (1808) 1 *Cranch C. C.* 507, 19 *Fed. Cas.* No. 10,966; *Wilson Sewing Mach. Co. v. Jackson*, (1877) 1 *Hughes* 295, 30 *Fed. Cas.* No. 17,853, holding that it was not sufficient that the witness was sworn to make true answers to the interrogatories propounded to him; *In re Thomas*, (1888) 35 *Fed.* 822 [*citing* *Bell v. Morrison*, (1828) 1 *Pet.* 351, 7 *U. S. (L. ed.)* 174; *Cook v. Burnley*, (1867) 11 *Wall.* 659, 20 *U. S. (L. ed.)* 29]; *Garrett v. Woodward*, (1819) 2 *Cranch C. C.* 190, 10 *Fed. Cas.* No. 5,253, holding that the fact that one of the interrogatories was in these words, "if you know anything further, material to plaintiff or defendant in the cause, mention it, and conceal nothing," was immaterial.

But see *Bussard v. Catalino*, (1823) 2 *Cranch C. C.* 421, 4 *Fed. Cas.* No. 2,228, where the objection that the magistrate

before whom the deposition was taken had not certified that the witness was sworn to testify the whole truth "in the matter in controversy" was overruled.

"Reduced to writing."—Before the Act of May 23, 1900, amending this section, and authorizing the depositions to be taken in typewriting, and permitting them to be reduced to writing or typewriting by some person other than the officer taking them, a deposition taken under the section could not be read unless the judge certified that it was reduced to writing either by himself or by the witness in his presence. *Bell v. Morrison*, (1828) 1 *Pet.* 351, 7 *U. S. (L. ed.)* 174; *Cook v. Burnley*, (1867) 11 *Wall.* 659, 20 *U. S. (L. ed.)* 29; *Pettibone v. Derringer*, (1818) 4 *Wash.* 215, 19 *Fed. Cas.* No. 11,043; *Blake v. Smith*, 3 *Fed. Cas.* No. 1,502; *Maratin v. McRea*, (1854) *Hempst.* 688, 16 *Fed. Cas.* No. 9,141; *Rainer v. Haynes*, (1854) *Hempst.* 689, 20 *Fed. Cas.* No. 11,536; *Donahue v. Roberts*, (1884) 19 *Fed.* 863; *In re Thomas*, (D. C. S. C. 1888) 35 *Fed.* 822; *Moller v. U. S.*, (C. C. A. 5th Cir. 1893) 57 *Fed.* 490, 13 *U. S. App.* 472, 6 *C. C. A.* 459; *Brown v. Ellis*, (D. C. Vt. 1900) 103 *Fed.* 834; *Vassee v. Smith*, (1811) 2 *Cranch C. C.* 31, 28 *Fed. Cas.* No. 16,896; *Edmondson v. Barrell*, (1821) 2 *Cranch C. C.* 228, 8 *Fed. Cas.* No. 4,284; *Bussard v. Catalino*, (1823) 2 *Cranch C. C.* 421, 4 *Fed. Cas.* No. 2,228; *Centre v. Keene*, (1820) 2 *Cranch C. C.* 198, 5 *Fed. Cas.* No. 2,553; *Van Ness v. Heineke*, (1821) 2 *Cranch C. C.* 259, 28 *Fed. Cas.* No. 16,866; *Thorpe v. Simmons*, (1819) 2 *Cranch C. C.* 195, 23 *Fed. Cas.* No. 14,007.

Name of party erroneously given in deposition.—Where the name of the plaintiff or defendant is correctly stated in the style of the cause, the fact that his name was erroneously stated in the deposition, reference, however, being made to him as plaintiff or defendant therein, will not vitiate the deposition. *Voce v. Lawrence*, (1847) 4 *McLean* 203, 28 *Fed. Cas.* No. 16,979.

Sec. 865. [Transmission to the court of depositions *de bene esse*.]

Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 *Stat. L.* 88.

Source.—This section is a re-enactment of part of section 30 of the Act of Sept. 24, 1789, 1 Stat. L. 88, and is to have the same construction as to the time at which the depositions are to be opened. *U. S. v. Tilden*, (1878) 10 Ben. 170, 28 Fed. Cas. No. 16,520.

This section limits R. S. sec. 863, *supra*, p. 172, in that a deposition *de bene esse* cannot be read at the trial of the case in which it is taken unless the conditions noted in the last sentence of this section obtain. *Vagaszki v. Consolidation Coal Co.*, (C. C. A. 2d Cir. 1915) 225 Fed. 913, 141 C. C. A. 37, quoted from at length *supra*, p. 183.

Return of deposition.—A deposition which is neither delivered into court in person nor sealed and addressed to the clerk as required by statute is inadmissible as evidence. *The Saranac*, (1904) 132 Fed. 936.

The fact that it was agreed by a stipulation between the parties that the testimony of the witness might be taken "subject to all legal objections for irrelevancy and incompetency, but all objections as to the form and manner of taking being hereby waived, and that said deposition may be used as evidence on the trial of this cause, as if regularly taken under the Act of Congress," does not dispense with the necessity of the return of the deposition, in all respects, as provided. *Livingston v. Pratt*, (1857) Brown Adm. 66, 15 Fed. Cas. No. 8,417.

Where an objection was raised in a case of a deposition *de bene esse* taken on behalf of the United States "that the deposition was not taken and returned according to law," this objection was held, in the appellate court, as relating to the deposition as a deposition in chief, and therefore the attorney for the United States was bound to prove the circumstances entitling him to read it as such deposition *de bene esse*. *The Thomas & Henry v. U. S.*, (1818) 1 Brock. 367, 23 Fed. Cas. No. 13,919.

The fact that the deposition was not directed to the court, but to the judges thereof, is immaterial. *Thorp v. Orr*, (1822) 2 Cranch C. C. 335, 23 Fed. Cas. No. 14,006.

Certificate accompanying deposition—Necessary facts.—A magistrate before whom the deposition was taken must certify to all the facts necessary to make the deposition good evidence under the Act of Congress. *Jones v. Knowles*, (1808) 1 Cranch C. C. 523, 13 Fed. Cas. No. 7,474.

Accidental omission of word.—A deposition will not be rejected on account of the evidently accidental omission of a word in the magistrate's certificate of the caption. *Bussard v. Catalino*, (1823) 2 Cranch C. C. 421, 4 Fed. Cas. No. 2,228.

Attestation.—By virtue of R. S. sec. 905, set out *infra*, p. 212, it was held in *Tooker v. Thompson*, (1842) 3 McLean

92, 24 Fed. Cas. No. 14,097, that the authority of the commissioner taking the deposition was not sufficiently shown because while the certificate of the clerk of the United States Circuit Court where the commissioner was appointed was in due form there was no certificate of the presiding judge that such attestation was in due form. But later authorities hold that section 905 is not applicable to courts of the United States. See *infra*, p. 214.

Sufficient authentication.—It has been held that a deposition taken before a certain person who certified himself to be "a commissioner appointed by the District Court of the United States for the eastern district of Louisiana under and by virtue of the Act of Congress entitled 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" such deposition being sealed up by the commissioner, and directed to the clerk of the Circuit Court of the District of Columbia for the county of Washington, was receivable, although not further authenticated. *Whitney v. Hunt*, (1837) 5 Cranch C. C. 120, 29 Fed. Cas. No. 17,589.

"Sealed up."—Where the envelope was sealed with two seals and the name of the magistrate written over each seal, it was held that the deposition was "sealed up" by the magistrate. *Thorp v. Orr*, (1822) 2 Cranch C. C. 335, 23 Fed. Cas. No. 14,006.

A witness who resided more than a hundred miles from the place of trial, but was within reach of the process of the court, had been subpoenaed, but did not attend, although he was in good health. The magistrate who took the deposition did not deliver it with his own hands into the court, nor did he seal it up and direct it to the court as the statute requires. The court refused to allow the deposition to be read. *Jones v. Neale*, (1796) 1 Hughes 268, 13 Fed. Cas. No. 7,483.

Where the deposition, together with the reasons of its being taken and of notice, etc., was not sealed up by the magistrate taking it and directed to the court, the deposition was not admitted. *Jones v. Neale*, (1796) 2 Mart. (N. C.) 81, 13 Fed. Cas. No. 7,483; *Shankwiler v. Reading*, (1847) 4 McLean 240, 21 Fed. Cas. No. 12,704.

The officer taking the deposition sealed up the same, marked the style of the case upon the envelope, made the usual indorsement across the seal, and addressed the envelope to the clerk of the court, who duly received it through the mail. Such officer, however, did not certify that he delivered the deposition to the court in which the cause was pending, or that he sealed it up and deposited it in the post-office. The certificate was held to be

sufficient. *Egbert v. Citizens' Ins. Co.*, (1881) 7 Fed. 47.

Where certain depositions reached the court in gummed envelopes, and not under the seal of the officer before whom they were taken, it was held that they could not be used, as every form of the Act must be complied with; but a deposition which was sealed with the impress of the seal of the Adams Express Company, and had written across it the name of the commissioner, was not suppressed, as "a person may adopt any seal as his own, or anything in place of a seal." *In re Thomas*, (1888) 35 Fed. 337.

The deposition was taken before a commissioner, who was also clerk of the court. The proctor of the adverse party knew that the deposition was being taken before such commissioner. The objection that the deposition was not sealed up was overruled. *Nelson v. Woodruff*, (1861) 1 Black 156, 17 U. S. (L. ed.) 97.

Where the envelope in which the deposition was enclosed was partly open at one end when received by the clerk of the court, the deposition otherwise being properly sealed and returned into court, the deposition was received, the appearance of the envelope showing that transmission in the mails was the cause of the partial opening. *Eiffert v. Craps*, (1890) 44 Fed. 164.

"Opened in court."—Where the objection was taken that the depositions were opened out of court without the consent thereto of the opposite party, it was held to be well taken. *The Roscius*, (1873) Brown Adm. 442, 20 Fed. Cas. No. 12,042, citing *Beale v. Thompson*, (1814) 8 Cranch 70, 3 U. S. (L. ed.) 491.

The party who initiated the proceedings for the taking of testimony *de bene esse* appears to have no right to the custody or suppression of the deposition. "The authority taking it appears to represent the court *pro hac vice*, for the purpose of authenticating the testimony of the witness, and preserving it for the trial, according to its admissibility and weight." *In re Rindskopf*, (1885) 24 Fed. 542.

Where both parties have examined the witness under a deposition *de bene esse*, the party who caused the deposition to be taken cannot direct the commissioner, before whom it was taken, to withhold such deposition; and where the commissioner, acting under instructions from such party, does so withhold the deposition, the court will grant an order for the return thereof, notwithstanding the fact that the testimony taken does not suit such party; for "the deposition in the hands of the commissioner is just as much beyond the control of the parties as though the same had been filed in court." *Grand Haven First Nat. Bank v. Forest*, (1890) 44 Fed. 246.

The deposition having been retained in the hands of defendant's attorney for a

long time, and being placed on file on the morning of the trial for the first time, the court held that it could not be read in evidence. *Livingston v. Pratt*, (1857) Brown Adm. 66, 15 Fed. Cas. No. 8,417.

Where depositions *de bene esse* have been taken, the fact that one party objects is no ground for refusing to open them before trial upon the application of the other party. *U. S. v. Tilden*, (1878) 10 Ben. 170, 28 Fed. Cas. No. 16,520.

"The law did not intend that either party should have possession of the deposition until it should be received by the clerk and opened by the general or special order of the court." *Shankwiler v. Reading*, (1847) 4 McLean 240, 21 Fed. Cas. No. 12,704.

Where a deposition was opened by the clerk of the court to whom it was directed, he supposing it to be a letter respecting his official business, it was held that it was not admissible. *Beale v. Thompson*, (1814) 8 Cranch 70, 3 U. S. (L. ed.) 491.

Where consent is given to the opening of the deposition out of court, such consent must be in writing. *The Roscius*, (1873) Brown Adm. 442, 20 Fed. Cas. No. 12,042.

Waiver of objections.—Where the deposition is taken against a party, and he, under an express declaration, waives an objection thereto, this general waiver must be understood as extending to the deposition in the character in which it was intended to be taken, and not as giving it a new character not intended by the party taking it; and therefore in the case of a deposition *de bene esse*, where all objections were waived by the opposing party, it was held that it was not made a deposition in chief by such waiver. *The Thomas & Henry v. U. S.*, (1818) 1 Brock. 367, 23 Fed. Cas. No. 13,919. See also *Kansas City, etc., R. Co. v. Stoner*, (C. C. A. 1892) 51 Fed. 649, 10 U. S. App. 209, 2 C. C. A. 437.

Where the signature to the deposition is waived, the deposition may be read. *Ketland v. Bissett*, (1804) 1 Wash. 144, 14 Fed. Cas. No. 7,742.

The package containing the depositions was received by mail addressed to the justice of the Circuit Court, being sealed with three seals, and had indorsed on it a request by the notary who sent it for its return to him as notary, there being no indorsement of the name of the cause. It was opened upon its receipt by one of the judges of the court, and immediately thereafter closed and placed in the custody of the clerk, with notice of its character. The attorneys for the parties having consented to the opening and publication of the deposition without qualification, except "without prejudice to any objections to the enclosed deposition other than relating to publication and opening,

which is hereby waived," it was held by the court that irregularities under the section were waived thereby. *Stewart v. Townsend*, (1890) 41 Fed. 121.

The presumption of a waiver of objections to the witness's competency will arise if such objections are not made by the party in attendance at the time of taking the depositions under the Act, if such objections are known to him; but if such objections were not so known at the time of taking the deposition, they may be raised when it is read. *U. S. v. One Case Hair Pencils*, (1825) 1 Paine 400, 27 Fed. Cas. No. 15,924.

Where it appeared that the witness was an aged man when his deposition was taken; that he had died before the trial; that one of the counsel for the opposite party had accepted notice of the taking of the deposition, and had attended at the taking and cross-examination of the witness, that he made no objection either to the sufficiency of the oath, to the reasons for taking the deposition, or to the competency of the magistrate; and that, although the deposition had been filed in the record of the cause more than a year before the trial, no exception had been taken to it, consent to the manner of taking the deposition must be presumed. *Shutte v. Thompson*, (1872) 15 Wall. 151, 21 U. S. (L. ed.) 123.

Where notice of the time and place of taking depositions was accepted by the counsel for the defendant; both parties appeared by counsel; the witnesses were examined and cross-examined; no objection was made during the taking of the depositions to the competency of the officer before whom they were taken, or to the regularity of the proceedings in any way, the signatures of the witnesses to the depositions being waived by mutual consent; and it being further agreed by counsel for both parties that the commissioner taking the depositions should transmit them by mail to the clerk of the proper court; and such depositions having been duly received, and by agreement opened by the counsel for the parties; the objections to receiving the depositions not having been made until the trial of the case before the jury had progressed three days, such objections were overruled. *Bird v. Halsy*, (1898) 87 Fed. 671.

Where, in an action in the District Court on a maritime contract, a commissioner who took the deposition of the master of the ship was a clerk of the court, and where the consignee's proctor knew that the deposition had been taken, the objections that preliminary proof had not been made of the materiality of the witness, and that the deposition was not sealed up, and that no notice had been given of its being filed, were overruled. *Nelson v. Woodruff*, (1861) 1 Black 156, 17 U. S. (L. ed.) 97.

Answer to motion to suppress deposition.—Where a motion has been made to suppress depositions, it is not a sufficient answer thereto that the parties moving have themselves given a similar notice for taking depositions. *Uhle v. Burnham*, (1890) 44 Fed. 729.

Distance of residence from trial.—Presumption.—Where a deposition is taken *de bene esse* under this section, the witness living more than one hundred miles from the place of trial when it was taken, "it will be presumed that he continued to live there at the time of the trial, and no further proof on that subject need be furnished by the party offering the deposition, unless this presumption shall be overcome by proof from the other side. But if it be overcome, and the party has knowledge of his power to get the witness in time to enable him to secure an attendance at the trial, he must do so, and the deposition will be excluded." Depositions taken under section 866, however, do not fall within this rule. *Whitford v. Clark County*, (1886) 119 U. S. 522, 7 S. Ct. 306, 30 U. S. (L. ed.) 500.

Where, at the time of taking the deposition, the witness lived in Minnesota, more than a hundred miles from the place of trial in Texas, and there was no presumption or proof that he had since come within a hundred miles of the said place of trial, his deposition to be used in a federal court in Texas was received, it being presumed that he continued to live in Minnesota at the time of the trial. *Texas, etc., R. Co. v. Reagan*, (C. C. A. 1902) 118 Fed. 815, 55 C. C. A. 427 [citing *Whitford v. Clark County*, (1886) 119 U. S. 522, 7 S. Ct. 306, 30 U. S. (L. ed.) 500, and *Patapasco Ins. Co. v. Southgate*, (1831) 5 Pet. 604, 8 U. S. (L. ed.) 243].

The magistrate before whom the deposition was taken certified that it appeared to him that the adverse party and his counsel resided upwards of one hundred miles from the place of taking the deposition. It was held that this was a sufficiently positive averment that the adverse party and his counsel were at the time more than one hundred miles from such place. *Banks v. Miller*, (1809) 1 Cranch C. C. 543, 2 Fed. Cas. No. 963.

Witness "gone to a greater distance," etc.—The witness lived more than one hundred miles from the place of trial, and was about to leave, and did leave, the District of Columbia for a place distant more than one hundred miles from such place of trial, not to return before the time of trial. It being objected that no subpoena had been issued for the witness, it was held that the deposition might be read, the court being of opinion that it was sufficient to show, at the time of trial, that the witness was "gone to a greater distance than one hundred miles from the place of trial," and the return

of a subpoena *non est* is one means of making that fact appear to the satisfaction of the court, but not the only means, the fact of the witness's presence within the district before the time of trial, but after the taking of the deposition, not being material. *Leatherberry v. Radcliffe*, (1839) 5 Cranch C. C. 550, 15 Fed. Cas. No. 8,163.

"The authority or jurisdiction conferred on the magistrate by this Act is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof;" and, therefore, where under the Act of Sept. 24, 1789, 1 Stat. L., ch. 20, § 30, the notice given by the magistrate stated only that the witness was "about to depart the state," and not that he was bound on a voyage to sea, or about to go out of the United States, or a hundred miles from the place of trial, the deposition was refused, parol proof not being allowed at the trial that he was about to leave the United States. *Harris v. Wall*, (1849) 7 How. 698, 12 U. S. (L. ed.) 875, citing *Bell v. Morrison*, (1828) 1 Pet. 351, 7 U. S. (L. ed.) 174.

Witness moving within one hundred miles.—After the deposition was taken, but before trial, the witness moved within a hundred miles of the place of trial. It was held that, notwithstanding this fact, the deposition would be received, unless such removal was shown, and also that this removal was known to the opposing party in sufficient time to issue a subpoena and have the witness served. *Russell v. Ashley*, (1847) Hempst. 546, 21 Fed. Cas. No. 12,160.

Where witness living more than one hundred miles from place of trial had been at latter place.—It is no objection to reading the deposition of a witness who lives in another state more than a hundred miles from the place of trial, taken under a rule of court, that he had been in the place of trial during the sitting of

the court, where it appeared that the fact of his being in the city was unknown to the party at whose instance the deposition was taken. *Quere*, whether, if the party had known of his presence at the place of trial, the case would have been altered. *Pettibone v. Derringer*, (1818) 4 Wash. 215, 19 Fed. Cas. No. 11,043. But see *Weed v. Kellogg*, (1853) 6 McLean 44, 29 Fed. Cas. No. 17,345, where a deposition was excluded, being objected to on the ground that the witness was present at the place of trial.

Where a witness does not live at a greater distance than one hundred miles from the place of trial, it will be incumbent on the party for whom the deposition is taken to show at the trial that the disability of the witness to attend personally continues, such disability being supposed to be temporary and the only impediment to a compulsory attendance; but the inhibition against receiving the deposition unless disability be made to appear at the trial "does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles, he being considered permanently beyond a compulsory attendance. The deposition in such case may not always be absolute, for the party against whom it is to be used may prove the witness has removed within the reach of a subpoena after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The onus, however, of proving this would rest upon the party opposing the admission of the deposition in evidence." *Patapasco Ins. Co. v. Southgate*, (1831) 5 Pet. 604, 8 U. S. (L. ed.) 243.

The fact that it did not appear either in the deposition or in the certificate that the party was not then a resident of the place of trial, or did not live within a hundred miles thereof, has been held insufficient to warrant the suppression of the deposition. *Sage v. Tauszky*, (1877) 6 Cent. L. J. 7, 21 Fed. Cas. No. 12,214.

Sec. 866. [Depositions under a *dedimus potestatem* and in *perpetuam*, etc.] In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five, shall not apply to any deposition to be taken under the authority of this section. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 88; Act of May 9, 1872, ch. 146, 17 Stat. L. 89.

Depositions according to state usage are authorized by the Act of March 9, 1892, ch. 14, given *infra*, p. 225.

Dedimus potestatem defined.—In the United States a commission to take testimony is termed a *dedimus potestatem*. Black's Law Dict. 343.

Applicability of R. S. secs. 863 and 865.—R. S. secs. 863 and 865 (*supra*, pp. 172, 185) are not in any way applicable to a deposition taken upon a *dedimus potestatem* or commission under this section. *Jones v. Oregon Cent. R. Co.*, (1875) 3 Sawy. 523, 13 Fed. Cas. No. 7,486. It follows that depositions taken under a *dedimus potestatem*, under this section, are not to be considered as taken *de bene esse*. *Sergeant v. Biddle*, (1819) 4 Wheat. 508, 4 U. S. (L. ed.) 627.

Where the testimony can be taken by deposition *de bene esse*, a *dedimus potestatem* will not be granted under this section. *Turner v. Shackman*, (1886) 27 Fed. 183.

"The method of taking testimony by commission is cumbersome and unsatisfactory, and not resorted to when the convenient method of taking proof prescribed by R. S. sec. 863 (*supra*, p. 172), is available." *Henning v. Boyle*, (1901) 112 Fed. 397.

Inquisitorial proceeding.—"The court will not sanction a merely inquisitorial proceeding" in an application under this section. *Flower v. MacGinniss*, (C. C. A. 1901) 112 Fed. 377, 50 C. C. A. 291.

The petition having been filed, and no answer having been filed or being yet due, a *dedimus potestatem* will not be granted under this section, the object being evidently to see what the defendant will testify to before he is put upon the witness stand in presence of the jury. *Turner v. Shackman*, (1886) 27 Fed. 183.

State statute.—It has been held that the mode of executing commissions out of a federal court is governed, not by the state statute, but by this section. *U. S. v. Pings*, (1880) 4 Fed. 714; *Turner v. Shackman*, (1886) 27 Fed. 183. But see *contra*, *U. S. v. Cameron*, (1883) 15 Fed. 794; and *Jones v. Oregon Cent. R. Co.*, (1875) 3 Sawy. 523, 13 Fed. Cas. No. 7,486, holding that the law of the state controls the manner of the qualification of the witness.

"In any case"—Meaning of words.—"The words 'in any case' do not mean broadly any case where one of the parties to a controversy desires the evidence of a foreign witness, but any case of which the court granting the commission has jurisdiction. The cause must be one pending in the court, and not before some other tribunal or officer over whom the court has no power or control."

Depositions to be used before immigration officers are not authorized by this section. *Ex p. Wing You*, (C. C. A. 9th Cir. 1911) 190 Fed. 294, 111 C. C. A. 194.

Chinese Exclusion Acts.—The District Court has been held to be without authority to issue a commission under this section for the taking of testimony in an investigation under the Chinese Exclusion Acts. *U. S. v. Hom Hing*, (1892) 48 Fed. 635. See CHINESE EXCLUSION.

Criminal cases.—A commission under this section will be granted in criminal cases; the question as to the admission of the evidence upon the trial being a matter to be considered then. *U. S. v. Wilder*, (1882) 14 Fed. 393; *U. S. v. Cameron*, (1883) 15 Fed. 794.

Court of admiralty.—This section does not require a court of admiralty to conform to the practice in the state courts. *The Westminster*, (1899) 96 Fed. 786.

"The words 'common usage' in regard to a suit in equity refer to the practice in courts of equity." *Bischoffsheim v. Baltzer*, (1882) 10 Fed. 1; *U. S. v. Parrott*, (1859) McAll. 447, 27 Fed. Cas. No. 15,999; *Green v. Compagnia Generale Italiana*, etc., (1897) 82 Fed. 490, holding that "the 'usages' referred to are evidently those of the English chancery, no different chancery practice being then or since established here, in that regard."

Where the attorney for the plaintiff wrote down the answers for the commissioner at his request, the defendant not being represented, it was held that the deposition was not taken "according to common usage," under this section, notwithstanding the fact that there was no evidence that the defendant was prejudiced or injured by what was done. *U. S. v. Pings*, (1880) 4 Fed. 714. But see *contra*, *Nicholls v. White*, (1802) 1 Cranch C. C. 58, 18 Fed. Cas. No. 10,235.

"There is nothing in this general phrase, 'according to common usage,' which imports that the federal courts in any of the states must adopt all subsequent new regulations that may be from time to time enacted by the state legislatures, or adopted by the state practice." *U. S. v. Fifty Boxes*, etc., *Lace*, (1899) 92 Fed. 601 [citing *Turner v. Shackman*, (1886) 27 Fed. 184; *Ex p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117].

The phrase "according to common usage" in this section means according to the existing practice, whether at law or in equity, and the usage referred to is the common usage at the time of the revision in 1874; "and in districts where there is no established practice in the federal courts, it is no doubt competent and proper to refer to the usage in other districts, or to laws and usages of the state, as evidence of the common usage." *U. S. v. Fifty Boxes*, etc., *Lace*, (1899) 92 Fed. 601 [citing *Bischoffsheim v. Baltzer*, (1882) 20 Blatchf. (U. S.) 229; *Budicum v. Kirk*, (1806) 3 Cranch 293, 2

U. S. (L. ed.) 444; *Jones v. Oregon Cent. R. Co.*, (1875) 3 Sawy. 523, 13 Fed. Cas. No. 7,486].

Commissioners — Agents of court.—A commissioner, although nominated by a party, is an agent of the court. *Gilpins v. Consequa*, (1813) 1 Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

Their authority to appear.—Inasmuch as commissioners act under a special authority which they are bound to pursue, this should be made to appear to the court by their own showing. "Whatever facts in relation thereto are stated in their report, the court is bound *prima facie* to give credit to; but the court cannot presume that they have duly executed their authority when they are themselves silent upon that subject. It should particularly appear when and where the depositions were taken." *Boudereau v. Montgomery*, (1821) 4 Wash. 186, 3 Fed. Cas. No. 1,694.

Authority to be strictly pursued.—Commissioners not deriving their authority from the parties, but from the court, such authority being special, it must be strictly pursued; and therefore a commission issued to four commissioners jointly, having been executed and returned by three only, two of whom were of the defendants' nomination, the objection by the defendants to the regularity of the execution of the commission was sustained. *Guppy v. Brown*, (1805) 4 Dall. (Pa.) 410, 1 U. S. (L. ed.) 887, 11 Fed. Cas. No. 5,871.

Disinterestedness.—Where, under the code of Iowa, no certificate is necessary as to the disinterestedness of the commissioner, it was held that depositions for use in the federal courts of that state, under this section, do not require such certificate, the previous secs. 863 and 865 (*supra*, pp. 172, 185) upon that point having no application to this section. *Giles v. Paxson*, (1888) 36 Fed. 882.

Showing necessity for *dedimus*.—The necessity for the issuing of a *dedimus potestatem* must be made to appear to the court, a commission not being granted to all litigants, but only when the necessity is made to appear. *Randall v. Venable*, (1883) 17 Fed. 162; *U. S. v. Cameron*, (1883) 15 Fed. 794.

Application for *dedimus*.—In *Zych v. American Car, etc., Co.*, (1904) 127 Fed. 723, an application for a *dedimus potestatem* to take testimony before trial alleged that the action was to recover damages for the negligent death of plaintiff's father, and that the plaintiffs are nonresidents and minors; that the negligence alleged consisted in defendant's failure to instruct deceased regarding the dangers of his employment, he being ignorant and illiterate, etc.; that the only persons who could give information as to decedent's death, and the rules and regulations under which decedent's business was conducted at the time, are persons in

defendant's employ; and that the truth of the allegations of plaintiffs' complaint must necessarily be established by the testimony of defendant's servants; that defendant has refused to permit plaintiffs' representative to enter its works and examine the place of the accident, and that at the inquest over deceased's remains five eyewitnesses testified, two of whom, since the accident, have left the state; that plaintiffs are unable to ascertain their whereabouts or that of another of such eyewitnesses; and that plaintiffs verily believe there is danger of losing the testimony of other important witnesses through death, disease, or accident. It was held that such allegations were sufficient to entitle plaintiffs to the relief demanded under this section, authorizing the taking of depositions of witnesses in order to prevent a failure or delay of justice.

Witnesses living at distance.—An affidavit that witnesses live more than one hundred miles from the place of trial of the action, without proof of a well-grounded apprehension of a failure or delay of justice, is insufficient for the issuance of a *dedimus* under this section. *Magone v. Colorado Smelting, etc., Co.*, (1905) 135 Fed. 846.

Insufficient affidavit on application.—An application to issue a commission to take depositions under the Act in an action at law was refused by the court at Alexandria, Va., "because not grounded on affidavit showing it to be necessary to the justice of the case." *Sutton v. Mandeville*, (1803) 1 Cranch C. C. 115, 23 Fed. Cas. No. 13,650.

Notice.—Under the laws of Virginia notice to an attorney at law is not authorized in the case of a *dedimus potestatem*. It was held, however, where such attorney consented to the taking of the deposition and examined the same without objecting to the want of notice, the witness in the meantime having died, that the deposition should be received. *Buddicum v. Kirk*, (1806) 3 Cranch 293, 2 U. S. (L. ed.) 444.

Rules of court.—Former equity rule 67, which authorized the evidence in a cause to be taken orally upon application by either party for an order therefor, was held applicable to depositions taken on a commission issued under this section, and where such a commission was applied for by one party to take the testimony of foreign witnesses, the court had power to permit the adverse party to cross-examine such witnesses orally. *Encyclopædia Britannica Co. v. Werner Co.*, (1905) 138 Fed. 461.

Where a commission was not taken according to the rules of the court, but was read in evidence without opposition, the objection to it thereafter came too late. *Evans v. Hittich*, (1822) 7 Wheat. 453, 5 U. S. (L. ed.) 496.

Reduction to writing.—It is not necessary that the commissioner, before whom depositions were taken in the federal courts of Iowa, under section 866, should certify that such depositions, taken by a clerk, were reduced to writing in his presence, the code of Iowa providing that such certificate is not necessary. *Giles v. Paxson*, (1888) 36 Fed. 882.

Time for raising objections.—Where a deposition is taken upon a commission, "the general rule is, that all objections of a formal character, and such as might have been obviated if urged on the examination of the witness, must be raised at such examination or upon motion to suppress the deposition." *York Mfg. Co. v. Illinois Cent. R. Co.*, (1865) 3 Wall. 107, 18 U. S. (L. ed.) 170.

Deposition taken without leave of court.—The deposition of one of the defendants having been taken by the complainants without leave of the court, such deposition was rejected, but the further objection that the commissioner before whom it was taken did not appear to have been sworn, was not sustained, he being an officer bound by the United States court, and his official action being *prima facie* valid. *Hoyt v. Hammekin*, (1852) 14 How. 346, 14 U. S. (L. ed.) 449.

Contents of return.—It is not necessary that the return of the commission should show when the examination was taken or who reduced it to writing; nor is it material whether the witness was "cautioned" or not before being sworn, nor that the return should show anything more than that he was duly sworn and examined upon his oath, duly administered, nor that the material facts are found in the preamble or introduction to the deposition so long as the return plainly refers to them. *Jones v. Oregon Cent. R. Co.*, (1875) 3 Sawy. 523, 13 Fed. Cas. No. 7,486.

Opening commission.—A commission which, in consequence of a misdirection of it by the commissioners, had been opened first by the Secretary of War, and afterwards by some other officer of the government, before it came to the hands of the clerk of the court, was rejected. *U. S. v. Price*, (1809) 2 Wash. 356, 27 Fed. Cas. No. 16,089.

Reading deposition in court.—A deposition being taken in chief under a commission must be read, unless it can be proved that the witness is within reach of the process of the court. *Ridgeway v. Ghequier*, (1801) 1 Cranch C. C. 4, 20 Fed. No. 11,813.

Fees and mileage of witnesses.—Where the prevailing party in an action at law in a federal court has taken testimony in

a foreign country under a *dedimus potestatem*, pursuant to this section, he is entitled to tax as a disbursement the fees and mileage of the witnesses at the same rate as though they had attended upon the trial. *Agius v. Perkins Co.*, (1907) 151 Fed. 958.

Bills to perpetuate testimony.—*Construction of section.*—The second clause of this section, which provides that "any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuum rei memoriam* if they relate to any matters that may be cognizable in any court of the United States," is wholly separate from the first clause authorizing any federal court, where necessary in order to prevent a failure or delay of justice in a pending case, to grant a *dedimus potestatem*, to take depositions according to the common usage, and is a recognition and regulation of the general power of the federal court as courts of chancery under Const., art. 3, § 2, to entertain bills to perpetuate testimony, where the complainant cannot himself bring the matter to which the desired testimony relates into present judicial investigation. *Westinghouse Mach. Co. v. Electric Storage Battery Co.*, (C. C. A. 1909) 170 Fed. 430, 95 C. C. A. 600, 25 L. R. A. (N. S.) 673.

Definition.—In *perpetuum rei memoriam* means in perpetual testimony of a matter; for the purpose of declaring and settling a thing forever. *Black's Law Dict.* 606.

Matter subject of immediate judicial investigation.—A bill to perpetuate testimony will not be sustained, "if it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation." *New York, etc., Coffee Polishing Co. v. New York Coffee Polishing Co.*, (1881) 9 Fed. 578, citing *Angell v. Angell*, (1822) 1 Sim. & St. (Eng.) 83.

Patent infringement suit.—A complainant may maintain a bill in equity in a Circuit Court to perpetuate testimony, where it shows that defendant charges that an article manufactured and sold by complainant infringes a patent owned by defendant, and threatens suit against complainant and its customers, but refuses to bring such suits, and that complainant can prove that such patent is void by the testimony of certain designated witnesses, but not otherwise. *Westinghouse Mach. Co. v. Electric Storage Battery Co.*, (C. C. A. 1909) 170 Fed. 430, 95 C. C. A. 600, 25 L. R. A. (N. S.) 673.

Sec. 867. [Depositions in perpetuum, etc., admissible at discretion of the court.] Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuum rei*

memoriam, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof. [*R. S.*]

Act of Feb. 20, 1812, ch. 25, 2 Stat. L. 682.

State laws as determining use of depositions.—This section does not limit the use of such depositions to any particular cases, nor to those taken in any particular manner, but leaves such matters to be determined by the laws of the state. *Ohio Copper Min. Co. v. Hutchings*, (C. C. A. 1909) 172 Fed. 201, 96 C. C. A. 653.

The provision of this section is intended to permit the courts of the United States to admit in evidence testimony perpetuated according to the laws of the state, and it does not relate to testimony perpetuated by direction of the Circuit Courts of the United States, in pursuance

of R. S. sec. 866, which latter testimony, however, it does not exclude. *New York, etc., Coffee Polishing Co. v. New York Coffee Polishing Co.*, (1881) 9 Fed. 578.

A deposition taken in *perpetuum rei memoriam* before a state magistrate under a state statute not having been recorded within the time prescribed by state law, and therefore according to such statute not being admissible in evidence, cannot, under this section, be received as competent evidence in United States courts. *Gould v. Gould*, (1844) 3 Story 516, 10 Fed. Cas. No. 5,637.

Sec. 868. [Deposition under a *dedimus potestatem*, how taken.] When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court. [*R. S.*]

Act of Jan. 24, 1827, ch. 4, 4 Stat. L. 197.

Necessity that commission issue.—In the case of *In re Robert Gair Co.*, (C. C. A. 1st Cir. 1912) 196 Fed. 492, 116 C. C. A. 57, which was a petition by Robert Gair Co. for mandamus, the following facts appeared. A bill in equity was brought against the petitioner in the Supreme Court of the District of Columbia for an alleged infringement of a patent for an invention, and issue thereon was duly joined. Pursuant to an agreement of counsel for the respective parties, the taking of evidence on the part of the complainant was begun before a notary public in the state of Massachusetts, proper notice thereof having been given; and a witness, one Haynes, was under examination for the complainant. On the cross-examination he refused, on advice of counsel for the complainant, to answer certain questions put to him by counsel for the respondent; and thereupon the counsel for respondent filed a motion in the United States District Court for the district of Massachusetts to compel an

answer. The motion was heard, and dismissed for want of jurisdiction. On these facts the petition was dismissed. Putnam, Circuit Judge, said: "The doubts of Judge Lacombe in *Arnold v. Chesebrough*, [E. D. N. Y. 1888] 35 Fed. 16, as to appointing an examiner to take testimony outside of the district of the court having jurisdiction of the case have become obsolete, and are fully met by the opinion of the Circuit Court of Appeals for the Second Circuit in *White v. Toledo, etc., Co.*, [C. C. A. 2d Cir. 1897] 79 Fed. 133, [51 U. S. App. 54] 24 C. C. A. 467. That establishes the proposition that the appointment of an examiner out of the district is fully supported by section 868 of the Revised Statutes therein referred to. This seems to require that the witness should be named. Whether the witness was named in the case in the Second Circuit is not clear. Also, *McClellan v. Carland*, [1910] 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762, has so far broadened out the prior decisions as to the

jurisdiction of Circuit Courts of Appeals over writs of mandamus that apparently, as the present topic might have ripened into matters which would clearly be appealable to the Circuit Court of Appeals, mandamus might lie. The fundamental difficulty is that the petition in this case shows that the examination was being conducted by consent of the parties, and that there was no commission as required by the Revised Statutes. They require that a commission should have been issued by the court for the taking of the testimony of the witness involved, and provided that thereupon a subpoena might be issued by the clerk of the federal court of the district where the witness was to be examined. It does not appear here that

any subpoena issued, or that there was anything more than an agreement that an order might be entered appointing a special examiner *nunc pro tunc*. All this might be sufficient ordinarily to enable the court where a case is pending to control a witness after he has appeared voluntarily before it; but in the present case it is clearly a condition precedent that the statute should be strictly complied with. So far as we can see, the only remedy the petitioner has is to induce the court, if it can, to refuse to allow the deposition to be used on the ground of the refusal of the witness to submit to a full cross-examination, though as to that we express no opinion."

Sec. 869. [Subpoena duces tecum under a dedimus potestatem.] When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties. [R. S.]

Act of Jan. 24, 1827, ch. 4, 4 Stat. L. 199.

"The function of a subpoena duces tecum is confined to securing the production of documents and books." *In re Shepard*, (1880) 3 Fed. 12. See also *U. S. v. Burr*, (1807) *Coombs' Trial of Aaron Burr* 37, 25 Fed. Cas. No. 14,692d.

By what procedure production enforced.—A party to an action at law cannot be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized, and the production of books and writings must be enforced according to modes of procedure not deriving their ori-

gin from state statutes or practice. *Eaton v. Hodges*, (1877) 7 Biss. 324, 8 Fed. Cas. No. 4,258.

Application of section.—It has been said that this section contains the only provisions relative to the power of a federal court to compel the production of documentary evidence to be used on the trial of a cause depending in another jurisdiction. *Smith v. National Bank*, (C. C. Nev. 1910) 193 Fed. 255. See also *Elting v. U. S.*, (1892) 27 Ct. Cl. 158, wherein it was held that the writ of subpoena *duces tecum* in United States courts was

regulated by this section. But under R. S. sec. 863 it is now well settled that a subpoena *duces tecum* may be ordered. See the authorities cited under that section, p. 172.

This section "applies to cases where depositions *de bene esse* are taken under the provisions of section 863 [*supra*, p. 172], or in *perpetuam rei memoriam* and under a *dedimus potestatem* under section 866 [*supra*, p. 189]. It does not apply to testimony taken . . . under the general powers of a court of equity, and in the mode prescribed by the equity rules," such as former rule 67 in equity, providing for the appointment of a special commissioner to take testimony in another district. *Johnson Steel St. R. Co. v. North Branch Steel Co.*, (1891) 48 Fed. 191, citing *Ex p. Fish*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117.

Interference with witness's possession of documents.—The witness may be compelled to appear to testify, and to produce documents in his power or possession, provided the same are material and competent evidence in behalf of the party applying therefor. The statute does not say that the witness may be compelled to produce documents in another jurisdiction, or in the court where the action is

pending. The production which can be compelled is the production to the notary taking the deposition at the time and place mentioned in the subpoena. The statute seems to confer no authority to interfere with the witness's possession and control of documents other than such as is requisite to enable the notary, or other officer before whom the deposition is being taken, to cause to be made correct copies of such documents, or of so much thereof as may be required by either of the parties. *Smith v. National Bank of D. O. Mills & Co.*, (C. C. Nev. 1910) 193 Fed. 255.

Sufficiency of application.—A petition for a subpoena *duces tecum* is sufficiently definite with respect to the books or documents required, where the description is specific enough to enable the witness to produce them without uncertainty. To entitle a party to a subpoena *duces tecum* requiring a witness not a party to the action to produce books and documents in his possession it is not sufficient to allege merely that the documents are material and relevant to the issues in the case; but the facts that will enable the court to determine that they are *prima facie* material and relevant must be set out. *U. S. v. Terminal R. Assoc.*, (1907) 154 Fed. 268.

Sec. 870. [Witness under a *dedimus potestatem*, when required to attend.] No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at, the place of examination, are paid or tendered to him at the time of the service of the subpoena. [*R. S.*]

Act of Jan. 24, 1827, ch. 4, 4 Stat. L. 197, 199.

Sec. 871. [Depositions in District of Columbia in suits pending elsewhere.] When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the supreme court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified. [*R. S.*]

Act of March 3, 1869, ch. 128, 15 Stat. L. 324.

Sec. 872. [Same subject; when no commission or notice.] When it satisfactorily appears by affidavit to any justice of the supreme court of

the District of Columbia, or to any commissioner for taking depositions appointed by said court —

First. That any person within said District is a material witness for either party in a suit pending in any State or territorial or foreign court;

Second. That no commission nor notice to take the testimony of such witness has been issued or given; and

Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons, requiring the witness to appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit. [R. S.]

Act of March 3, 1869, ch. 128, 15 Stat. L. 325.

Sec. 873. [Same subject; manner of taking and transmitting the deposition.] Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit. [R. S.]

Act of March 3, 1869, ch. 128, 15 Stat. L. 325.

Sec. 874. [Same subject; witness fees.] Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance. [R. S.]

Act of March 3, 1869, ch. 128, 15 Stat. L. 325. See the title WITNESSES.

Sec. 875. [Letters rogatory from United States courts.] When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the Government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power

to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. [R. S.]

Act of March 3, 1863, ch. 95, 12 Stat. L. 770.

The last sentence in this section as above given was added by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 241.

R. S. secs. 876-881, inclusive, relate to the attendance and recognizance of witnesses, and are given under the title WITNESSES.

See R. S. secs. 4071-4074, *infra*, p. 222, relative to taking testimony to be used in foreign countries.

Scope of section.—This section only provides for the procedure when letters rogatory are addressed and commissioner appointed; it does not extend to cases in which examination of witnesses will be ordered. *In re Letters Rogatory*, (1888) 38 Fed. 306. See also *Matter of Spanish Consul*, (1867) 1 Ben. 225, 22 Fed. Cas. No. 13,202.

Where a foreign government refuses to suffer a commission to be executed within its jurisdiction, the Circuit Court, instead of sending a commission, will send letters rogatory. *Nelson v. U. S.*, (1816) Pet. C. C. 235, 17 Fed. Cas. No. 10,116.

This section does not restrict the inherent power of a federal court to issue letters rogatory in cases not mentioned therein when testimony of witnesses is desired to be taken in countries that refuse to compel the attendance of witnesses under commissions; and where the witnesses are likely to be unwilling the examination should be oral and not on written interrogatories. *De Villeneuve v. Morning Journal Ass'n*, (S. D. N. Y. 1913) 206 Fed. 70, wherein the court said: "Letters rogatory have very rarely issued in this circuit. The statutes of the United States confer no general power upon the courts to issue them. Section 875, Rev. Stat. U. S. . . . does treat of letters issued in cases in which the United States is a party or has an interest, and this has been thought evidence of an intention upon the part of Congress to restrict the inherent power of the court. However, as we execute letters rogatory coming from foreign countries, and as this method of getting testimony is most necessary in countries which refuse to compel the attendance of witnesses under commissions, I think we ought not to suppose that Congress intended to limit the power of the court. The subject has been considered in various aspects in the *Matter of Spanish Consul* [1867] 1 Ben. 225, 22 Fed. Cas. No. 13,202; *In re Pacific R. Commission*, [N. D. Cal. 1887] 32 Fed. 241, 256; *In re Letters Rogatory*, [S. D. N. Y. 1888] 38 Fed. 306; *Gross v. Palmer*, [N. D. Ill. 1900] 105 Fed. 833; *Benedict's Admiralty*, § 456. This case is one in which a number of the witnesses are likely

to be unwilling, so that the examination should be oral, though that is a most unusual method, and not upon written interrogatories."

A mere investigating committee appointed by Congress has no power to authorize the taking of depositions on letters rogatory. *In re Pacific Ry. Com.*, (N. D. Cal. 1887) 32 Fed. 241, wherein the court said: "There are certain powers inherent in all courts. The power to preserve order in their proceedings, and to punish for contempt of their authority, are instances of this kind. And by jurists and text writers the power of the courts of record of one country, as a matter of comity, to furnish assistance, so far as is consistent with their own jurisdiction, to the courts of another country, by taking the testimony of witnesses to be used in the foreign country, or by ordering it to be taken before a magistrate or commissioner, has also been classed among their inherent powers. 'For by the law of nations,' says Greenleaf, 'courts of justice of different countries are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to the court within whose jurisdiction the witness resides a writ, either patent or close, usually termed a letter rogatory, or a commission *sub mutua vicissitudinis obtentu ac in juris subsidium*, from those words contained in it. By this instrument the court abroad is informed of the pendency of the cause and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice, with an offer on the part of the tribunal making the request to do the like for the other in a similar case.' *Treatise on Evidence*, vol. 1, 320. The comity in behalf of which this power is exercised cannot, of course be invoked by any mere investigation commission. And it would see that, by act of Congress, the power of the federal courts in this respect has been restricted to cases in which a foreign government is a party or has an interest. Rev. St. § 4071 [*infra*, p. 222]."

Sec. 882. [Copies of department records and papers.] Copies of any books, records, papers, or documents in any of the Executive Departments,

authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof. [R. S.]

Act of Sept. 15, 1789, ch. 14, 1 Stat. L. 69; Act of Feb. 22, 1849, ch. 61, 9 Stat. L. 347; Act of May 31, 1854, ch. 60, 10 Stat. L. 297.

Similar provisions relating to various offices are contained in a number of the following sections of the Revised Statutes.

Copies of public documents, etc., in the office of the Commissioner of Indian Affairs were rendered admissible by virtue of the Act of July 26, 1892, ch. 256, § 3, 27 Stat. L. 273. See INDIANS.

Similar provisions were made with respect to copies of documents, etc., required to be kept under the Naturalization Act of June 29, 1906, ch. 3592, by section 28 thereof, 34 Stat. L. 606. See NATURALIZATION.

Similar provisions relating to records, documents, etc., in the office of the Interstate Commerce Commission were made by the Act of Feb. 4, 1887, ch. 104, as amended by the Act of June 29, 1906, ch. 3591, § 5, 34 Stat. L. 590. See INTERSTATE COMMERCE.

The words "documents" and "papers" cannot be held to mean every document or paper on file, but only such as were made by an officer or agent of the government in the course of his official duty. *Block's Case*, (1871) 7 Ct. Cl. 406.

Seal.—Unless a copy of a record is authenticated by a seal it is not admissible in evidence. *Newsom v. Langford*, (Tex. 1915) 174 S. W. 1036.

Authentication.—Statutes providing for authentication must be understood and interpreted by the same reasons that govern at common law. *Block's Case*, (1871) 7 Ct. Cl. 406.

Where the original bond of a collector of internal revenue was in the custody of the treasury department and was wholly disconnected from the transcript certified by the register of the treasury, a certificate of the secretary of the treasury was held to be a sufficient authentication of the copy of such bond in a suit thereon. *Chadwick v. U. S.*, (1880) 3 Fed. 750.

The commissioner of pensions certified that "the accompanying page, numbered 1, is truly copied from the original in the office of the commissioner of pensions." The acting secretary of the interior, under the seal of the department, certified to the official character of such commissioner of pensions, and the faith and credit to which his attestations were entitled. The certificates in question taken together were held to be a substantial compliance with this section. *Ballew v. U. S.*, (1895) 160 U. S. 187, 16 S. Ct. 263, 40 U. S. (L. ed.) 388.

Where the certificates of the commissioner of patents, under seal, show that the trademarks in question were deposited in the patent office, for registration, and that with each mark was deposited also a statement, a copy of which was annexed to each certificate; such certificate further stating that a declaration under oath of a member of the firm by which the trademark was so registered was also deposited, and it being further certified that the statement under oath contained certain declarations almost word for word in the language of the statutes, it was held that such certificates were not admissible un-

der R. S. sec. 882, not being copies authenticated by the seal of the department. *U. S. v. Steffens*, (1877) 24 Int. Rev. Rec. 14, 27 Fed. Cas. No. 16,384.

Presumption of genuineness.—In *Wynne v. U. S.*, (1910) 217 U. S. 234, 30 S. Ct. 447, 54 U. S. (L. ed.) 748, it was held that the genuineness of the authentication of a copy of a certificate of enrollment offered in evidence to establish the national character of a vessel on a prosecution for a crime committed on ship-board will be assumed, as will also the official character of the purported signer and the signing by him, or one authorized to sign for him, where there is no evidence casting suspicion upon the genuineness of the copy or of the seal, or the signature, and none which challenges in any way the American character of the ship.

Copies of papers relating to lands or patents.—"Under this provision it has been customary to furnish from time to time from the various departments of the government copies of papers and documents in addition to the public records relating to lands or patents; and these have been admitted, as it is understood, in evidence at the trial of causes by the various courts." (1877) 15 Op. Atty.-Gen. 342.

The records of the Pension Office are admissible in evidence, equally with the certificate issued, to prove the granting of a pension. *Pooler v. U. S.*, (C. C. A. 1904) 127 Fed. 509, 62 C. C. A. 307.

Exemplified copies of pension vouchers executed thirty years before, made pursuant to this section, prove themselves, and are admissible in evidence. *Murphy v. Cady*, (1906) 145 Mich. 33, 108 N. W. 493.

A copy of a bond certified under this section is not evidence of the execution of such bond, where the same is denied, but it must be certified under R. S. sec. 886, shown *infra*, p. 199, by the register, subject to the right to call for the production of the original. *U. S. v. Humason*, (1881) 8 Fed. 71.

Evidence of imposition of a fine.—Where the evidence that a fine had been imposed, under R. S. sec. 3962 (shown under the

title **POSTAL SERVICE**), upon the contractor of a mail route for failure to perform service according to contract, is contained in a document authenticated by the postmaster-general, under the seal of the department, as required under this section, such document is admissible in evidence of the imposition of such fine, and, until overcome by competent proof,

entitles the United States to a verdict and judgment for the amount of the fine. *U. S. v. McCoy*, (C. C. A. 1900) 104 Fed. 669, 44 C. C. A. 125.

A certified copy of the certificate of tax commissioners is properly admitted in evidence by virtue of this section. *Stephens v. Long*, (1912) 92 S. C. 65, 75 S. E. 530.

Sec. 883. [Copies of records, etc., in office of Solicitor of the Treasury.] Copies of any documents, records, books, or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as Solicitor for the time, shall be evidence equally with the originals. [R. S.]

Act of Feb. 22, 1849, ch. 61, 9 Stat. L. 347.

Sec. 884. [Instruments and papers of Comptroller of the Currency.] Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer. [R. S.]

Act of June 3, 1864, ch. 106, 13 Stat. L. 100.

By virtue of this section certificates from the comptroller's office authenticated by his seal are admissible in evidence. *Weitzel v. Brown*, (Mass. 1916) 112 N. E. 945.

"Certificate."—The commission or written appointment of a person as receiver

of a national bank, signed by "the deputy and acting comptroller of the currency," and attested by the seal of office of the comptroller, was held to be "a certificate," under this section. *Davis v. Watkins*, (1898) 56 Neb. 288, 76 N. W. 575.

Sec. 885. [Organization certificates of national banks.] Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate. [R. S.]

Act of June 3, 1864, ch. 106, 13 Stat. L. 101.

As to the form, requisites, etc., of the certificates mentioned in the text, see **NATIONAL BANKS**.

Conclusiveness of comptroller's certificate.—In an action brought against a stockholder of a bank on his liability as such, the comptroller's certificate is conclusive as to the completeness of the

organization of the bank, the comptroller being clothed with jurisdiction of deciding in reference thereto. *Casey v. Galli*, (1876) 94 U. S. 673, 24 U. S. (L. ed.) 168.

Sec. 886. [Transcripts from books, etc., of the Treasury, in suits against delinquents.] When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the Auditors respectively charged with the examination of those

accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: *Provided*, That where suit is brought upon a bond or other sealed instrument, and the defendant pleads "non est factum," or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit. [R. S.]

Act of March 3, 1797, ch. 20, 1 Stat. L. 512; Act of March 3, 1817, ch. 45, 3 Stat. L. 367.

Certification of the transcripts required by this section was required by the Act of July 31, 1894, ch. 174, § 17, given as amended, *infra*, p. 227.

Constitutionality.—"It has long since been decided by the Supreme Court that the legislature had the power to establish new rules of evidence, in derogation of the common law," by making transcripts from the departments at Washington evidence against public debtors. *U. S. v. Harrill*, (1857) McAll. 243, 26 Fed. Cas. No. 15,310.

General application of section.—The provision in this section, as to the admission of authenticated copies, is not restricted to certain cases, but is general, and applies to all cases where the evidence is required, being "founded upon a prudent precaution to guard against the loss of the original." *U. S. v. Lent*, (1825) 1 Paine 417, 26 Fed. Cas. No. 15,593.

"Accountable for public money."—A commissioner of claims under Act of Congress, March 3, 1797, 1 Stat. L. 512, who had received money in advance for the contingencies of his office, was held to be a receiver of public money, and accountable therefor. *U. S. v. Lee*, (1824) 2 Cranch C. C. 462, 26 Fed. Cas. No. 15,585.

It being a part of the duty of an Indian agent to receive and disburse public moneys, he is, therefore, a "person accountable for public money," within the meaning of this section, and the treasury transcript is sufficient to establish an indebtedness on his part to the government for moneys claimed to have been received by him, and not properly disbursed or accounted for. *U. S. v. Allen*, (1888) 36 Fed. 174.

This section, so far as respects the certification of accounts, being confined to suits founded on the "delinquency of a revenue officer, or other person accountable for public money," it was held that an action against the superintendent of a

mint on his official bond, on the ground that he had not safely kept the moneys and bullion, with the keeping of which he had been intrusted, was not a suit brought in such case of delinquency, etc., and that the transcript could not be admitted. *U. S. v. Bosbyshell*, (1896) 73 Fed. 616.

Nature of transcript.—By the expression, "a transcript from the books and proceedings of the treasury, certified by the register," etc., it is understood that the whole accounts as they appear in the books, the elements out of which the reported balance is formed, together with all the proceedings which have been had concerning them, shall be certified and submitted to the court and jury. A full transcript from the books containing the accounts, and also of the proceedings of the treasury in relation to them, in admitting or rejecting disputed vouchers, charges, etc., is indispensable; a mere exhibition of the balance not being sufficient. *U. S. v. Patterson*, (1829) Gilp. 44, 27 Fed. Cas. No. 16,008; *U. S. v. Hilliard*, (1843) 3 McLean 324, 26 Fed. Cas. No. 15,368.

While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books. *U. S. v. Gaussen*, (1873) 19 Wall. 198, 22 U. S. (L. ed.) 41; *Gratiot v. U. S.*, (1841) 15 Pet. 336, 10 U. S.

(L. ed.) 759; *U. S. v. Irving*, (1843) 1 How. 250, 11 U. S. (L. ed.) 120; *Hoyt v. U. S.*, (1850) 10 How. 109, 13 U. S. (L. ed.) 348.

Statutory mode of authenticating transcript strictly followed.—The mode of authenticating transcripts from the departments at Washington, as prescribed by law, must be strictly pursued. *U. S. v. Harrill*, (1857) McAll. 243, 26 Fed. Cas. No. 15,310.

Authentication by the assistant secretary of the treasury of a quarterly return of a collector of internal revenue is sufficient. *Chadwick v. U. S.*, (1880) 3 Fed. 750.

Ex parte statements of post-office officials.—In an action by the United States against a party on his bond as a postmaster, to recover an alleged deficit in his accounts, *ex parte* statements of account made by post-office officials are not admissible as competent evidence to support a judgment, it not being the intention of the law that executive officers should be clothed with the power thus to usurp the province of court and jury, and decide, finally and irrevocably, questions of fact upon *ex parte* and hearsay statements." *U. S. v. Case*, (1892) 49 Fed. 270 [citing *U. S. v. Jones*, (1834) 8 Pet. 375, 8 U. S. (L. ed.) 979; *U. S. v. Forsythe*, (1855) 6 McLean 584; 25 Fed. Cas. No. 15,133; *U. S. v. Buford*, (1830) 3 Pet. 12, 7 U. S. (L. ed.) 585; *Hoyt v. U. S.*, (1850) 10 How. 109, 13 U. S. (L. ed.) 348; *U. S. v. Smith*, (1888) 35 Fed. 490; *Cox v. U. S.*, (1832) 6 Pet. 172, 8 U. S. (L. ed.) 359; *Smith v. U. S.*, (1831) 5 Pet. 292, 8 U. S. (L. ed.) 130; *U. S. v. Edwards*, (1839) 1 McLean 467, 25 Fed. Cas. No. 15,026; *U. S. v. Patterson*, (1829) Gilp. 44, 27 Fed. Cas. No. 16,008; *U. S. v. Beattie*, (1829) Gilp. 92, 24 Fed. Cas. No. 14,554; *Bruce v. U. S.*, (1854) 17 How. 437, 15 U. S. (L. ed.) 129; *U. S. v. Irving*, (1843) 1 How. 250, 11 U. S. (L. ed.) 120].

Transcript prima facie evidence.—The transcript from the books and proceedings of the treasury department is, under this section, made *prima facie* evidence of the facts stated therein, so far as the same are authorized by law. *U. S. v. Eggleston*, (1877) 4 Sawy. 199, 25 Fed. Cas. No. 15,027 [citing *Walton v. U. S.*, (1824) 9 Wheat. 651, 6 U. S. (L. ed.) 182; *U. S. v. Buford*, (1830) 3 Pet. 12, 7 U. S. (L. ed.) 585; *U. S. v. Jones*, (1834) 8 Pet. 375, 8 U. S. (L. ed.) 979; *Gratiot v. U. S.*, (1841) 15 Pet. 336, 10 U. S. (L. ed.) 759; *U. S. v. Irving*, (1843) 1 How. 250, 11 U. S. (L. ed.) 120; *Hoyt v. U. S.*, (1850) 10 How. 109, 13 U. S. (L. ed.) 348; *Bruce v. U. S.*, (1854) 17 How. 437, 15 U. S. (L. ed.) 129]; *Harvey v. U. S.*, (C. C. A. 1899) 97 Fed. 452, 38 C. C. A. 267 [citing *Smith v. U. S.*, (1831) 5 Pet. 292, 8 U. S. (L. ed.) 130; *U. S. v. Pinson*, (1880) 102 U. S. 548, 26

U. S. (L. ed.) 226; *Moses v. U. S.*, (1897) 166 U. S. 571, 17 S. Ct. 682, 41 U. S. (L. ed.) 1119]; *U. S. v. Du Perow*, (N. D. Ohio 1913) 208 Fed. 895. But see *contra*, *Dennis v. U. S.*, (Ariz. 1898) 52 Pac. 353; *U. S. v. Ralston*, (1883) 17 Fed. 895, holding that transcripts are not to be considered as making a *prima facie* case in favor of the government; *U. S. v. Corwin*, (1857) 1 Bond 149, 25 Fed. Cas. No. 14,870, holding that in an action on a bond the principal and sureties have the right to establish non-allowed credits.

In *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390, it was held that, in the absence of countervailing evidence in an action on the bond of an Indian agent, the introduction of a duly certified transcript of the books and proceedings of the treasury department established a *prima facie* case in favor of the government entitling it to judgment.

This section contemplates the certification only of a bookkeeper's plain statement of account; and therefore a statement made in a certified copy of a postmaster's account, after showing that a charge was made against him, that it was on account of money paid by him to a laborer "for which no service was performed," was held not to be admissible in evidence against him. *Nagle v. U. S.*, (C. C. A. 1906) 145 Fed. 302, 76 C. C. A. 181.

Rulings of treasury department.—Where, in an action on the bond of an Indian agent, the transcript of the books and proceedings in the treasury department contained a debit and credit statement of the account and a showing of the items in dispute, it was held not to be objectionable because it also contained explanatory memoranda showing the ground of the rulings of the accounting officers concerning the items rejected, and, in some instances, the evidence on which they relied. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390.

Where departmental treasury regulations are printed, and a duplicate copy of such regulations was found in a book kept by the collector, such book containing a large number of treasury circulars from the commissioners, it was held that such regulations in the form of a circular might be admitted as evidence in a suit against the collector. *Chadwick v. U. S.*, (1880) 3 Fed. 750.

Evidence of receipt of money.—In *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390, it was held that in an action on the bond of a United States Indian agent a transcript of the books and proceedings of the treasury department was not evidence of the receipt by such agent of moneys that did not come to his hands through the ordinary channels of the department.

Evidence of execution of bond.—It has been held that in an action on a bond of

an Indian agent if its execution is denied it may be proved by a copy certified by the register of the treasury under the seal of the department. *U. S. v. Humason*, (C. C. Ore. 1881) 8 Fed. 71.

Restatement of accounts.—Under this section, a disbursing officer's accounts may, under some circumstances, and with reference to certain matters, be restated by the treasury, and, when so restated, they may be used to make a *prima facie* case against him. *U. S. v. Butler*, (1902) 114 Fed. 582 [citing *Soule v. U. S.*, (1879) 100 U. S. 8, 25 U. S. (L. ed.) 536; *Moses v. U. S.*, (1897) 166 U. S. 571, 17 S. Ct. 682, 41 U. S. (L. ed.) 1119].

A copy of a paymaster's bond certified according to the "Act to provide more effectually for the settlements of accounts between the United States and receivers of public money" was held to be competent evidence in *U. S. v. Vanzandt*, (1822) 2 Cranch C. C. 338, 28 Fed. Cas. No. 16,611. The case was reversed on other grounds in (1826) 11 Wheat. 184, 6 U. S. (L. ed.) 448.

Transcripts held sufficient.—In a suit upon the bond of a purser in the navy, a transcript from the books and proceedings of the treasury department, authenticated by the fourth auditor and setting out the state of account between the treasury department and such purser, the secretary of the treasury certifying to the identity and official position of such fourth auditor at the time of such certification by him, was held admissible and competent evidence. *U. S. v. Bell*, (1884) 111 U. S. 477, 4 S. Ct. 498, 28 U. S. (L. ed.) 477.

Where a suit was brought by the United States against an Indian agent for a balance of government money alleged to be in his hands, the objection that the transcript from the treasury books was not accompanied by authenticated copies of his receipts was overruled; and it was further held that, a transcript being only *prima facie* evidence, if the defendant disputed any of the charges against him, he was able, by proper application to the court, supported by sufficient evidence, to obtain the original vouchers on which he was charged, if necessary to his defense and to show that the debit against him was erroneous; and if it appeared on the face of the account that an item was charged against him which had not come to his hands in the regular and ordinary operations of the government, and of which, therefore, the accounting officers could have no official knowledge, the transcript would not be evidence to support that charge. *Bruce v. U. S.*, (1854) 17 How. 437, 15 U. S. (L. ed.) 129.

An action was brought to recover damages accruing to the United States by reason of the failure of a certain person to comply with his bid to furnish certain supplies for the government military posts, the action being against him per-

sonally and his sureties on the bond. There was introduced as evidence a United States treasury transcript duly certified under this section, included in such transcript being the notice to the defendant of the acceptance of his bid inclosing contract and bond, and his letter declining to enter into the agreed contract and to furnish the required bond, along with an itemized statement and account showing the purchases by the government in consequence of the default. The objection that such transcripts are admissible in suit against revenue officers or other persons accountable for public moneys only, was overruled, and the transcript was admitted. *U. S. v. Drachman*, (Ariz. 1896) 43 Pac. 222 [citing *U. S. v. Griffith*, (1822) 2 Cranch C. C. 366, 28 Fed. Cas. No. 15,263, and *U. S. v. Ellis*, (1887) 2 Ariz. 253, 14 Pac. 300], affirmed *Dennis v. U. S.*, (Ariz. 1898) 52 Pac. 353.

Where a separate action was brought against the sureties on a bond it was held that a certified transcript of the collector's account might be admitted. *Chadwick v. U. S.*, (1880) 3 Fed. 750.

Where an account of a contractor had been duly adjusted by the proper accounting officers of the treasury, certified, and authenticated, it was held that it might be received as evidence of money which had been advanced to him and also of certain payments made by sundry officers of the army for the purchase of provisions, in consequence of the contractor's having failed to make the necessary supplies according to his contract. *U. S. v. Griffith*, (1822) 2 Cranch C. C. 366, 26 Fed. Cas. No. 15,263.

Where a collector's accounts were returned to the treasurer each quarter, but he did not assume and surrender his office on any even quarter day, but on a day between the beginning and end of a quarter, it was held that a restatement and transcript from the treasurer of his accounts to the termination of his term might be received as legal evidence in the action against the sureties. *U. S. v. Irving*, (1843) 1 How. 250, 11 U. S. (L. ed.) 120.

A treasury transcript, having been certified by the register and secretary of the treasury, as required by this section, was held to be competent to show what public moneys the defendant, in an action against him upon his bond in the case of a special Indian agent, had received, and what disbursements made by him had been approved. *U. S. v. Smith*, (1888) 35 Fed. 490.

Where a party was sued for money alleged to have been paid to him by mistake by one of the disbursing officers of the government, it was not error to exclude the certified transcript from the books of the second auditor's office as evidence, this section relating only to suits against

persons accountable for public money as such. *U. S. v. Radowitz*, (1879) 8 Rep. 263, 27 Fed. Cas. No. 16,112.

Transcripts held insufficient.—An action was brought against the sureties of a United States marshal thirty-three years after the expiration of his term of office and several years after he died. To support such action there was offered in evidence a transcript from the books and proceedings of the treasury department, fragmentary and incomplete in itself, and covering only a portion of the term, and not containing a single item of account for almost the last two years that he remained in office. It was held that a judgment based thereon for certain moneys expended and which were thereby shown to have been claimed by the marshal to have been rejected or suspended by the government, should be reversed. *Harvey v. U. S.*, (C. C. A. 1899) 97 Fed. 452, 38 C. C. A. 267 [citing *U. S. v. Pinson*, (1880) 102 U. S. 548, 26 U. S. (L. ed.) 226; *U. S. v. Gausson*, (1873) 19 Wall. 198, 22 U. S. (L. ed.) 41; *U. S. v. Stone*, (1882) 106 U. S. 525, 1 S. Ct. 287, 27 U. S. (L. ed.) 163; *U. S. v. Hunt*, (1881) 105 U. S. 183, 26 U. S. (L. ed.) 1037; *U. S. v. Dumas*, (1893) 149 U. S. 278, 13 S. Ct. 872, 37 U. S. (L. ed.) 734; *Soule v. U. S.*, (1879) 100 U. S. 11; *Smith v. U. S.*, (1831) 5 Pet. 292, 8 U. S. (L. ed.) 130; *U. S. v. Smith*, (1888) 35 Fed. 490].

Where the account of a revenue officer, or other person who was intrusted with the custody of public money and who was an alleged delinquent in regard thereto, had been finally adjusted by the proper officers, it was held that such account is not admissible under this section, unless it is certified by the proper officer and authenticated under a department seal to

be "a transcript from the books and proceedings of the treasury department;" and where the certificate states that the "transcript" is a true copy of the original on file, it is not a sufficient certificate, this being the certificate an officer would make in reference to mere copies of bonds, contracts, or other papers relating to or connected with the final adjustment of the account. *U. S. v. Pinson*, (1880) 102 U. S. 548, 26 U. S. (L. ed.) 226.

Where there was an action on a bond given by the defendant to secure the faithful performance by a party of his duties as special Indian agent, and there was a treasury transcript certified by the register and secretary of the treasury containing a statement on the debit side of the charge "for government property received at the Western Shoshone Agency, and not properly accounted for," the transcript, however, not showing of what the property consisted nor the manner in which the value of the same was ascertained, it was held, notwithstanding the fact that there was attached to the transcript another paper professing to describe the property item by item and stating the value of the various articles, but not showing in what way such values were ascertained and not professing to be a transcript from any book kept, or a copy of any document on file in the treasury department, but probably being compiled from original returns made by the Indian agent of public property in his possession now on file in the department and professing to show what portion of such property had not been accounted for by proper vouchers, that such treasury transcript was not admissible under this section. *U. S. v. Smith*, (1888) 35 Fed. 490.

Sec. 887. [Transcripts from books of the Treasury in indictments for embezzlement of public moneys.] Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section. [*R. S.*]

Act of Aug. 6, 1846, ch. 90, 9 Stat. L. 63; Act of March 2, 1797, ch. 20, 1 Stat. L. 512.

Against whom evidence can be used.—The evidence mentioned in the section "can only be used against persons who are previously declared to be guilty of embezzlement." (1855) 7 Op. Atty-Gen. 82.

Officer of United States.—Under section 16 of the Act of Aug. 1, 1846, ch. 90, 9 Stat. L. 63, the facts showed that W. having been constituted an attorney by certain Indians to collect from the government claims for back pay and bounty due them for military services, he was, upon executing a bond to the United

States conditioned for the faithful performance of his duties as such attorney, and filing the same in the interior department, also empowered as a special agent of that department, without compensation (except such fees as were then or might thereafter be authorized by said department), to collect and pay over to the said Indians their claims. The appointment as such special agent was not made in pursuance of any law of Congress. It was held that W. did not become, by virtue of that appointment, or by the execution of the bond, an officer of

the United States within the meaning of this section and subject to prosecution thereunder; but it was advised that the secretary of the interior might proceed by civil action on the bond for any breach of its conditions, and seek the recovery of whatever damages, if any, the govern-

ment has thereby sustained. *Wright's Case*, (1871) 13 Op. Atty.-Gen. 588.

Garbled and mutilated statements.—See, under R. S. sec. 886, *supra*, p. 199, *U. S. v. Gausson*, (1873) 19 Wall. 198, 22 U. S. (L. ed.) 41, and other cases cited as to garbled and mutilated statements.

Sec. 888. [Copies of returns in returns-office.] A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns-office. [R. S.]

Act of June 2, 1862, ch. 93, 12 Stat. L. 412.

Sec. 889. [Copies of Post-Office records and of Auditor's statement of accounts.] Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account-books of the Post-Office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits. [R. S.]

Act of March 3, 1825, ch. 64, 4 Stat. L. 113; Act of July 2, 1836, ch. 270, 5 Stat. L. 82; Act of May 17, 1864, ch. 87, 13 Stat. L. 78; Act of July 27, 1868, ch. 246, 15 Stat. L. 197.

The Sixth Auditor was designated the Auditor for the Post Office Department by a provision of the Act of July 31, 1894, ch. 174, § 3, 28 Stat. L. 206. See TREASURY DEPARTMENT.

A transcript of the quarterly report described in the indictment, duly certified by the sixth auditor of the treasury for the Post Office Department, was held to have been properly admitted in evidence. *U. S. v. Snyder*, (1882) 14 Fed. 554.

Transcript giving balance.—Where a transcript from the Post Office Department set out the balance due by the postmaster, without giving full items, such balance having been struck by the postmaster himself, and acknowledged by him, the transcript was held admissible. *Lawrence v. U. S.*, (1841) 2 McLean 581, 15 Fed. Cas. No. 8,145.

Balances of quarterly returns audited and adjusted by government officers.—Where transcripts of accounts are offered in evidence in an action to recover upon a postmaster's bond, the fact that the items charged in such accounts, as balances of quarterly returns, do not purport on the face of such accounts to be balances acknowledged by him, and that they are not supported by proper vouch-

ers, but merely purport to be the balances of said quarterly returns as audited and adjusted by the officers of the government, does not destroy the competency of the transcripts. *U. S. v. Hodge*, (1851) 13 How 478, 14 U. S. (L. ed.) 231.

A certified account from the books of the auditor for the Post Office Department comes within this statute. *U. S. v. McCoy*, (1904) 193 U. S. 593, 24 S. Ct. 530, 48 U. S. (L. ed.) 805.

Postmaster-general's order.—In an action brought by the United States to recover from a postmaster and his sureties money alleged to have been illegally retained by him while such postmaster, an order was issued by the postmaster-general alleging that false business returns had been made by the postmaster, and that, by reason thereof, a definite compensation would be allowed him, in place of commissions as heretofore. Such order was held admissible as evidence. *U. S. v. Marks*, (1898) 5 Ariz. 404, 52 Pac. 773.

Omission of credits from transcript.—Where a transcript of the account in a suit brought upon a postmaster's bond omitted allowed credits, it was held that such omission did not destroy the sufficiency of the transcript. *U. S. v. Harrill*, (1857) *McAdl.* 243, 26 *Fed. Cas.* No. 15,310, *citing* *U. S. v. Hodge*, (1851) 13 *How.* 478, 14 *U. S. (L. ed.)* 231.

Where, in an action to recover upon a postmaster's bond, certified transcripts of accounts are offered in evidence, the fact that they do not purport to contain the statement of credits claimed by the postmaster and disallowed by the government does not invalidate the transcripts. *U. S. v. Hodge*, (1851) 13 *How.* 478, 14 *U. S. (L. ed.)* 231.

Quarterly reports signed by postmaster, but made out in handwriting of the accused assistant.—An assistant postmaster was indicted for embezzling government money. Quarterly reports were sent in to the government signed by the postmaster, but made out in the handwriting of the accused. These reports, duly certified as required by this section, were held to have been properly admitted as evidence. *Mo-*

Bride v. U. S., (*C. C. A.* 1900) 101 *Fed.* 821, 42 *C. C. A.* 38.

Transcript as prima facie evidence.—A suit was instituted by the government to recover on a postmaster's bond, and a duly certified transcript of the books of the United States treasury department showing the post-office accounts between the government and the postmaster was offered as evidence. The competency of this evidence was sustained, but the court held that it was only *prima facie* evidence, subject to be met by other competent proof. *U. S. v. Carlovitz*, (*C. C. A.* 1897) 80 *Fed.* 852, 52 *U. S. App.* 168, 26 *C. C. A.* 188; *U. S. v. Dumas*, (1893) 149 *U. S.* 278, 13 *S. Ct.* 872, 37 *U. S. (L. ed.)* 734 [*citing* *U. S. v. Irving*, (1843) 1 *How.* 250, 11 *U. S. (L. ed.)* 120; *U. S. v. Hodge*, (1851) 13 *How.* 478, 14 *U. S. (L. ed.)* 231; *Watkins v. U. S.*, (1869) 9 *Wall.* 759, 19 *U. S. (L. ed.)* 820; *Soule v. U. S.*, (1879) 100 *U. S.* 8, 25 *U. S. (L. ed.)* 536]; *U. S. v. Marks*, (1898) 5 *Ariz.* 404, 52 *Pac.* 773.

See under *R. S.* sec. 886, *supra*, p. 199, *U. S. v. Case*, (1892) 49 *Fed.* 270.

Sec. 890. [Copies of statements of demands by Post-Office Department.] In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the Sixth Auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster-General or the Auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the post-office where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due. [*R. S.*]

Act of July 27, 1868, ch. 246, 15 *Stat. L.* 197.

As to the Sixth Auditor, see the note to the preceding *R. S.* sec. 889.

Sec. 891. [Copies of records, etc., of General Land-Office.] Copies of any records, books, or papers in the General Land-Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record. [*R. S.*]

Act of April 25, 1812, ch. 68, 2 *Stat. L.* 717; Act of July 4, 1836, ch. 352, 5 *Stat. L.* 109, 111; Act of March 3, 1843, ch. 95, 5 *Stat. L.* 627, 628.

See title PUBLIC LANDS, and see R. S. secs. 2469 and 2470, *infra*, p. 222, relative to Commissioner of the General Land Office preparing and certifying copies of records, books, and papers for use as evidence in courts of justice.

Introductory.—The records of the land office being of great importance to the country and kept under the official sanction of the government, "their contents must always be considered, and they are always received in courts of justice as evidence of the facts stated." *Galt v. Galloway*, (1830) 4 Pet. 332, 7 U. S. (L. ed.) 876.

Book prepared as substitute for the original tract book.—The records of a local land office having been burned, a book was subsequently prepared under the direction of the commissioner of the General Land Office as a substitute for the original tract book thus destroyed, and was transmitted by him in the regular course of his official duty to the register and receiver of the local land office for use in disposing of the public lands in that district. It was held that, although this book was not certified by the commissioner of the General Land Office to be a correct copy of any record or paper on file in his office, yet it might be received in evidence under this section as an official book. *Jesse D. Carr Land, etc., Co. v. U. S.*, (C. C. A. 1902) 118 Fed. 821, 55 C. C. A. 433, *citing* *Belk v. Meagher*, (1881) 104 U. S. 279, 26 U. S. (L. ed.) 735.

Questions of land titles.—A certified copy of the records of the General Land Office, including the certificate of local land officers that on the records of their office there were no homestead pre-emption or other valid claims to certain lands within the place limits of the grant to the

Atlantic & Pacific Railroad Company, made by the Act of July 27, 1866, and that the land had not been returned or denominated as swamp or mineral land, was held to be competent evidence under this section, on the question of the title of one claiming as grantee from the railroad company. *Howard t. Perrin*, (1906) 200 U. S. 71, 26 S. Ct. 195, 50 U. S. (L. ed.) 374.

Land warrants.—This section is authority for the introduction in evidence of the transcript of the General Land Office in a question as to the location of land warrants. *Culver v. Uthe*, (1890) 133 U. S. 655, 10 S. Ct. 415, 33 U. S. (L. ed.) 776.

Signature by "acting commissioner."—Where a certificate of a copy was signed by a person as "acting commissioner of the General Land Office," with the seal of the General Land Office attached, the certified copy was admitted under the section, such signature not showing a vacancy in the office of the commissioner. *Murray v. Poiglase*, (1896) 17 Mont. 455, 43 Pac. 505.

"The words 'evidence equally,' as used in the Act of Congress, were not intended to mean that in all cases the copy should have the same probative force as the original instrument, but that it should be regarded as of the same class, in the grades of evidence, as to written and parol, and primary and secondary." *Campbell v. Laclede Gas-Light Co.*, (1886) 119 U. S. 445, 7 S. Ct. 278, 30 U. S. (L. ed.) 459.

Sec. 892. [Copies of records, etc., of Patent-Office.] Written or printed copies of any records, books, papers, or drawings belonging to the Patent-Office, and of letters-patent authenticated by the seal and certified by the Commissioner or Acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof. [R. S.]

Act of July 8, 1870, ch. 230, 16 Stat. L. 207.

Similar provisions relating to trade-marks were made by the Act of Feb. 20, 1905, ch. 592, § 11, 33 Stat. L. 727.

Scope of section.—This section relates only to records, books, papers, or drawings "belonging to" the Patent Office, and letters-patent. *Paine v. Trask*, (C. C. A. 1893) 56 Fed. 233, 5 U. S. App. 283, 5 C. C. A. 497.

Certificate by "acting commissioner."—Where there was a contest between the patentee and third persons, and the copies were certified to by a person signing himself as "acting commissioner," it was held that this might, on the face of it, be sufficient, there being a presumption of

the legality of the appointment. *Woodworth v. Hall*, (1846) 1 Woodb. & M. 248, 30 Fed. Cas. No. 18,016.

Second transcript.—Where a transcript from the Patent Office is defective, another transcript may be certified which may correct the errors in the first. *Brooks v. Jenkins*, (1844) 3 McLean 432, 4 Fed. Cas. No. 1,953.

Copy as proof of genuineness of original.—While there is a difference of opinion the better rule seems to be that a certified copy of the record of an assignment of

a patent with the acknowledgment thereto, although made evidence where the original would be evidence by this section, does not prove the genuineness of due execution of the original assignment. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 164 Fed. 47, wherein the court after quoting the section said: "But this merely dispenses with the production of the record, a certified copy from it being made the equivalent. It does not establish the due execution or genuineness of a paper which happens to be found there, which must still be proved in the usual way. Nor is this affected by the Act of March 3, 1897, ch. 391, § 5, 29 Stat. L. 692 [amending R. S. sec. 4898; see PATENTS], which provides that, if any assignment, grant, or conveyance of a patent shall be acknowledged before a notary public, or certain other designated officers, 'the certificate of such acknowledgment under the hand and official seal of such notary or other officer, shall be prima facie evidence of the execution of such assignment, grant, or conveyance.' An assignment so authenticated does not have to be otherwise proved, as by calling the subscribing witnesses, or by proof of the handwriting of the party who executed it. But the document itself must still be produced, and not a certified copy taken from the record, which in no respect is made a substitute. For the purpose of notice, an assignment of a patent is required to be recorded within three months, and if not so recorded is made void as against a subsequent purchaser or mortgagee for value, without notice. Rev. Stat. 4898 [see PATENTS]. But while constructive notice may be effectively provided for in this way, parties being thereby put upon inquiry, inquiry is by no means excused, nor can the record alone be relied on to make out title, however it may be resorted to, to trace it. No doubt there are authorities entitled to respect which hold otherwise (*Dederick v. Whitman Agricultural Co.* [E. D. Mo. 1886] 26 Fed. 763; *National Folding Box, etc., Co. v. American Paper Pail, etc., Co.*, [S. D.

N. Y. 1893] 55 Fed. 488; *Standard Elevator Co. v. Crane Elevator Co.*, [C. C. A. 7th Cir. 1896] 76 Fed. 767, [46 U. S. App. 411] 22 C. C. A. 549); but not, in my judgment, with reason, the correct view being the other way (*Paine v. Trask*, [C. C. A. 1st Cir. 1893] 56 Fed. 233, [5 U. S. App. 283] 5 C. C. A. 497; *New York v. American Cable Ry. Co.*, [C. C. A. 2d Cir. 1894] 60 Fed. 1016, [23 U. S. App. 7] 9 C. C. A. 336). The case is not to be ruled by analogy with the recording of deeds for the alienation of real estate, which depends upon the effect of local statutes, where, as in Pennsylvania for instance, an exemplification of the record is expressly made evidence, 'as valid and effectual in law as the original deeds themselves.' 1 Brightly's Dig. p. 472, par. 74. Congress might have so provided, but the fact is that it has not done so, and that is the end of it."

In *Standard Elevator Co. v. Crane Elevator Co.*, (C. C. A. 7th Cir. 1896) 76 Fed. 767, 46 U. S. App. 411, 22 C. C. A. 549, a contrary authority to the one above, the court said: "The sense—the essential significance and intent—of this section is that the record or official copy of any assignment shall give to any person interested the *prima facie* assurance that an original assignment was made in terms as shown in the record, that such instrument was subscribed as shown, that it was delivered, that the signature thereto is the genuine signature of the assignor, and that such assignor had an assignable interest according to the purport of the instrument."

Affidavit of vendor of patent right.—A copy of letters-patent is duly authenticated only when it bears such official attestation as will render it legal and admissible in evidence; and therefore it was held that the affidavit of the vendor of the patent right, that his letters-patent are genuine, that they have not been revoked or annulled, and that he has full authority to sell or barter the right, is not sufficient attestation. *Mayfield v. Sears*, (1892) 133 Ind. 86, 32 N. E. 816.

Sec. 893. [Copies of foreign letters-patent.] Copies of the specifications and drawings of foreign letters-patent, certified as provided in the preceding section, shall be prima-facie evidence of the fact of the granting of such letters-patent, and of the date and contents thereof. [R. S.]

Act of July 8, 1870, ch. 230, 16 Stat. L. 207.

Authentication of French patent.—A copy of a French patent certified by the director of the Conservatoire National des Arts et Métiers of France, under the seal of that department, and verified by the minister of agriculture and commerce and the minister of foreign affairs, under their seals, but not by the great seal of France, was held to be authenticated in the proper

manner and admissible in evidence under the section. *Schoerken v. Swift, etc., Co.*, (1881) 7 Fed. 469, wherein the court said: "This suit is brought upon letters patent of the United States No. 63,104, dated March 19, 1867, and issued to the orator, for a match-box. Among the defenses set up in the answer is one that the same invention has been previously

patented in letters patent of France No. 52,907, dated February 6, 1862, and a certificate of addition thereto, dated April 29, 1864, granted and issued to one Caussemille. The orator's invention is not shown earlier than the patent. The defendant has filed in evidence what purports to be a copy of the patent set up in answer, certified from France. The orator objects to this copy as evidence, for want of sufficient authentication, and insists that, if admissible in evidence at all, it does not show such an open public patent as will defeat a patent of the United States, and that it does not purport to be a patent for the same invention. Courts of this country take judicial notice of all other nations and their seals of state, but not of their inferior departments and their officers and seals. The copy filed in evidence is certified by the director of the Conservatoire National des Arts et Métiers of France, under the seal of that department, verified by the minister of agriculture and commerce and the minister of foreign affairs, under their seals, but not by the great seal of France. This would not be sufficient proof of the copy if the common law was to govern. *Church v. Hubbard*, 2 Cranch 187, [2 U. S. (L. ed.) 249]. But the difficulties of making proof of foreign as well as of domestic patents have been lessened by statute. Copies of any records, books, or papers belonging to the patent office, and of letters patent, authenticated by the seal, and certified by the commissioner or acting commissioner, are made evidence where the originals would be evidence. Rev. St. 892. And 'copies of the specifications and drawings of the foreign letters patent, certified as provided in the preceding section, shall be *prima facie* evi-

dence of the fact of the granting of such letters patent, and of the date and contents thereof.' Rev. St. 893. This department and its directors, in France, correspond to the patent office and its commissioner in the United States, as is understood, and the minister of agriculture and commerce to the secretary of the interior. So that this copy comes from the proper source, is authenticated in the proper manner, and is admissible in evidence under the statute. *De Florez v. Raynolds*, 17 Blatch. 436. This defense, as formulated in the Revised Statutes, is that the invention shall have been patented before the supposed invention by the patentee. Section 4920, par. 3 [see PATENTS]. There are patents in France which may, for public and special reasons, be kept secret. The expression 'patented,' in the statute, would seem, from the signification of the word, to mean only inventions laid open to the public and protected to the inventors, and such appears to be the construction which the expression has heretofore received. There is nothing to show whether this is an open patent or one made secret, except what can be gathered from the copy itself, and the fact of its production. Only public records are provable by copy certified merely, and these departments of the government of France would not have the patent in condition to certify by copy if it was secret, and not public. So the fact that it is certified shows it to be what could be certified, and that the invention described by it was, in the sense of the patent law, patented by the original patent of the copy produced. The patent is prior to the orator's invention, and the invention patented by it is to be compared with the orator's."

Sec. 894. [Printed copies of specifications and drawings of patents.]

The printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the district courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained. [R. S.]

Res. of Jan. 11, 1871, No. 5, 16 Stat. L. 590.

Sec. 895. [Extracts from the Journals of Congress.] Extracts from the Journals of the Senate, or of the House of Representatives, and of the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or by the Clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court. [R. S.]

Act of Aug. 8, 1846, ch. 107, 9 Stat. L. 80.

Journals as highest evidence.—This section "is not a statutory declaration that the journals are the highest evidence of the facts stated in them, or complete evidence of all that occurs in the progress of business in the respective houses; much less that the authentication of an enrolled bill, by the official signatures of the presiding officers of the two houses and of the

President, as an act which has passed Congress, and been approved by the President, may be overcome by what the journal of either house shows or fails to show." *Field v. Clark*, (1892) 143 U. S. 649, 12 S. Ct. 495, 36 U. S. (L. ed.) 294. See also *U. S. v. Burr*, (1895) 159 U. S. 78, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82.

Sec. 896. [Copies of records, etc., in offices of United States consuls, etc.] Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States. [*R. S.*]

Act of Jan. 8, 1869, ch. 7, 15 Stat. L. 286.

The office of commercial agent was abolished by a provision of the Act of April 5, 1906, ch. 1366, § 3, 34 Stat. L. 100. See the title *DIPLOMATIC AND CONSULAR OFFICERS*, *ante*, p. 4.

Sec. 897. [Certain books and papers in offices of district and circuit courts in Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas.] The transcripts into new books, made by the clerks of the district courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seven, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the circuit courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had. [*R. S.*]

Act of June 27, 1864, ch. 165, 13 Stat. L. 199.

The Circuit Courts were abolished and their powers and duties conferred on the District Courts by the Judicial Code of March 3, 1911, ch. 13, §§ 289-291, 36 Stat. L. 1167. See *JUDICIARY*.

Sec. 898. [Transcribed records in the clerks' offices of western district of North Carolina.] The transcripts into new books made by the clerks of the circuit and district courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit and district courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed. [*R. S.*]

Act of June 4, 1872, ch. 282, 17 Stat. L. 217.

As to the Circuit Courts, see the note to the preceding *R. S.* sec. 897.

3 F. S. A.—8

Sec. 899. [When original records are lost or destroyed.] When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had. [R. S.]

Act of March 3, 1871, ch. 111, 16 Stat. L. 474.

Rule as to secondary evidence.—This Act “provides for putting in a permanent form proof of the contents of judicial records lost or destroyed, such proof to take the place of the original records for all purposes.” There is nothing in this Act which changes the established rule as to

secondary evidence. *Cornett v. Williams*, (1873) 20 Wall. 226, 22 U. S. (L. ed.) 254.

Lost records in bankruptcy may be supplied under the provisions of R. S. secs. 899, 900. *In re Friedlob*, (1879) 11 Chi. Leg. News 189, 9 Fed. Cas. No. 5,118.

Sec. 900. [Same subject.] When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of if [it] shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed. [R. S.]

Act of March 3, 1871, ch. 111, 16 Stat. L. 475.

A proceeding to restore records is sui generis, and is to be governed by the statute authorizing it, and not by the state statute. It was not the intention of Congress by the Conformity Act, June 1, 1872, 17 Stat. L. 196 (R. S. sec. 914, see JUDICIARY), to repeal or abrogate the Act of

March 3, 1871. The proceeding to restore records does not come within the general term of practice or pleadings in the courts, which obviously has reference to the mode of commencing and trying causes. *Turner v. Newman*, (1872) 3 Biss. 307, 24 Fed. Cas. No. 14,262.

Sec. 901. [Same subject.] When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same

effect as the original record would have had if the same had not been lost or destroyed. [R. S.]

Act of March 3, 1871, ch. 111, 16 Stat. L. 475.

Sec. 902. [Same subject.] In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal. [R. S.]

This section was amended so as to read as above given by section 1 of the Act of Jan. 31, 1879, ch. 39, 20 Stat. L. 277, entitled "An Act to amend the Revised Statutes of the United States relating to the records and files of district and circuit courts of the United States lost or destroyed."

Originally this section was as follows:

"SEC. 902. In the proceedings to restore the records of the circuit and district courts of the northern district of Illinois, destroyed by fire on the ninth of October, eighteen hundred and seventy-one, under the three preceding sections, the notice required may be served upon any non-resident of said district anywhere within the jurisdiction of the United States, or in any foreign country, the proof of the service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal." Act of March 18, 1872, ch. 56, 17 Stat. L. 40.

Sec. 903. [Same subject.] A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to. [R. S.]

This section was amended so as to read as above given by section 2 of the Act of Jan. 31, 1879, ch. 39, 20 Stat. L. 277.

Originally this section was as follows:

"SEC. 903. A certified copy of the official return of the district attorney, clerk of the circuit or district court, or the marshal of the northern district of Illinois, made in pursuance of law, and on file in the Department of Justice, relating to any cause in either of said courts to which the United States was a party, the record of which was destroyed in said fire, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original return made to said court; and in any case in which the names of the parties, and the date and amount of the judgment or decree shall appear from such returns, it shall be lawful for the court in which they

are filed to issue the necessary process to enforce such decree of [decree or] judgment in the same manner as if the original record was before said court." Act of March 18, 1872, ch. 56, 17 Stat. L. 41.

Sec. 904. [Same subject.] That whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files to [sic] be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judge[s] shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund. [R. S.]

This section was amended so as to read as above given by section 3 of the Act of Jan. 31, 1879, ch. 39, 20 Stat. L. 277.

Originally this section was as follows:

"SEC. 904. It shall be the duty of the district attorney for the northern district of Illinois to take such steps as may be necessary to restore the records and files of the circuit and district courts of said district which were destroyed by fire on the ninth of October, eighteen hundred and seventy-one, and in which the United States is interested, so far as the judges of said courts, respectively, shall deem it essential to the interests of the United States that said records and files be restored; and the judges of said courts, respectively, are authorized to direct such steps to be taken as, in their opinion, shall be deemed advisable to restore the judgment dockets and indices of said courts, and for that purpose may direct the performance, by the clerks of said courts, and by the United States attorney for said district, of any duty incident thereto; and said clerks and said district attorney shall be allowed such compensation and disbursements for services rendered under this section (in cases where no compensation is now provided by law for such services) as may be allowed by the Attorney-General, and certified to be just and reasonable by the judge of the court in which said services are rendered, and the amount so allowed shall be paid out of the judiciary fund: *Provided, however,* That the sum allowed the clerks of said courts shall not exceed the sum of twelve thousand dollars, and the entire compensation of the United States attorney for such services shall not exceed the sum of six thousand dollars." Act of March 18, 1872, ch. 56, 17 Stat. L. 41.

Sec. 905. [Authentication of legislative acts and proof of judicial proceedings of States, etc.] The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court

within the United States as they have by law or usage in the courts of the State from which they are taken. [R. S.]

Act of May 26, 1790, ch. 11, 1 Stat. L. 122; Act of March 27, 1804, ch. 56, 2 Stat. L. 299.

Statutes of state or territory.—The rule is settled that where the unwritten law of a sister state is in question, resort may be had to the published reports of the decisions of the courts of such state, or to oral testimony of witnesses skilled in the subject; but where the written law of a sister state is to be proved, the methods provided for by this section must be followed. *Ridpath v. Heller*, (1913) 46 Mont. 586, 129 Pac. 1054; *Hewitt v. Indian Territory Bank*, (1902) 64 Nebr. 463, 90 N. W. 250, 92 N. W. 741.

This statute requires no other or further formality to authenticate an act of a state legislature than the seal of the state; the seal itself is supposed to import absolute verity, and it must always be presumed that it was affixed by a person having the custody of the seal and competent authority to do the act. *U. S. v. Amedy*, (1826) 11 Wheat. 392, 2 U. S. (L. ed.) 502.

An act of a state has been admitted in evidence when certified by the clerk of the executive council, and the seal of the state was annexed. *U. S. v. Johns*, (1806) 1 Wash. 303, 26 Fed. Cas. No. 15,481.

A printed pamphlet, without seal, purporting to be the law of a territory, is inadmissible. *Craig v. Brown*, (1816) Pet. C. C. 352, 6 Fed. Cas. No. 3,328.

The statute book of one of the states, purporting to be published by authority of its legislature, and deposited in the Department of State of the United States, under an Act of Congress requiring the Secretary of State to obtain copies of the laws of the several states, was held to be admissible evidence of the laws of such states, in the courts of the District of Columbia; and it was held not necessary that such statute book should be authenticated according to the provisions of this statute. *Commercial, etc., Bank v. Patterson*, (1822) 2 Cranch C. C. 346, 6 Fed. Cas. No. 3,056.

"Records and judicial proceedings"—*Unpublished opinion.*—An unpublished opinion of a state supreme court is a "record" and "judicial proceeding." *Whited v. Johnson*, (Tex. 1914) 167 S. W. 812, wherein the court said: "The opinion, not being published as an opinion of the court, could have been admitted only as a record and judicial proceeding of the Supreme Court of Louisiana, and as such should have been attested by the clerk of that court, with the seal of the court annexed, together with a certificate of the chief justice, that the attestation is in due form."

Record of deeds, etc.—Copies of the record of deeds and other similar private

writings made in a sister state are admissible in evidence in the courts of other states when properly certified and authenticated. But they will be given such force and effect only as is given thereto by the law of the state from which they are taken, and it must appear that the record was one which was authorized and provided for by the statutes of that state. *Wilcox v. Bergman*, (1906) 96 Minn. 219, 104 N. W. 955, 5 L. R. A. (N. S.) 938.

Foreign judgments.—This section applies only to the authentication of records of judicial proceedings had in the states and territories. It has no application to foreign judgments. *American Surety Co. v. Sandberg*, (W. D. Wash. 1915) 225 Fed. 151, wherein the court said: "It is conceded that there is no statute providing for the authentication of judicial proceedings in foreign countries. No treaty touching the question has been called to the court's attention. Justice Gray in *Hilton v. Guyot*, 159 U. S. 113, 228, 16 S. Ct. 139, 40 U. S. (L. ed.) 95, intimates that there is neither statute law nor treaty on the subject of foreign judgments."

Proceeding supplemental to execution.—The statute is not restricted to the case of judgments. Where the laws of a state provide for the examination of a debtor, in a proceeding supplemental to execution, such examination constitutes a judicial proceeding, and admissions of the debtor, properly authenticated, are evidence against him in a suit in another state. *In re Rooney*, (1871) 6 Nat. Bankr. Reg. 163, 20 Fed. Cas. No. 12,032.

The final settlement of an executor, before the appropriate state tribunal, containing an itemized statement of the accounts of the executor with the estate of his testator, giving debts and credits in full, and finding a balance in the hands of the executor, which he was ordered to distribute according to the will of the testator and the laws of the case, constitutes a judicial proceeding within the meaning of this statute. *Fitzsimmons v. Johnson*, (1891) 90 Tenn. 416, 17 S. W. 100.

A discharge under a state insolvent law is a judicial proceeding. *Channing v. Reiley*, (1835) 4 Cranch C. C. 528, 5 Fed. Cas. No. 2,596.

Recording foreign wills.—A state statute provides that "authenticated copies" of foreign wills shall be recorded, in order that they may have the same effect in passing title to lands in that state as is given to the recording of domestic wills. Such wills must be authenticated in the manner prescribed by this section as to

the authentication of records, and a certificate that the attestation of the clerk is in due form, made by the governor of the state, acting through his private secretary, and not by the judge, chief justice, or presiding judge of the court where the will was admitted to probate, is insufficient. *Harrison v. Weatherby*, (1899) 180 Ill. 418, 54 N. E. 237.

Transcript of minutes.—An exception that the court excluded docket entries duly certified cannot be maintained, as the writing produced did not purport to be a record, but a mere transcript of minutes extracted from the docket of the court. *Ferguson v. Harwood*, (1813) 7 Cranch 408, 3 U. S. (L. ed.) 386.

A judgment of a justice of the peace in Pennsylvania was admitted in evidence in an action of debt upon the judgment, where such judgment had been entered of record in the Court of Common Pleas of the county, and the record of the court was certified by the prothonotary and the presiding judge, according to this statute. *Hade v. Brotherton*, (1829) 3 Cranch C. C. 594, 11 Fed. Cas. No. 5,892.

Indictment.—The provisions of this section do not apply to an indictment by a grand jury, as such a body is not a court. *In re Dana*, (1895) 68 Fed. 886. See *Matter of Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8,162.

Records and proceedings of what courts—Courts of United States.—The statute does not apply to the courts of the United States, but is limited in terms to the records and judicial proceedings of the state courts. *Turnbull v. Payson*, (1877) 95 U. S. 418, 24 U. S. (L. ed.) 437; *Owings v. Hull*, (1835) 9 Pet. 607, 9 U. S. (L. ed.) 246; *U. S. v. Wood*, (1818) Brun. Col. Cas. 456, 28 Fed. Cas. No. 16,757; *In re Neale*, (1869) 3 Nat. Bankr. Reg. 177, 17 Fed. Cas. No. 10,066; *Mason v. Lawraeson*, (1804) 1 Cranch C. C. 190, 16 Fed. Cas. No. 9,242; *National Acc. Soc. v. Spiro*, (C. C. A. 1899) 94 Fed. 750, 37 C. C. A. 388; *Jordan v. McDonnell*, (1907) 151 Ala. 279, 44 So. 101; *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

But while the statute in terms applies only to the state courts, the record of the United States courts is admissible in evidence in the state courts if authenticated by the seal of the court, attestation of the clerk, and certificate of the judge. *Buford v. Hickman*, (1834) Hempst. 232, 4 Fed. Cas. No. 2,114a.

In *O'Hara v. Mobile, etc., R. Co.*, (C. C. A. 1896) 76 Fed. 718, 40 U. S. App. 471, 22 C. C. A. 512, the court said: "While that section does not, in terms, include the records and judicial proceedings of the courts of the United States, it has been the uniform practice from 1790 down to the present time to follow its requirements in authenticating the records and judicial proceedings of those courts, and such authentication has always been held sufficient."

"So far as this statutory provision relates to the effect to be given to the judicial proceedings of the states, it is founded on article 4, section 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution." *Embry v. Palmer*, (1892) 107 U. S. 3, 2 S. Ct. 25, 27 U. S. (L. ed.) 346.

In *Harmon v. Best*, (1910) 174 Ind. 323, 91 N. E. 19, it appeared that a federal Circuit Court appointed a receiver for a railroad, and thereafter entered an order in the receivership proceeding appointing a commissioner to hear garnishment suits against employees of the railroad, and providing how such claims could be adjudged. A railroad employee was garnished before the commissioner, and the receiver, pursuant to the order, reported the amount of the wages due, and the garnishment was satisfied. The employee then sued the receiver in the state court without leave of the federal court, and the order of the federal court, properly authenticated, was introduced in evidence. It was held that under this section the order was entitled to be given full faith and credit in the state court and could not be collaterally attacked, and should have been treated by the state court as conclusive against its jurisdiction.

Records of state courts offered in federal courts.—This statute does not apply to judicial records of state courts where offered in evidence in a federal court. *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

Authentication—Exclusiveness of statutory method.—This statute providing for the mode of authenticating records of state courts is not exclusive, and states can adopt any other method. *Gribble v. Pioneer Press Co.*, (1883) 15 Fed. 689; *Petty v. Hayden*, 115 Ia. 212, 88 N. W. 339; *Tomlin v. Woods*, (1904) 125 Ia. 367, 101 N. W. 135; *Willock v. Wilson*, (1901) 178 Mass. 68, 59 N. E. 757; *Wells v. Davis*, (1887) 105 N. Y. 670, 12 N. E. 42; *Hewitt v. Indian Ter. Bank*, (1902) 64 Nebr. 463, 90 N. W. 250, 92 N. W. 741; *Title Guarantee, etc., Co. v. Trenton Potteries Co.*, (1897) 56 N. J. Eq. 441, 38 Atl. 422; *Otto v. Trump*, (1887) 115 Pa. St. 425, 8 Atl. 786.

But a state cannot enact additional requirements, though it may provide less. *Sullivan v. Kenney*, 148 Ia. 361, 126 N. W. 349; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 A. S. R. 877.

By virtue of article 4, section 1, of the Constitution of the United States providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every

other state, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof," Congress has enacted this section, providing thereby a uniform method of proof and authentication, and therefore state legislatures cannot add more onerous burdens as to proof arising from other states, but they may by statute lessen such burdens. *In re Peterson*, (1912) 22 N. D. 480, 134 N. W. 751.

Authentication according to statute not required by United States courts.—Compliance with this statute as to the authentication of judicial records is not required as to the records of a state court where introduced in evidence in a federal court in the same state. *Mewster v. Spalding*, (1853) 6 McLean 24, 17 Fed. Cas. No. 9,513. See also *Channing v. Reiley*, (1835) 4 Cranch C. C. 528, 5 Fed. Cas. No. 2,596.

The national courts take judicial knowledge of the laws of every state in the Union, and do not require the certificate of the judge of a state court that the attestation of the clerk thereof is in due form of law, as they determine that matter by their knowledge of the laws of the state where it was made. *Bennett v. Bennett*, (1867) Deady 299, 3 Fed. Cas. No. 1,318.

Probate of will.—On proceedings to probate a will which had been admitted to probate in Illinois, where the copy of the will and of the record showing the admission to probate were not authenticated by the attestation of the officer having charge of the record, nor certified by him to have been compared with the original, and to be a true copy thereof, as required by this section, it was held that the County Court of another state had no jurisdiction to admit the will to probate. *In re Box*, (1906) 127 Wis. 264, 106 N. W. 1063.

Commission to take testimony.—An instrument purporting to be a commission to take testimony, issued by a court of one state, is not entitled to recognition in a court of another state, unless certified in accordance with the above section. *New York Press Co. v. Salter*, (1911) 129 La. 51, 55 So. 706.

Sufficiency of authentication as question of law.—In an action of debt on a judgment, on a plea of *nul tiel record*, it is the province of the court, and not that of the jury, to decide when the proof of the record is sufficient. *Wittemore v. Malcomson*, (1886) 28 Fed. 605.

Sufficiency of authentication.—See *Seymour v. Du Bois*, (1906) 145 Fed. 1003; *Nadel v. Campbell*, (1910) 18 Idaho 335, 110 Pac. 262; *Brown v. Baxter*, (1908) 77 Kan. 97, 94 Pac. 155, 574; *Halfhill v. Malick*, (1911) 145 Wis. 200, 129 N. W. 1086.

Attestation by clerk.—*Generally.*—This section expressly provides for attestation by the clerk, and in *Henry Inv. Co. v.*

Semonian, (1909) 45 Colo. 260, 100 Pac. 425, it was held that a transcript of the proceedings of a court of another state, to which was appended a certificate of the judge alone that the foregoing was a complete transcript of the proceedings of the County Court in a certain county, and in a case specified, was not admissible in evidence.

The clerk's certificate need not show that such clerk had charge of the records of the court, in order to authorize him to certify thereto; this section does not require that this be certified to or shown, and this fact will be presumed. *Ritchie v. Carpenter*, (1891) 2 Wash. 512, 28 Pac. 380, 26 A. S. R. 877.

The court is precluded from receiving any other evidence than the record itself to show that the attestation was not in due form of law, and when the certificate of the clerk states that "the foregoing is truly taken from the record of proceedings" in that court it will be presumed to be a full copy of the record of all the proceedings in the case. *Ferguson v. Harwood*, (1813) 7 Cranch 408, 3 U. S. (L. ed.) 386.

By deputy.—An attestation by a deputy clerk is not within the terms of the statute. *Willock v. Wilson*, (1901) 178 Mass. 68, 59 N. E. 757; *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

In the case of a copy of the record of a court this section is satisfied where, although some parts of the record were attested by deputies of the clerk, there is a final authentication of the whole record under the hand of the clerk himself. *Holyoke v. Holyoke*, (1913) 110 Me. 469, 87 Atl. 40.

The phrase "in due form" as employed in this section, means in the form prescribed by the law or practice of the state from which the record comes. *Adams v. Stenehjelm*, (1915) 50 Mont. 232, 146 Pac. 469.

The seal should be annexed to the record, of which the certificate of the judge is no part, and when the seal appears, not on the record with the attestation of the clerk, but with the certificate of the judge, it will not be admitted. *Turner v. Waddington*, (1811) 3 Wash. 126, 24 Fed. Cas. No. 14,263. See *Talcott v. Delaware Ins. Co.*, (1810) 2 Wash. 449, 23 Fed. Cas. No. 13,734.

It is only necessary that the seal be attached to the certificate of the clerk; it does not matter that the seal was not attached to the record. *Ritchie v. Carpenter*, (1891) 2 Wash. 512, 28 Pac. 380, 26 A. S. R. 877.

Certificate of judge or magistrate.—A copy of a judgment of a state court certified by the clerk alone, without the certificate of a judge, chief justice, or presiding magistrate that the attestation was in due form of law, cannot be admitted in evidence. *Northwestern Mut.*

L. Ins. Co. v. Stevens, (C. C. A. 1895) 71 Fed. 258, 36 U. S. App. 401, 18 C. C. A. 107; *Bohlender v. Heiker*, (C. C. A. 5th Cir. 1909) 168 Fed. 886, 94 C. C. A. 298; *Smith v. Brockett*, (1897) 69 Conn. 492, 38 Atl. 57; *Gardner v. Linde*, (1802) 1 Cranch C. C. 78, 9 Fed. Cas. No. 5,231; *Hagan v. Snider*, (1906) 44 Tex. Civ. App. 139, 98 S. W. 213; *Wolf v. King*, (1908) 49 Tex. Civ. App. 41, 107 S. W. 617; *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

The certificate must show that the person signing it as a judge was, at the time of so signing, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record. *U. S. v. Biebusch*, 1 Fed. 213.

It is not necessary that the official character of the certifying judge or magistrate shall be certified by the governor under the great seal of the state, nor that the clerk of the court shall certify under his hand and seal of office that the certifying judge or magistrate is duly commissioned and qualified. *Kinsley v. Rumbough*, (1887) 96 N. C. 193, 2 S. E. 174; *Dusenberry v. Abbott*, (1901) 1 Nebr. (unofficial) Rep. 101, 95 N. W. 466. See also *Taylor v. Carpenter*, (1846) 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785.

The record of the Supreme Court of a state, attested by the clerk, with the seal annexed, in which the judge states himself to be "one of the judges of the Supreme Court of Tennessee," is not duly authenticated. This does not import that he was the sole judge, chief justice, or presiding judge of that court. *Stewart v. Gray*, (1830) Hempst. 94, 23 Fed. Cas. No. 13,428a.

A certificate signed by the judge as both judge and clerk, and sealed with the seal of the court, is sufficient. When the judge is also *ex officio* clerk, he must certify in each capacity, but it is a matter of form rather than of substance whether the certification be made by two separate certificates, or comprised in one. *Keith v. Stiles*, (1896) 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

When the judge in his certificate states that the person named is the clerk of the court "whereof I am the judge," it is a fair inference from the use of the term "the judge," that he is the sole judge of the court, and the proper person to sign the attestation. *Willock v. Wilson*, (1901) 178 Mass. 68, 59 N. E. 757.

The national courts will take judicial notice that the judge who signed the certificate is the sole judge of the district in which the proceedings are of record. *Bennett v. Bennett*, (1867) Deady 299, 3 Fed. Cas. No. 1,318.

It is a fatal defect when the presiding magistrate omits the statement in his certificate that the attestation of the clerk is in due form. A court cannot officially know the forms of another state. *Trigg*

v. Conway, (1847) Hempst. 538, 24 Fed. Cas. No. 14,172. See also *Craig v. Brown*, (1816) Pet. C. C. 352, 6 Fed. Cas. No. 3,328; *Catlin v. Underhill*, (1847) 4 McLean 199, 5 Fed. Cas. No. 2,523.

The reason for the rule requiring the certificate of the judge as to the due form of the clerk's certificate is that the court in which the document is offered in evidence is not presumed to know or take judicial notice of the laws in force or what is "due form" in another state or foreign jurisdiction. *Ganow v. Ashton*, (1913) 32 S. D. 458, 143 N. W. 383.

In *Adams v. Stenehjem*, (1915) 50 Mont. 232, 147 Pac. 469, the court, holding that the copy of a judgment roll of a North Dakota court, not properly certified by a judge of that court, was inadmissible in evidence, said: "To entitle the copy of the judgment roll to be admitted in evidence, it must have been duly attested by the clerk of the North Dakota court. Whether the attestation was in due form prescribed by the law or practice in North Dakota could not be determined by the trial court from an inspection of the attestation certificate; for the courts of this state do not take judicial notice of the statute laws or practice of a sister state. Because of this fact the trial court was required to look to other evidence, and the evidence which the federal statute and our own code have provided is the certificate of the judge of the sister state. It is for that judge, charged with knowledge of the laws of his state, to determine whether the attestation of the clerk is in due form and to evidence his conclusion by his certificate, and it is to his certificate alone that the Montana court must look to ascertain whether what purports to be a certificate by the clerk is such under the laws of the state where made. *Craig v. Brown*, [Pet. C. C. 352] 6 Fed. Cas. No. 3,328. Under the federal statute and our code provision above, the district court of the sister state is required to make known the fact that the copy is properly attested, by his certificate 'that the said attestation is in due form.' In the absence of such certificate as the federal statute and our code prescribe, the copy is not entitled to be admitted. This rule is recognized universally. But it is insisted that, while the certificate of the judge of the North Dakota court is not in the form prescribed by statute, in substance it is the same. If we understand the language employed in the certificate, it does not mean anything more than that the laws of North Dakota authorize the clerk of a district court of that state to certify copies of judicial records in his charge. It would impeach the intelligence of the judge who made the certificate to say that he intended it to conform to the

requirements of the federal statute. The language of that statute is so plain that any one who attempts to comply with it cannot possibly fail in the attempt. The addition of the words 'and full faith and credit are due to all his official acts as such' do not aid the certificate. In the connection in which they are employed they are meaningless. Our courts are not required to give full faith and credit to the act of the North Dakota clerk in attesting a public record. If the record is attested by the clerk with the seal annexed, and the attestation is certified to be in due form by the judge, then full faith and credit is due the record—in this instance the judgment roll—but not the act of the clerk in attesting it. Furthermore, whether a record is or is not entitled to full faith and credit is a question to be determined by the Montana court, and not by the judge of the court from which the record comes."

Full faith and credit—Generally.—The effect of the provision regarding full faith and credit is that in the courts of other states the judgment of a court of one state is not impeachable except for fraud or want of jurisdiction; is indisputable proof that it rests upon an unanswerable cause of action; is conclusive evidence that the right to its enforcement is wholly unaffected by a laches or lapse of time which preceded its rendition; and gives a right of action for its enforcement subject to limitation and other laws of the forum which regulate, but do not deny, unreasonably restrict, or oppressively burden the exercise of the right. *Lamb v. Powder River Live Stock Co.*, (1904) 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558.

The full faith and credit clause was enacted to carry into effect the constitutional provision on the subject. *Roller v. Murray*, (1914) 234 U. S. 738, 34 S. Ct. 902, 58 U. S. (L. ed.) 1570. And under Const. U. S. art. 4, § 1, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the section which is declaratory thereof and providing for the authentication of judicial proceedings of the state courts, a judgment, conclusive between the parties in the state in which rendered, is equally conclusive in every other state, though the court has no power to issue execution thereon. *Damon v. Webber*, (1914) 111 Me. 473, 89 Atl. 734.

In *Mutual Life Ins. Co. v. McGrew*, (1903) 188 U. S. 291, 23 S. Ct. 375, 47 U. S. (L. ed.) 480, 63 L. R. A. 33, it was held that a decision of a state court cannot be reviewed in the Supreme Court of the United States on the ground that by it full faith and credit were denied to a Hawaiian judgment, in violation of U. S. Const., art. 4, § 1, as carried out by R. S. sec. 905, where the judgment

of the trial court was rendered prior to the Act of April 30, 1900, providing a government for Hawaii (see HAWAIIAN ISLANDS), and such contention was not brought to the attention of the highest state court in any form.

In *Anglo-American Provision Co. v. Davis Provision Co.*, (1903) 191 U. S. 373, 24 S. Ct. 82, 48 U. S. (L. ed.) 225, it was held that full faith and credit was not denied an Illinois judgment by N. Y. Code Civ. Pro., § 1780, which, as construed by the New York courts, precludes the maintenance of an action on such judgment by one foreign corporation against another, because it is not upon a cause of action which arose within the state.

A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood nor be helped out by any doctrine of the common law is not denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. *Northern Assur. Co. of London v. Grand View Bldg. Assn.*, (1906) 203 U. S. 106, 27 S. Ct. 27, 51 U. S. (L. ed.) 109.

In *Fauntleroy v. Lum*, (1908) 210 U. S. 230, 28 S. Ct. 641, 52 U. S. (L. ed.) 1039, it was held that the Mississippi courts cannot deny to a judgment of a Missouri court, based upon an award in arbitration proceedings in Mississippi, the full faith and credit secured by U. S. Const., art. 4, § 1, to the judgments of sister states, because the original controversy grew out of a gambling transaction in futures in Mississippi, which is made a misdemeanor by Miss. Annot. Code 1892, §§ 1120, 1121, 2117, which further provide that contracts of that character shall not be enforced by any court.

In order that a judgment or decree shall be conclusive in an action brought thereon in another state, it must not only be conclusive in the jurisdiction where rendered, but also final in character, and establish a fixed and certain liability, and therefore a decree for alimony and costs will support an action in another state in so far as it is for a sum due at the time of its rendition, and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time in the discretion of the court. *Israel v. Israel*, (C. C. A. 1906) 148 Fed. 576, 79 C. C. A. 32, 8 Ann. Cas. 697, 9 L. R. A. (N. S.) 1168.

In *Tilt v. Kelsey*, (1907) 207 U. S. 43, 28 S. Ct. 1, 52 U. S. (L. ed.) 95, it was held that the full faith and credit due the probate proceedings of the New Jersey courts do not require that the courts of

New York shall be bound by the adjudication of the New Jersey courts on the question of domicile.

In *Andrews v. Andrews*, (1903) 188 U. S. 14, 23 S. Ct. 237, 47 U. S. (L. ed.) 366, it was held that the full faith and credit clause of the Federal Constitution is not violated by the refusal of the Massachusetts courts, acting in accordance with Mass. Pub. Stat., ch. 146, § 41, to give effect to a decree of divorce rendered by a court of another state in a suit instituted by one who temporarily left the state of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in that state.

In *Carpenter v. Beal*, (E. D. Ark. 1915) 222 Fed. 453, the court held that the judgment of a state court, obtained in a proceeding *in rem* by default on substituted service, could not be collaterally attacked in a court of another state upon the ground that the consideration of the judgment was a wagering transaction and that such judgment under the laws of the latter state was absolutely void.

A state court in an action on a judgment rendered in another state is required to give it such faith and credit as it has by law or usage in the state of its origin. The highest evidence of what faith and credit a judgment has in the state of its origin is the decisions of the court of last resort of that state. *Free v. Western Union Tel. Co.*, (1914) 158 Wis. 36, 147 N. W. 1040. But a judgment against a garnishee in a court that did not acquire jurisdiction of the person of the principal defendant, which does not recite that the garnishee disclosed any defensive matter or any fact other than an admission of his indebtedness to the principal defendant, is not, as against such principal defendant and in favor of such garnishee, an adjudication of any issue as to whether the garnishee discharged his duty to the principal defendant in such garnishment proceedings in respect to notice and defenses. Such judgment would not be accorded faith or credit as such adjudication in the state in which it is rendered, nor in any other state, and a refusal of a court of a state other than the one in which it was rendered to give the judgment effect as an adjudication of the issue between the garnishee and the principal defendant is not a denial of the same the full faith and credit to which it is entitled under section 1, art. 4 of the Federal Constitution and R. S. sec. 905. *St. Louis, etc., R. Co. v. Crews*, (Okla. 1915) 151 Pac. 879.

A judgment of one state when sued upon in another is not merely prima facie evidence of an indebtedness but is conclusive. *Bonfils v. Gillespie*, (1914) 25 Colo. App. 496, 139 Pac. 1054, wherein

the court said: "Counsel insist that the Nevada judgment is only prima facie evidence of the debt, and that nul tiel record is an inappropriate plea to suits upon foreign judgments, inasmuch as they do not create a merger, and are only prima facie evidence of an indebtedness, and that either debt or assumpsit may be maintained upon them or upon the original indebtedness, and the general issue in such cases is nil debet or non assumpsit, as the case may be, and puts in issue both the validity of the judgment and of the debt; and counsel cites many authorities in support of this proposition. These authorities are not pertinent to the question here involved, as, since the adoption of article 4, section 1, of the Federal Constitution, and an Act of Congress in pursuance thereof, approved May 26, 1790, 1 Stat. 122, ch. 11 (R. S. sec. 905) there has been a well-marked distinction recognized between foreign judgments and judgments of sister states. Said section of the Federal Constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. The Act of Congress, *supra*, provides that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that said attestation is in due form. And the said record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken. After the adoption of said constitutional provision and approval of said Act of Congress, there was great chaos and diversity of opinion among the courts of the different states as to the intention of the constitutional convention and Congress in their several utterances as to the effect of judgments of sister state courts when sued upon in courts of other states or of the United States. In 1813 those provisions were construed by the Supreme Court of the United States, and that court held that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments; the court saying: 'We can perceive no rational interpretation of the Act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision.' *Mills v. Dur-* yee, 7 Cranch 481, 3 U. S. (L. ed.) 411;

2 Black, *supra*, § 856. In the Mills-Duryee Case, *supra*, Justice Story, speaking for the court, also said: 'Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments.' And held that: 'If it be a record, conclusive between the parties, it cannot be denied but by the plea of nul tiel record.' This holding by the court, however, has been confined to the general issue and was never intended to exclude such plea as a denial of the jurisdiction. The Mills-Duryee Case is a leading authority for the proposition that a judgment of a sister state is conclusive on the merits; that, for purposes of pleading and evidence, it is entitled to the full dignity of a record; and that the defendant is not at liberty, when sued on the judgment, to deny the indebtedness, which it ascertains and establishes, or to impeach its justice or deny its obligation."

A judgment entered upon a warrant of attorney to confess judgment, contained in the instrument evidencing the obligation, without personal service on the obligor, is a judgment entitled to full faith and credit. *Miller v. Miller*, (Wash. 1916) 156 Pac. 8.

United States courts.—"The Act of Congress goes, perhaps, further than the constitutional requirement, which relates to the faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, inasmuch as it declares the effect of the records and judicial proceedings of the states when authenticated, as provided 'in every court within the United States,' thus making its provisions applicable to the national courts, as well as to the courts of the states." *Galpin v. Page*, (1874) 3 Sawy. 93, 9 Fed. Cas. No. 5,206.

The statutory provision extends to every court "within the United States," and therefore to courts of the United States, and such courts are therefore bound to give to judgments of state courts the same faith and credit which the courts of another state are bound to accord to them. *Union, etc., Bank v. Memphis*, (C. C. A. 1901) 111 Fed. 561, 49 C. C. A. 455; *Foster Milburn Co. v. Chinn*, (C. C. A. 2d Cir. 1913) 202 Fed. 175, 122 C. C. A. 577.

Rule of evidence.—This section providing that the record of a judgment after due notice in one state shall be conclusive evidence in the courts of another state or of the United States of a matter adjudged, etc., prescribes a rule of evidence rather than a ground of jurisdic-

tion. *Israel v. Israel*, (1904) 130 Fed. 237; *Clifford v. Williams*, (1904) 131 Fed. 100; *Beauchamp v. Bertig*, (1909) 90 Ark. 351, 119 S. W. 75, 28 L. R. A. (N. S.) 659; *De Vall v. De Vall*, (1910) 37 Ore. 128, 109 Pac. 755, 110 Pac. 705.

Jurisdictional matters.—Notwithstanding this statute the judgment of a foreign court when sued upon in the courts of another state is open to impeachment for want of jurisdiction of the foreign court. The recital or assertion of jurisdiction, in the record of the judgment, is in this respect immaterial. *Marshall v. Owen*, (1912) 171 Mich. 232, 137 N. W. 204.

Not applicable to courts of limited jurisdiction.—See *Strecker v. Railson*, (1907) 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

Orders in supplementary proceedings.—In *Orient Ins. Co. v. Rudolph*, (1905) 69 N. J. Eq. 570, 61 Atl. 28, it was held that as supplementary proceedings in the state of New York are not considered special proceedings before a court or officer of limited jurisdiction, but as a new remedy in an action in which the court has general jurisdiction, the production and proof in a New Jersey court of an order by a court of New York appointing a receiver in supplementary proceedings there, and reciting the facts necessary to give the court jurisdiction, furnishes conclusive evidence of the regularity and validity of the order, and prima facie evidence of the jurisdictional facts.

Limitations.—Under this section it was held that the question whether a judgment dismissing an action on a note in New York on the ground that it was barred by limitations of that state was a determination on the merits of the case, and therefore barred another action on the note in Kentucky, depended on the effect which would be given to such judgment by the courts of New York, and that where under the decisions of New York a judgment based solely on the statute of limitations is held to affect the remedy only, and not the cause of action, such judgment was no bar to the plaintiff's action in Kentucky, where a different statute of limitation prevailed. *Brand v. Brand*, (1903) 116 Ky. 785, 76 S. W. 868, 63 L. R. A. 206.

Completeness of transcript.—In *Montgomery v. Consolidated Boat Store Co.*, (1903) 115 Ky. 156, 72 S. W. 816, 103 A. S. R. 302, it was held that a transcript of the judgment of a sister state on which execution had been issued and certified, as required by this section and R. S. sec. 909, given under FINES, PENALTIES AND FORFEITURES, so as to entitle the judgment to full faith and credit, would be deemed to contain a complete copy of the judgment, though it differed in form from the form of judgment used in Kentucky.

Conclusiveness as to jurisdiction.—Neither the full faith and credit clause of

the Federal Constitution (Const., art. 4, § 1) nor this section passed in conformity therewith prevents an inquiry into the jurisdiction of the court of a sister state by which a judgment rendered therein is offered in evidence, and a copy of the record, though duly authenticated, may be contradicted as to the facts necessary to give jurisdiction, or where it appears in a collateral proceeding in another state that such facts did not exist, the record is a nullity, though it may contain recitals that the facts did exist. *De Vall v. De Vall*, (1910) 57 Ore. 128, 109 Pac. 755, 110 Pac. 706.

Decisions of state courts founded on local laws.—A decision of a state court founded upon a law local or peculiar to that state, is entitled, by virtue of section 1 of article 4 of the Constitution of the

United States and this section, to full faith and credit in the courts of another state, in which such local or peculiar law is not recognized. *Roller v. Murray*, (1912) 71 W. Va. 161, 76 S. E. 172, Ann. Cas. 1914B 1139, L. R. A. 1915F 984.

Courts of the District of Columbia.—The judgments of the courts of the United States are upon the same footing, so far as concerns the obligations created by them, with domestic judgments of the states, wherever rendered and wherever sought to be enforced; and that the Supreme Court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress. *Embry v. Palmer*, (1882) 107 U. S. 3, 2 S. Ct. 25, 27 U. S. (L. ed.) 346.

Sec. 906. [Proofs of records, etc., kept in offices not pertaining to courts.] All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken. [R. S.]

Act of March 27, 1804, ch. 56, 2 Stat. L. 298, 299; Act of Feb. 21, 1871, ch. 62, 16 Stat. L. 419.

Validity.—Congress had the power to enact this section, under which territorial legislation must be given, by every court within the United States, the same faith and credit which it has by law or usage in the court of the territory enacting it. *Atchison, etc., R. Co. v. Sowers*, (1909) 213 U. S. 55, 29 S. Ct. 397, 53 U. S. (L. ed.) 695.

Scope.—The statute does not exclude every other mode of authentication, nor abrogate any principle of evidence previously established. "It is the settled rule that when the copy of an instrument is certified to by the officer whose duty

it is by law to keep the original on file in his office, it must be received as evidence of the original." *Logansport Gas Light, etc., Co. v. Knowles*, (1871) 4 Ch. Leg. N. 75, 15 Fed. Cas. No. 8,466.

Enforcement of transitory action in another state.—This section, which was enacted to carry into effect article 4, § 1, of the Federal Constitution, requires the courts of the several states to enforce any transitory cause of action created by a statute of a sister state, not opposed to the settled policy of the state wherein the cause of action is sought to be enforced. But neither the Constitution of

the United States nor any Act of Congress passed in pursuance thereof authorizes the legislature of one state to deny to one having a transitory cause of action originating in that state under one of its statutes the right to appeal to the courts of another state for the enforcement of his cause of action. *Tennessee Coal, etc., Co. v. George*, (1912) 11 Ga. App. 221, 75 S. E. 567.

Evidentiary value of copy.—In the absence of a state statute defining the evidentiary value or effect of a copy of a record from another state, this section is binding upon the courts of the state, at least to the extent of defining the evidentiary value of such a copy. *Milwaukee Gold Extraction Co. v. Gordon*, (1908) 37 Mont. 209, 95 Pac. 995.

A copy of a marriage record not authenticated in accordance with this section is inadmissible in evidence. *McNeill v. State*, (1915) 117 Ark. 8, 173 S. W. 826, 1200.

Copies of deeds not authenticated as this section requires will not be received in evidence. *Newsom v. Langford*, (Tex. 1915) 174 S. W. 1036.

Sufficiency of authentication.—See *Milwaukee Gold Extraction Co. v. Gordon*, (1908) 37 Mont. 209, 95 Pac. 995.

Proof of incorporation.—In *Milwaukee Gold Extraction Co. v. Gordon*, (1908) 37 Mont. 209, 95 Pac. 995, it was held that as there is no common-law rule for granting charters to corporations, which are the creatures of law, and authorized by private statutes or general laws, and as courts of Montana do not take judicial notice of the statutory law of Arizona, a certified copy of the record of incorporation of a company in Arizona is not evidence in a Montana court of its lawful incorporation in Arizona, in the absence of proof that the laws of Arizona authorized its incorporation.

A recorded mortgage is such a record as is within the meaning of this statute, and an exemplification of the record may be admitted in evidence when, by the law of the state in which the mortgage is of record, the record as between the parties is made evidence of the existence, execution, the conveyance of the lands therein described, the indebtedness thereby created, and the covenants and agreements therein contained. *Chase v. Caryl*, (1895) 57 N. J. L. 545, 31 Atl. 1024.

It is not competent to prove by the

testimony of the register of deeds of another state that an instrument read in evidence was a chattel mortgage, duly filed and recorded in his office; proof of such instrument should be made in the manner required by this section. *Jones v. Melindy*, (1896) 62 Ark. 203, 36 S. W. 22.

Faith and credit.—"Shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state," does not impart to an authenticated state record anything more than "faith and credit," and does not extend the effect of a decision against a state to the United States, nor make an award or judgment which might be final against a state "either obligatory in law, or conclusive as evidence, against the United States." *Williams v. U. S.*, (1890) 137 U. S. 113, 11 S. Ct. 43, 34 U. S. (L. ed.) 590.

In *Atchison, etc., R. Co. v. Sowers*, (1909) 213 U. S. 55, 29 S. Ct. 397, 53 U. S. (L. ed.) 695, it was held that the full faith and credit demanded by this section is given by the Texas courts to the New Mexico Act of March 11, 1903, providing that an action for personal injuries received in that territory will not lie unless certain requirements as to the making of an affidavit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restrictions, although the statute also undertakes to make the suit maintainable only in the District Court of the territory.

But in *El Paso, etc., R. Co. v. Gutierrez*, (1909) 215 U. S. 87, 30 S. Ct. 21, 54 U. S. (L. ed.) 106, it was held that the full faith and credit demanded by this section is not given to the New Mexico Act mentioned in the preceding paragraph, where a recovery is permitted in a state court on such a cause of action, with no showing of a compliance with the preliminaries of notice and demand prescribed by the territorial statute.

The faith and credit due an authenticated copy of a record of another state depends on the laws and usages of that state, and this requires proof of its laws and usages, as judicial notice will not be taken of them. *Newsom v. Langford*, (Tex. 1915) 174 S. W. 1036, following *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121.

Sec. 907. [Copies of foreign records, etc., relating to land-titles in the United States.] It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the Departments, the Solicitor of the Treasury, or the Commissioner of the General Land-Office, to authenticate copies

thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals. [R. S.]

Act of Feb. 22, 1849, ch. 61, 9 Stat. L. 346; Act of March 2, 1849, ch. 82, 9 Stat. L. 350.

R. S. sec. 908, relating to Little & Brown's edition of statutes as evidence, is given under the title **STATUTES**.

R. S. sec. 909, relating to the burden of proof in seizure cases, is given under the title **FINES, PENALTIES AND FORFEITURES, post**.

R. S. sec. 910, relating to possessory actions for the recovery of mining titles, is given under the title **MINERAL LANDS, MINES, AND MINING**.

Sec. 2469. [Copies of records, etc., to be certified.] The Commissioner of the General Land-Office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office, as may be applied for, to be used in evidence in courts of justice. [R. S.]

Act of July 4, 1836, ch. 352, 5 Stat. L. 111.

See R. S. sec. 891, *supra*, p. 205, relative to copies of records, etc., of General Land Office.

Exclusiveness of method.—This section and the following section do not prescribe an exclusive method of proving the public documents therein mentioned. *Harmoning v. Howland*, (1913) 25 N. D. 38, 141 N. W. 131.

Duplicate tract book—original destroyed.—Where the records of a land office were destroyed by fire, a tract book, purporting to show what portions of the land of the various townships named therein is public land, prepared under the direction of the commissioner of the General Land Office as a substitute for the

original tract book destroyed, may be used in evidence, though it is not certified by the commissioner of the General Land Office to be a correct copy of any record or paper on file in his office. "Its character as such was sufficiently established by proof that it was in use as a tract book in the local land office, that it was made under the direction of the commissioner of the General Land Office, and had been transmitted by him to the register and receiver for their official use." *Jesse D. Carr Land, etc., Co. v. U. S.*, (C. C. A. 1902) 118 Fed. 821, 55 C. C. A. 433.

Sec. 2470. [Exemplifications valid without names of officers signing and countersigning.] Literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record. [R. S.]

Act of March 3, 1843, ch. 95, 5 Stat. L. 627.

Sec. 4071. [Taking testimony to be used in foreign countries.] The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in

which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided*, That when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letters rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons. [R. S.]

Act of March 3, 1863, ch. 95, 12 Stat. L. 769; Act of March 3, 1873, ch. 245, 17 Stat. L. 581.

See R. S. sec. 875, *supra*, p. 196, relative to letters rogatory from United States courts

Only where foreign government is party or has interest.—"It would seem that, by Act of Congress, the power of the federal courts in this respect has been restricted to cases in which a foreign government is a party or has an interest." *Matter of Pacific R. Commission*, (1887) 32 Fed. 257.

Criminal prosecution.—A petition of the Spanish consul at the port of New York represented that he had received from the judge of the southern district of Santiago, in the island of Cuba, a commission, empowering him to take testimony of certain witnesses named therein, to be used in a criminal prosecution for swindling, a translation of which commission he produced, and prayed that a summons might be issued requiring the witnesses to attend and testify. The petition was denied, as this Act is confined to the taking of testimony to be used in a suit for the recovery of money or property depending in a court of a country with

which the United States are at peace, and in which the government of such a foreign country is a party or has an interest. *Matter of Spanish Consul*, (1867) 1 Ben. 225, 22 Fed. Cas. No. 13,202.

Investigation as to smuggling.—This section provides that the testimony of any witness residing in the United States may be obtained by commission or letters rogatory, to be used in a suit (a) for the recovery of money or property; (b) depending in any court in a foreign country, with which the United States are at peace; (c) where the government of that country is a party to such suit, or interested therein. It does not permit the taking of testimony for the court of Vera Cruz "for the purpose of clearing up the details of" a certain importation, where it does not appear that the "proceedings relating to the investigation as to the smuggling" amount to "a suit for the recovery of money or property." *In re Letters Rogatory*, (1888) 36 Fed. 306.

Sec. 4072. [Witness need not criminate himself.] No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign state. [R. S.]

Act of March 3, 1873, ch. 245, 17 Stat. L. 581.

Sec. 4073. [Punishment of witness for contempt.] If any person shall refuse or neglect to appear at the time and place mentioned in the summons

issued, in accordance with section forty hundred and seventy-one, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States. [R. S.]

Act of March 3, 1863, ch. 95, 12 Stat. L. 769.

Sec. 4074. [Fees and mileage of witnesses.] Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States. [R. S.]

Act of March 3, 1863, ch. 95, 12 Stat. L. 769.

SEC. 5. [Books, invoices, and papers required in civil suits under revenue-laws.] That in all suits and proceedings other than criminal arising under any of the revenue-laws of the United States, the attorney representing the Government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid. [18 Stat. L. 187.]

This and the following section 8 are from the Act of June 22, 1874, ch. 391. See for the other sections of this Act, CUSTOMS DUTIES, vol. 2, p. 1176.

See R. S. sec. 860, noted *supra*, p. 166.

Constitutionality.—In actions for penalties or forfeitures of goods, this section is unconstitutional, as being opposed to articles 4 and 5 of the constitutional amendments. *Boyd v. U. S.*, (1886) 116 U. S. 616, 6 S. Ct. 524, 29 U. S. (L. ed.) 746. See also *U. S. v. Hughes*, (1875) 8 Ben. 29, 26 Fed. Cas. No. 15,416, hold-

ing that this section, so far as it applies to a suit pending at the time of the passing of the Act, is unconstitutional and void, as being *ex post facto*, and therefore, in a suit by the government before the passage of the Act for forfeiture of goods on account of alleged fraudulent importations, an order calling upon the claimants

to produce a certain invoice proposed to be admitted as evidence was declared void.

This Act is not limited to cases arising under the customs revenue laws, but ap-

plies also to proceedings under the internal revenue laws. U. S. v. Distillery No. Twenty-Eight, (1875) 6 Biss. 483, 25 Fed. Cas. No. 14,966.

SEC. 8. [Officers and persons claiming compensation and defendants may be witnesses.] That no officer, or other person entitled to or claiming compensation under any provision of this act, shall be thereby disqualified from becoming a witness in any action, suit, or proceeding for the recovery, mitigation, or remission thereof, but shall be subject to examination and cross-examination in like manner with other witnesses, without being thereby deprived of any right, title, share, or interest in any fine, penalty, or forfeiture to which such examination may relate; and in every such case the defendant or defendants may appear and testify and be examined and cross-examined in like manner. [18 Stat. L. 188.]

See the note to the preceding section 5 of this Act.

SEC. 9. [Transcribed records in former district of California.] That either of the clerks of the circuit and district courts for the said northern district of California, is hereby authorized, at the request of the district judge of said southern district, and at the cost of the parties requiring the same, to make transcripts of any of the records, files, or papers of the district and circuit courts of the United States remaining in the office of the clerks of the present district of California, and of all matters and proceedings which relate to or concern liens upon or titles to real estate situated in said southern district; and such transcripts, when so made by either of said clerks, shall be certified to be true and correct by the clerk making the same, and the same, when so made and certified, and filed in the proper court, shall constitute the record in such court, and shall be evidence in all courts and places equally with said originals. [18 Stat. L. 310.]

This is from an Act of Aug. 5, 1886, ch. 928. The remaining sections of this Act detached certain counties from the district of California and formed of them the southern district of California, the remainder of the state to form the northern district of California, to which reference is made in the text. The remaining sections were superseded by the Judicial Code of March 3, 1911, ch. 5, § 72, 36 Stat. L. 1107. See JUDICIARY.

An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States.

[Act of March 9, 1892, ch. 14, 27 Stat. L. 7.]

[Depositions for United States courts may follow State usage.] That in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held. [27 Stat. L. 7.]

See R. S. sec. 866, *supra*, p. 189.

Relates to manner of taking only.—This Act merely relates to the manner of taking depositions, and neither enlarges nor restricts the ground for taking them prescribed by R. S. secs. 863, 866, set out *supra*, pp. 172, 189. *Zych v. American Car, etc., Co.*, (1904) 127 Fed. 724; *Magone v. Colorado Smelting, etc., Co.*, (1905) 135 Fed. 846; *Smith v. International Mercantile Co.*, 154 Fed. 786.

This Act was intended only to simplify the practice of taking depositions by providing that the mode of taking in instances authorized by the federal laws might conform to the mode prescribed by the laws of the state in which the federal courts are held, and not to authorize the taking of depositions in instances not before authorized by the federal statutes, and not to confer additional rights to obtain proof by interrogatories addressed to the adverse party in action at law. *National Cash-Register Co. v. Leland*, (C. C. A. 1899) 94 Fed. 502, 37 C. C. A. 372. See also *Seeley v. Kansas City Star Co.*, (1896) 71 Fed. 554; *U. S. v. Fifty Boxes, etc., Lace*, (1899) 92 Fed. 601; *Shellabarger v. Oliver*, (1894) 64 Fed. 306.

In *Despeaux v. Pennsylvania R. Co.*, (1897) 81 Fed. 897, the court refused to grant a motion to take the testimony of a witness by deposition in advance of the trial in accordance with a practice prescribed by a rule of the state court.

But in *International Tooth-Crown Co. v. Hanks' Dental Assoc.*, (1900) 101 Fed. 306, (1901) 112 Fed. 396, it was held that an examination of defendant before trial may be had, where the code of the state provides such mode of taking proof.

See also *Smith v. Northern Pac. R. Co.*, (1901) 110 Fed. 341, in which the court, commenting on *National Cash Register Co. v. Leland*, *supra*, said: "With all due deference to that learned court, the construction thus given to the statute is in my opinion unwarranted, for two reasons, viz., first, it interpolates and reads into the statute words of limitation which Congress did not see fit to put into it; and, second, it fails to give effect to all the words which the Act contains, because, if only depositions may be taken in the mode prescribed by the laws of the state, then the words 'or testimony' are meaningless and superfluous, whereas the rules for the interpretation of statutes require the court to give effect to every word of a statute, if it is possible to do so consistently with the manifest intent of the legislature."

Following state practice.—Where the laws of a state in which a court is held provide for the issuance of a commission by the clerk to take depositions of witnesses on interrogatories attached on notice to the adverse party, such practice may properly be followed in the federal court with respect to the taking of depositions of witnesses residing in other dis-

tricts or state. *Carrara Paint Agency Co. v. Carrara Paint Co.*, (1905) 137 Fed. 319.

The examination of a party before trial, authorized by N. Y. Code Civ. Pro., § 870, cannot be required by a federal Circuit Court sitting in that state, by virtue of the declaration of the above Act. *Hanks Dental Assoc'n v. International Tooth Crown Co.*, (1904) 194 U. S. 303, 24 S. Ct. 700, 48 U. S. (L. ed.) 999.

A deposition taken for use in a state court, it has been held, in accordance with the state practice, may be used upon the removal of the cause into the federal court, where it appears that since the taking of the deposition the deponent has died, though the place of taking was within one hundred miles of the point where the state court was held (see R. S. sec. 865, *supra*, p. 185). *U. S. Life Ins. Co. v. Ross*, (C. C. A. 1900) 102 Fed. 722, 42 C. C. A. 601.

But in *Texas, etc., R. Co. v. Wilder*, (C. C. A. 1899) 92 Fed. 953, 35 C. C. A. 105, it was held that depositions, taken under the practice of the state court, could not be received in evidence on the trial of the cause when removed into the federal court, where the witnesses were accessible and resided within one hundred miles of the place where the cause was being tried.

And in *Seeley v. Kansas City Star Co.*, (1896) 71 Fed. 554, it was held that a deposition could not be read in the trial of a cause in the federal court, where such deposition had been taken in a suit pending in the state court, which suit had been voluntarily discontinued, and this suit in the federal court instituted.

Stenographic notes of a former trial cannot be admitted in evidence, though such evidence would be competent in the state court under a state statute. *Mulcahey v. Lake Erie, etc., R. Co.*, (1895) 69 Fed. 172.

Enforcement of attendance of witnesses.

—Where, prior to the removal of a cause to the federal court, notice of the taking of depositions of witnesses before trial as authorized by Rev. Stat. Mo. 1899, sec. 2883, was given, and after removal a special commissioner was appointed by the federal court to take such testimony, as authorized by Act of March 9, 1892, ch. 14, given in the text, it was held that the commissioner was authorized to enforce the attendance of the witnesses by attachment under the authority conferred by the state statute. *Zych v. American Car, etc., Co.*, (1904) 127 Fed. 723.

Foreign witnesses.—Under this Act and under the Connecticut law permitting the taking of depositions of nonresidents and providing for their oral examination, direct and cross, it was held that the Circuit Court for the district of Connecticut could grant a *dedimus potestatem* to take depositions in Cuba, where otherwise

there would be a failure or delay of justice. *Compania Azucarera Cubana v. Ingraham*, (1910) 180 Fed. 516.

Manner of objection to mode of taking depositions.—In *Zych v. American Car, etc., Co.*, (1904) 127 Fed. 723, it appeared that suit was brought against the defendant in the state courts of Missouri, and notice was given to the taking of the depositions of certain witnesses before trial, and subpoenas for such witnesses were duly issued and served. The defendant then removed the case to the federal court, and after removal applied for the appointment of a special commissioner before whom such witnesses might be examined, as authorized by Rev. Stat. Mo. 1899, sec. 2883. The federal court

made such appointment under Act Cong. March 9, 1892, making it lawful to take depositions for use in the federal court in the mode prescribed by the laws of the state. It was held that defendant, having itself applied for the appointment of the commissioner, waived its right to object that inasmuch as the witnesses intended to remain in St. Louis, and were not aged or in poor health, conditions prescribed by R. S. secs. 861, 863, 866, *supra*, p. 168 et seq., as conditions precedent to the taking of proof to be used in the federal courts in advance of the trial, did not obtain, and that the witnesses were not therefore required to appeal and testify before the commissioner.

SEC. 17. [Transcripts and copies from Treasury Department — how certified.] The transcripts from the books and proceedings of the Department of the Treasury and the copies of bonds, contracts and other papers provided for in section eight hundred and eighty-six of the Revised Statutes shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury under the seal of the Department. [28 Stat. L. 210, as amended by 28 Stat. L. 809.]

The above section 17 is from the Legislative, Executive, and Judicial Appropriation Act of July 31, 1894, ch. 174. It was amended to read as above given by the Legislative, Executive, and Judicial Appropriation Act of March 2, 1895, ch. 177, § 10. Originally it read as follows:

“The transcripts from the books and proceedings of the Department of the Treasury, provided for in section eight hundred and eighty-six of the Revised Statutes, shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury, and the copies of contracts and other papers therein provided for shall be certified by the Auditor having the custody of such papers.” [28 Stat. L. 210.]

R. S. sec. 886 mentioned in the text is given *supra*, p. 199.

Section not retroactive.—Where, in an action on the bond of a United States Indian Department agent, a transcript of the books and proceedings of the Treasury Department, certified and authenticated by the Register of the Treasury, as required by R. S. sec. 886, *supra*, p. 199, was offered in evidence, it was held to be immaterial that it was not certified by the Secretary or the Assistant Secretary

of the Treasury, as required by Amending Act of March 2, 1895, ch. 177, sec. 10, 28 Stat. L. 809, enacted after the transcript was filed as a part of the record, and in force at the time of the trial, but providing expressly that it related to certificates thereafter made. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390.

An Act Relating to proof of signatures and handwriting.

[Act of Feb. 26, 1913, ch. 79, 27 Stat. L. 683.]

[Admitted handwriting allowed as evidence.] That in any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved

handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. [37 Stat. L. 683.]

This Act changes the common-law rule in regard to the comparison of writings where the genuineness of the handwriting of any person may be involved. The rule of the common law would not permit a comparison of handwriting unless the

writing to be compared was properly in the case for other purposes than mere comparison. *Maxey v. United States*, (C. C. A. 8th Cir. 1913) 207 Fed. 327, 125 C. C. A. 77; *Short v. U. S.*, (C. C. A. 8th Cir. 1915) 221 Fed. 248, 137 C. C. A. 104.

EXCISE TAX

See INTERNAL REVENUE

EXECUTION

- R. S. 916. *Executions in Common-law Causes*, 229.
R. S. 985. *Executions to Run in All the Districts of a State*, 229.
R. S. 986. *Executions in Favor of United States to Run in Every State and Territory*, 230.
R. S. 987. *Execution Stayed on Conditions*, 230.
R. S. 988. *When Judgment Debtor Entitled to a Continuance of One Term*, 231.
R. S. 989. *Execution Not to Issue Against Officers of Revenue in Cases of Probable Cause, etc.*, 232.
R. S. 990. *Imprisonment for Debt*, 234.
R. S. 991. *Discharge from Arrest or Imprisonment on Mesne or Final Process*, 237.
R. S. 992. *Privileges of Jail Limits*, 238.
R. S. 993. *Goods Taken on a Fieri Facias, How Appraised*, 239.
R. S. 994. *Death of Marshal After Levy or After Sale*, 239.
R. S. 3470. *Purchase on Execution*, 239.
R. S. 3471. *Discharge of Poor Debtor by Secretary of the Treasury*, 240.
R. S. 3472. *Discharge by the President*, 241.

Act of March 3, 1893, ch. 225, 241.

Sec. 1. *Real Estate, How Sold under Order or Decree of Court*, 241.

2. *Personal Property*, 243.

3. *Publication*, 243.

CROSS-REFERENCES

See *CRIMINAL LAW; JUDICIAL OFFICERS; JUDICIARY*.

Sec. 916. [Executions in common-law causes.] The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise. [R. S.]

Act of June 1, 1872, ch. 255, 17 Stat. L. 197.

This section is repeated under the title *JUDICIARY*, and the cases construing it will be found under that title.

The reference to the Circuit Court was superseded by the abolition of that court by the Judicial Code of March 3, 1911, ch. 13, secs. 289-291, 36 Stat. L. 1167. See *JUDICIARY*.

Sec. 985. [Executions to run in all the districts of a State.] All writs of execution upon judgments or decrees obtained in a circuit or district court, in any State which is divided into two or more districts, may run

and be executed in any part of such State; but shall be issued from, and made returnable to, the court wherein the judgment was obtained. [R. S.]

Act of May 20, 1828, ch. 124, 4 Stat. L. 184.

"May" means at the plaintiff's option. "He has a right to concurrent execution all over the state. It is impossible to give the words of the statute effect unless every writ is allowed to run in all the districts in the same state. The formal direction to one marshal is of no consequence, since the same Act of Congress which enlarges the territorial power of the writ enlarges the direction correspondingly." *Prevost v. Gorrell*, (1877) 25 Pittsb. Leg. J. (Pa.) 125, 19 Fed. Cas. No. 11,402. See also *Treadwell v. Seymour*, (1890) 41 Fed. 579.

The lien of a judgment obtained in one of the districts of a state operates from

the date of the judgment upon real estate situated in all parts of the state. *Prevost v. Gorrell*, (1877) 25 Pittsb. Leg. J. (Pa.) 125, 19 Fed. Cas. No. 11,400.

Suit brought outside district of residence.—The provisions of this statute do not give a corporation complainant the right to bring suit in a district in which it is a nonresident without giving security for costs, as required by state statute adopted by the rules of the court. *Lyman Ventilating, etc., Co. v. Southard*, (1875) 12 Blatchf. 405, 15 Fed. Cas. No. 8,633. See also *Miller v. Norfolk, etc., R. Co.*, (1891) 47 Fed. 264.

Sec. 986. [Executions in favor of United States to run in every State and Territory.] All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State, may run and be executed in any other State, or in any Territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained. [R. S.]

Act of March 3, 1797, ch. 20, 1 Stat. L. 515.

Applicability of section to District of Columbia.—"Its sphere of operation was, originally, co-extensive with the limits of the United States, and was manifestly intended by Congress so to be; and I think it may with propriety be taken to have the like operation throughout the entire bounds of the United States, and accordingly to extend to the District of Columbia, at least until a different inter-

pretation has been judicially placed upon it." (1874) 14 Op. Atty-Gen. 384.

Must be authority of law.—Prior to the abolition of the Circuit Court, its process could not be served outside of the district in which it was established without the authority of law. *Toland v. Sprague*, (1838) 12 Pet. 300, 9 U. S. (L. ed.) 1093.

Sec. 987. [Execution stayed on conditions.] When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 83; Act of March 3, 1865, ch. 86, 13 Stat. L. 501.

Purpose of section.—"Section 987 does not in terms relate either to appeals or writs of error or to the supersedeas of the judgment sought to be reviewed in an appellate court. It rather relates to a

method of securing a deliberate reconsideration of a judgment or decree by the court which rendered it without the embarrassment which would occur if immediate execution of the judgment were

permitted, and yet on such conditions as secured the payment of the judgment if allowed to stand. It is well known by the profession that prior to the creation of the Circuit Courts of Appeals, at a time when these sections were enacted by Congress, few cases, comparatively speaking, ever found their way from the trial court to the Supreme Court of the United States, the then only available court of review. The fact that no appeal or writ of error could be prosecuted unless \$5,000 or more was involved, the long distance from the places of trials to the seat of government where the Supreme Court was held, and the heavy expense attending the proceeding, were largely prohibitive of any review of the work of a trial judge. As a result his judgment in a large majority of cases was final. In view of this situation, it was quite a reasonable thing that provision should be made insuring the fullest opportunity, consistent with ample security to the judgment creditor, for the trial court to reconsider its own judgments upon petitions for a new trial. Lest the right of a suitor to invoke such reconsideration should be lost or impaired by the hasty execution of a judgment, the statute seems to have for its object and purpose the stay of such execution until such petition could be definitely and intelligently filed and considered." *Sanborn v. Bay*, (C. C. A. 8th Cir. 1911) 194 Fed. 37, 114 C. C. A. 57.

Time to file motion.—This section "relates only to method of staying execution pending new trial, and does not limit the time in which motions for new trial may be otherwise filed." *Felton v. Spiro*, (C. C. A. 1897) 78 Fed. 576, 47 U. S. App. 402, 24 C. C. A. 321. See *Rutherford v. Penn Mut. L. Ins. Co.*, (1880) 1 Fed. 456; *Emma Silver Min. Co. v. Park*, (1878) 14 Blatchf. 411, 8 Fed. Cas. No. 4,467.

The trial court has no jurisdiction to grant a motion for a new trial and to avoid a judgment rendered, after the expiration of the term at which it was rendered, in the absence of any motion or notice of motion or other proceeding looking to its vacation during that term. *Manning v. German Ins. Co.*, (C. C. A. 1901) 107 Fed. 52, 46 C. C. A. 144. See also *Den v. M'Allister*, (1823) 4 Wash. 393, 19 Fed. Cas. No. 11,277.

Rules of court, prescribing the time and mode in which motions for new trial must be made, must be observed. *Henning v.*

Western Union Tel. Co., (1890) 41 Fed. 864.

A bill of exceptions may be allowed and filed at the term when the motion for a new trial is finally acted on, even though such action is taken at a term subsequent to the entry of judgment. *Woods v. Lindvall*, (C. C. A. 1891) 48 Fed. 73, 4 U. S. App. 45, 1 C. C. A. 34.

"An order granting or refusing a new trial which the court has the jurisdiction or power to make, is discretionary, and cannot be reviewed by writ of error or appeal in the federal courts. . . . But the question whether or not the court had the jurisdiction or power to make an order granting or refusing a new trial and avoiding a former judgment is always reviewable in the federal courts by a writ of error or an appeal challenging the order, because it goes to the effect and finality of the judgment itself." *Manning v. German Ins. Co.*, (C. C. A.) 1901) 107 Fed. 52, 46 C. C. A. 144.

On a reference by consent, the consent and the order providing that the cause be referred to a referee to hear and determine all the issues thereof, and that the report of the referee have the same effect as a judgment of the court, the court has no authority to grant a motion for a stay of proceedings under this section after judgment has been duly entered upon the report of the referee, notwithstanding the consent and order provide that judgment shall be entered "the same as if the cause had been tried before the court." The scope of this section is limited to cases where there has been either a verdict or a finding of the court upon the facts. *Neafie v. Cheesebrough*, (1877) 14 Blatchf. 313, 17 Fed. Cas. No. 10,064. See *Chicago Fourth Nat. Bank v. Neyhardt*, (1876) 13 Blatchf. 393, 9 Fed. Cas. No. 4,991. But see *Robinson v. Mutual Ben. Life Ins. Co.*, (1879) 16 Blatchf. 194, 20 Fed. Cas. No. 11,961.

Judgment, pending motion, not final.—While a motion to stay execution is pending, the court has not lost its jurisdiction over the case, and having power to grant the motion, the judgment is not final for the purpose of taking out a writ of error. *Kingman v. Western Mfg. Co.*, (1898) 170 U. S. 675, 18 S. Ct. 786, 42 U. S. (L. ed.) 1192. See *Cambuston v. U. S.*, (1877) 95 U. S. 285, 24 U. S. (L. ed.) 448; *Brown v. Evans*, (1883) 18 Fed. 56.

Sec. 988. [When judgment debtor entitled to a continuance of one term.] In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term. [R. S.]

Act of May 19, 1828, ch. 68, 4 Stat. L. 281.

Construction.—This section gives a right of stay in a federal court only when the defendant has property upon which the judgment, if in a state court, would be a lien, and he by reason of such lien would be entitled under the state law to a stay of such judgment. Thus where a state statute makes judgments liens on real estate, but not on personal property, and gives a right of stay to a defendant owning sufficient real estate without other security, and also a right of stay to other defendants on their giving bail, a judgment defendant in a federal court who has no real estate cannot obtain a stay by virtue of section 988 by giving bail. *The Island Queen*, (1907) 152 Fed. 470.

In *Petrified Bone Min. Co. v. Rogers*, (1908) 159 Fed. 1019, it appeared that the Pennsylvania codifying statute of June 16, 1836, P. L. 762, secs. 3 and 4, 2 *Purd. Dig.* (Stewart's ed.) 1517, pars. 9 and 10, provides that certain judgment defendants may give security for the sum recovered,

with interest and costs, and thereupon be entitled to a stay, to be computed from the first day of the term to which the action was commenced, from six to twelve months, depending upon the size of the judgment. Act Pa. 1873, P. L. 60, 1 *Purd. Dig.* 1519, par. 16, changed the time from which the stay is to be computed to the return day of the writ by which the action was commenced. No term of state court in Pennsylvania lasts six months. 1 *Purd. Dig.* (Stewart's ed.) 629, 630, pars. 59, 60. It was held that so far as a stay of execution is concerned, defendants in the federal courts in Pennsylvania have the same privilege as those in the state courts, and upon the same conditions, except that the stay cannot last longer than one term, and that either the Pennsylvania Act of 1836 or that of 1873 fixes the time when the stay begins in the federal courts, as well as in the state courts.

Sec. 989. [Execution not to issue against officers of revenue in cases of probable cause, etc.] When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. [*R. S.*]

Act of March 3, 1863, ch. 76, 12 Stat. L. 741.

Notice to the government.—A judgment and certificate, under this section, properly obtained, create under the law an obligation against the government, for, by relieving the officers from liability, in effect and practically, a judgment is rendered against the United States. If, for irregularity or other cause, payment is refused, the Court of Claims may take jurisdiction. Where an action was brought against late officers of the internal revenue for a trespass, judgment obtained, and a certificate of probable cause given, the government was not concluded by the judgment, where no department, bureau, officer, or agent of the government had any notice or knowledge of the judicial proceedings; and the fact that the defendants went out of office two or three years before suit was brought shows that there was not even constructive notice. *Dunnegan's Case*, (1881) 17 Ct. Cl. 247. See *Flanders v. Seelye*, (1881) 105 U. S. 718, 26 U. S. (L. ed.) 1217.

It is not discretionary with the court to give a certificate, but when the collector has exacted money in the performance of

his official duty, under the directions of the secretary of the treasury, and has paid it into the treasury, it is the duty of the court to grant a certificate to that effect. *Cox v. Barney*, (1877) 14 Blatchf. 289, 6 Fed. Cas. No. 3,300. See dissenting opinion in *Lowe v. Kansas*, (1896) 163 U. S. 81, 16 S. Ct. 1031, 41 U. S. (L. ed.) 78.

The judge who tried the case is not the only person to grant the certificate, but another than the one before whom the verdict was rendered may hear the application and grant the certificate. The statute provides for the making of the certificate by the court and not by any particular judge. *Cox v. Barney*, (1877) 14 Blatchf. 289, 6 Fed. Cas. No. 3,300. But see *Faber v. Barney*, (1869) 6 Blatchf. 305, 8 Fed. Cas. No. 4,601.

A separate finding of probable cause is evidently contemplated. Dissenting opinion in *Lowe v. Kansas*, (1896) 163 U. S. 81, 16 S. Ct. 1031, 41 U. S. (L. ed.) 78.

The accounting officers of the government have no jurisdiction to scrutinize and modify a judgment rendered by a

court adjudging the payment by the United States of a certain sum of money with interest. *New York Cent., etc., R. Co. v. U. S.*, (1888) 24 Ct. Cl. 22.

Time of application for certificate.—Where the practice has grown up of not asking for a certificate of probable cause until the time came around for the payment of the money out of the treasury, laches or delay on the part of the government or collector cannot be charged where the application for the certificate is not made until after failure to collect from the treasury department and the issue of an execution against the property of the collector. "The certificate is to be granted not only to prevent the issuing of an execution against the collector, but to stay one already issued." *Cox v. Barney*, (1877) 14 Blatchf. 289, 6 Fed. Cas. No. 3,300.

But in *Faber v. Barney*, (1869) 6 Blatchf. 305, 8 Fed. Cas. No. 4,601, the court said that where no application for the certificate was made at the trial, nor until the expiration of nearly two years, and, after a special motion for execution is noticed, it is then made before a judge who took no part in the trial, and upon affidavits, the application for a certificate under such circumstances comes too late.

Interest.—In an action against a collector to recover excessive fees exacted at the custom house, "where there is a judgment and a certificate of probable cause, and thus a case for payment out of the treasury under section 989, and then, by direction of the government, a writ of error is taken which operates as a stay, interest on the judgment during the stay ought to be allowed, and the statutes not only do not forbid such allowance, but permit it." *Schell v. Cochran*, (1882) 107 U. S. 625, 2 S. Ct. 827, 27 U. S. (L. ed.) 543. See *Schell v. Dodge*, (1882) 107 U. S. 629, 2 S. Ct. 820, 27 U. S. (L. ed.) 601.

So also it has been held that although this section provides for the payment of judgments recovered against a collector out of the treasury, a suit against a collecting officer to recover inheritance taxes paid under protest does not thereby become a suit in form against the United States so as to preclude the recovery of interest by the successful claimant, from the date of the payment. *Kinney v. Conant*, (C. C. A. 1st Cir. 1909) 116 Fed. 720, 92 C. C. A. 410, *affirming* (C. C. R. I. 1908) 162 Fed. 581.

However, interest cannot be recovered from the United States for the time from the rendering of the judgment until the certificate of probable cause was given. Before the certificate is given, the government is under no obligation, and the secretary of the treasury is not at liberty, to pay; but if the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the

government. *U. S. v. Sherman*, (1878) 98 U. S. 565, 25 U. S. (L. ed.) 235. See *Hedden v. Iselin*, (1887) 31 Fed. 266.

But in *White v. Arthur*, (1882) 10 Fed. 80, the court said that interest cannot be adjudged against the government unless expressly allowed by statute, nor in such case can the interest be recovered from the collector, though, in the absence of a certificate, judgment, with interest and costs, may be recovered from the collector. See *New York Cent., etc., R. Co. v. U. S.*, (1889) 24 Ct. Cl. 22.

Statute of limitations.—The collector should be allowed to plead the statute of limitations in bar to plaintiff's right to recover duties alleged to have been illegally exacted; as, where it might happen that the court before which the trial may be had should deem the case, as developed on the trial, one in which a certificate of probable cause ought not to be granted, the defendant should be allowed to set up any defense to which he would be entitled. *Andrae v. Redfield*, (1875) 12 Blatchf. 407, 1 Fed. Cas. No. 367, *affirmed* (1878) 98 U. S. 225, 25 U. S. (L. ed.) 158. See *Crookes v. Maxwell*, (1867) 6 Fed. Cas. No. 3,413, (1869) 6 Blatchf. 468, 6 Fed. Cas. No. 3,415.

Upon a motion for an injunction to restrain a collector from pleading the statute of limitations in bar of an action to recover duties alleged to have been illegally exacted, a stipulation that, whatever facts might be developed on the trial, a certificate of probable cause might be granted, cannot be permitted. "It would be a fraud upon the government to permit parties, by stipulation, to cast upon the government officers the duty to pay a judgment recovered against an individual whether a certificate of probable cause ought or ought not to be granted, is for the determination of the judicial tribunal, upon the facts developed on the trial." *Andrae v. Redfield*, (1875) 12 Blatchf. 407, 1 Fed. Case No. 367, *affirmed* (1878) 98 U. S. 225, 25 U. S. (L. ed.) 158.

Raised by demurrer.—"The bar of a statute of limitation may be raised by demurrer when there is no exception to the statute, and the petition shows the bar of the statute complete." *Sinking Fund Com'rs v. Buckner*, (1891) 48 Fed. 533.

"Other proper officer of the government."—A certificate cannot be given that the collector "acted under the directions of the secretary of the treasury, or other proper officer of the government," where it appears that he acted pursuant to the request of a revenue agent, who was instructed to make the request by the chief clerk of a supervisor. "The plain intent of the statute . . . is that the direction to the collector shall shield him only when given by some officer of the government who has the undoubted authority to direct.

Unless the collector is under some obligation to heed the instructions, he is not protected." *Frerichs v. Coster*, (1885) 22 Fed. 637.

A postmaster was sued in equity, and adjudged to pay personally a sum of money, for the infringement of a patent, committed by the use in the post office of an apparatus for stamping letters with a postmark and canceling postage stamps. A certificate could not be granted under this section, as a postmaster is not an "officer of the revenue" within the meaning of this section. *Campbell v. James*, (1880) 3 Fed. 513.

The "final judgment" referred to in

this section is the judgment as it stands after its affirmance by the Supreme Court, and after the court below has rendered such judgment as the mandate of the Supreme Court requires. *Schell v. Cochran*, (1882) 107 U. S. 625, 2 S. Ct. 827, 27 U. S. (L. ed.) 543.

Seizure of vessel.—A certificate of probable cause does not protect the collector of customs from a judgment for damages under this section for the seizure of a vessel upon the supposition that it was subject to duty under the tariff laws. *The Conqueror*, (1897) 166 U. S. 110, 17 S. Ct. 510, 41 U. S. (L. ed.) 937.

Sec. 990. [Imprisonment for debt.] No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such State. [R. S.]

Act of Feb. 28, 1839, ch. 35, 5 Stat. L. 321; Act of Jan. 14, 1841, ch. 2, 5 Stat. L. 410; Act of March 2, 1867, ch. 180, 14 Stat. L. 543.

Debtors of the United States.—The United States, as plaintiffs in an action for debt, are within the operation of insolvent debtor laws. And this is so notwithstanding Congress has given to the President and the Secretary of the Treasury power to discharge from prison poor debtors of the United States (see R. S. secs. 3471 and 3472, *infra*, p. 240). Such acts are cumulative. *U. S. v. Tetlow*, (1872) 2 Lowell 159, 28 Fed. Cas. No. 16,456. See also *U. S. v. Knight*, (1840) 14 Pet. 301, 10 U. S. (L. ed.) 465; *U. S. v. Walsh*, (1867) Deady 281, 28 Fed. Cas. No. 16,635; *Moan v. Wilmarth*, (1847) 3 Woodb. & M. 399, 17 Fed. Cas. No. 9,686.

But in *U. S. v. Hewes*, (1839) Crabbe 307, 26 Fed. Cas. No. 15,359, it was held that the United States and its rights and remedies against its debtors were not affected by, and included in, the provisions of the Act of Congress of Feb. 28, 1839. See *U. S. v. Wilson*, (1823) 8 Wheat. 253, 5 U. S. (L. ed.) 610.

"The intent of R. S. secs. 990, 991, is that in civil actions for debt the defendant shall be subject to imprisonment, and be released therefrom, precisely as he would be under the law of the state." *Low v. Durfee*, (1880) 5 Fed. 256. See *Mewster v. Spalding*, (1853) 6 McLean 24, 17 Fed. Cas. No. 9,513.

A state court has no authority, under a state insolvent law, to release from jail one held on bail under a judgment rendered in an action at law by a federal court. "Under this Act [of 1839], what-

ever was to be done to assimilate the effect of process out of the courts of the United States, to the effect of process out of the state courts, was to be done in and by the courts of the United States, acting on their own process, by changing its requirements or controlling its effects upon motion, and not by orders or decrees of state courts operating thereon." *Sadlier v. Fallen*, (1854) 2 Curt. 190, 21 Fed. Cas. No. 12,209. See also *Duncan v. Darst*, (1843) 1 How. 301, 11 U. S. (L. ed.) 139; *McNutt v. Bland*, (1844) 2 How. 9, 11 U. S. (L. ed.) 159; *United States Bank v. Tyler*, (1830) 4 Pet. 366, 7 U. S. (L. ed.) 888; *Matter of Farrand*, (1867) 1 Abb. 140, 8 Fed. Cas. No. 4,678.

A judgment for tort in a federal court is not a "debt" within the meaning of the provisions of this section. *Stroheim v. Deimel*, (C. C. A. 1897) 77 Fed. 802, 46 U. S. App. 639, 23 C. C. A. 467. See also *U. S. v. Walsh*, (1867) Deady 281, 28 Fed. Cas. No. 16,635.

An action for damages for personal injuries, when it ripens into a decree for a sum of money, becomes a debt against the defendant in the decree. "Such a claim is not a debt; it is less than a debt; and it cannot be said that the reason for abolishing imprisonment for debt does not apply in a case like this. If a defendant is not liable to imprisonment for a debt, he should not, for the stronger reason, be liable to imprisonment in an action where the result can only be a judgment for money." *Stone v. Murphy*, (1898) 83 Fed. 158.

An action for damages for personal injuries was held in *Hanson v. Fowle*, (1871) 1 Sawy. 497, 11 Fed. Cas. No. 6,041, not to be governed by the provisions of this section. While a person who willfully injures another is liable in damages, and may, therefore, in a sense, be called the "debtor" of the party injured, and the sum due for the injury "debt," he is in fact a wrongdoer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment because he is pecuniarily unable to pay what he has promised.

"The word 'debt' is of very general use, and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume that this provision in the state constitution was intended to prevent the useless and often cruel imprisonment of persons, who, having honestly become indebted to another, are unable to pay as they undertook and promised. In this view of the matter the clause in question should be construed as if it read: 'There shall be no imprisonment for debt arising upon contract express or implied, except,' etc. Such is substantially the language employed in the legislative acts of most of the states abolishing imprisonment for debt; and there can be but little doubt that this was the end which the framers of the Constitution had in view, as well as the popular understanding of the clause, when the instrument was adopted at the polls. General or abstract declarations in bills of rights are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life, they must be construed with reference to the causes which produced them and the end sought to be obtained. A person who willfully injures another in person, property, or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt. But he is in fact a wrongdoer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment because he is pecuniarily unable to pay what he promised to." *U. S. v. Walsh*, (1867) Deady 281, 28 Fed. Cas. No. 16,635.

Unliquidated damages or contingent debt.—"The statute and the [admiralty] rule refer only to imprisonment for debt, and do not affect the power of the court to issue a warrant of arrest as process for compelling defendants to respond to a claim for unliquidated damages, which is not a debt, any more than it restricts the power of the court to imprison defendants for nonpayment of fines or by way of punishment for contempt. The word 'debt,' when used in a statute, without some plain or explicit declaration making

it applicable thereto, does not include taxes nor claims for unliquidated damages. The legal definition of the word is opposed to unliquidated damages, or a liability in the sense of an inchoate or contingent debt, or an obligation not enforceable by ordinary process." *Bolden v. Jensen*, (1895) 69 Fed. 745. But see *The Carolina*, (1876) 14 Fed. 424; *Chiesa v. Conover*, (1888) 36 Fed. 334; *The Bremana v. Card*, (1889) 38 Fed. 144.

Actions for penalties are civil actions, as a penalty, when incurred by the transgression of a statute, becomes immediately a debt, and upon an information filed by the United States attorney charging an offense for which the statute prescribes a penalty but does not make a crime, a bench warrant will not be issued for the arrest of the defendant, where the constitution and laws of the state have abolished imprisonment for debt. *U. S. v. Younger*, (1899) 92 Fed. 672.

Contempt—Bankruptcy proceedings.—A district court has power to punish a bankrupt for contempt of court, as manifested by his refusal to obey an order of court, made after due hearing of the parties, directing him to deliver or to pay the assets of the bankrupt estate to the trustee in bankruptcy. Such an order is not for the payment of a debt, but for the delivery by the bankrupt of the assets of his estate to his trustee in bankruptcy. *In re Schlesinger*, (C. C. A. 1900) 102 Fed. 117, 42 C. C. A. 207. See also *In re Purvine*, (C. C. A. 1899) 96 Fed. 192, 37 C. C. A. 446; *Sinsheimer v. Simonson*, (C. C. A. 1901) 107 Fed. 898, 47 C. C. A. 51; *In re Anderson*, (1900) 103 Fed. 854.

The Bankruptcy Act of 1898 (see BANKRUPTCY, vol. 1, p. 495) confers special power upon the court to control the administration of estates of bankrupts, and to imprison bankrupts and others for contumacy. If this section can be so construed as to make it applicable to such cases as the one under consideration, and to forbid the imprisonment of bankrupts as a means of compelling the surrender of their estates, then there is a conflict, and the court must give effect to the Bankruptcy Act as the later one. *Ripon Knitting Works v. Schreiter*, (1900) 101 Fed. 810.

So where by the law of the state (New York) disobedience of an order is punishable as for a contempt of the court, where it requires the payment of money to the court, or to an officer thereof, a court of bankruptcy may enforce an order directing petitioning creditors to pay the receiver's expenses, by a proceeding for contempt. In other words, this section has no application to a case in which imprisonment for failure to obey the lawful order of the court is permitted by the laws of the state. *In re Lacov*, (C. C. A. 2d Cir. 1905) 142 Fed. 960, 74 C. C. A. 130.

Failure to pay equity decrees.—"By the laws of this state [New York] proceedings cannot be had as for a contempt for the nonpayment of money ordered by the court to be paid when the payment can be enforced by execution, and imprisonment for nonpayment of costs is abolished. The power of the courts of the United States to punish for contempt and imprisonment for nonpayment of money judgments is circumscribed and controlled by the laws of the state; and where an order made in the progress of the cause is of the character in substance of a judgment or decree for the payment of money, it cannot be enforced upon the theory that disobedience is a contempt" *Mallory Mfg. Co. v. Fox*, (1884) 20 Fed. 409. But see *Hendryx v. Fitzpatrick*, (1884) 19 Fed. 810.

Where the state law provides that no person shall be arrested or imprisoned on any civil process in any suit or proceeding instituted for the recovery of any money, due upon any judgment or decree founded on any contract, or due upon any contract, express or implied, with certain exceptions, an attachment will not lie, in a proceeding in equity against a liquidated partner for an account for noncompliance with a decree against him for a balance due the plaintiff, where the case did not come within the statutory exceptions. *Nelson v. Hill*, (1898) 89 Fed. 477.

False entry of merchandise.—An action for the value of merchandise entered in violation of R. S. secs. 2839 and 2864 (see CUSTOMS DUTIES, vol. 2, pp. 994, 1002), by which, in case goods are entered by means of a false invoice, the goods or their value are declared forfeited to the United States, is neither an action "to recover a fine or penalty," nor "to recover damages for fraud," and where the state law prohibits arrest in a civil action except in such cases, an execution against the person of the defendant cannot issue. *U. S. v. Moller*, (1878) 10 Ben. 189, 26 Fed. Cas. No. 15,793.

In an action for debt, for the value of merchandise forfeited for entry by means of false and fraudulent practices and appliances under R. S. sec. 2864 (see CUSTOMS DUTIES, vol. 2, p. 1002) execution cannot issue against the bodies of the defendants for the damages and costs, where the law of the state allows process to issue against the body in actions, (1) to recover a fine or penalty; . . . (4) in an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability." The execution cannot be upheld on the ground that the recovery was of a penalty, nor can either action be said to be one of a contract, either express or implied. *U. S. v. Reid*, (1883) 17 Fed. 497.

Suits in admiralty.—In *Hanson v. Fowle*, (1871) 1 Sawy. 497, 11 Fed. Cas. No. 6,041, it was held that that portion of the Act of 1867 which adopted the state law concerning the "modifications, conditions, and restrictions upon imprisonment for debt," did not apply to process in suits in admiralty. See *The Carolina*, (1876) 14 Fed. 424; *Marshall v. Bazin*, (1849) 7 N. Y. Leg. Obs. 342, 16 Fed. Cas. No. 9,125.

In *Stone v. Murphy*, (1898) 86 Fed. 158, the court said that under an admiralty rule which provides that, "in all suits *in personam* where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal, and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state courts," and where by the law of the state a party arrested in a civil action is entitled to his discharge from the arrest upon giving an undertaking to the effect that he will at all times render himself amenable to the process of the court during the pendency of the action, defendants in an action for damages for personal injuries received on the high seas cannot be required to add to the conditions of the bond that they will appear and pay the money awarded by the decree that may be rendered.

In *Louisiana Ins. Co. v. Nickerson*, (1874) 2 Lowell 310, 15 Fed. Cas. No. 8,539, it was held that the Act of 1867 applied to cases in admiralty courts. See *The Blanche Page*, (1879) 16 Blatchf. 1, 3 Fed. Cas. No. 1,524.

In the following cases, rules adopted by the court conforming to the practice in suits in admiralty, as to the arrest and imprisonment of the defendant, to that of the state, in like or analogous cases, were applied; *The Kentucky*, (1860) 4 Blatchf. 448, 14 Fed. Cas. No. 7,717; *Hodge v. Bemis*, (1849) 2 Am. L. J. N. S. 337, 12 Fed. Cas. No. 6,557; *Gardner v. Isaacson*, (1848) Abb. Adm. 141, 9 Fed. Cas. No. 5,230; *Gaines v. Travis*, (1849) Abb. Adm. 422, 9 Fed. Cas. No. 5,180; *In re Freeman*, (1855) 2 Curt. 491, 9 Fed. Cas. No. 5,083; *Atkins v. Fibre Disintegrating Co.*, (1867) 1 Ben. 118, 2 Fed. Cas. No. 600; *The Steamboat Delaware*, (1846) Olc. Adm. 240, 7 Fed. Cas. No. 3,762.

Penal remedy against debtor.—Where a state law provides fully for the abolition of imprisonment for debt, and the process by which the arrest of a debtor is made has been also abolished, the consequence is that imprisonment for debt in all the cases under process from the federal court is formally terminated. But a law of the state, very highly penal, giving to creditors a remedy as respects their debtors in certain cases of fraud, cannot be enforced in the courts of the United States. *Curtis v. Feste*, (1853) 6 Fed. Cas. 3,502.

Criminal case.—A fine imposed for the violation of laws for the punishment of crimes and misdemeanors is not such a debt as is within the scope of provisions of a state constitution abolishing imprisonment for debt, and this section is therefore not applicable to a criminal case. *In re Sanborn*, (1892) 52 Fed. 583. See also *In re Laski*, (1871) 13 Int. Rev. Rec. 142, 14 Fed. Cas. No. 8,098; *In re Bergen*, (1870) 2 Hughes 513, 3 Fed. Cas. No. 1,338.

Imprisonment of defaulting officer on distress warrant.—This section has no application to imprisonment under a distress warrant issued by a department under authority of a specific Act of Congress against the property and body of a defaulting officer of the government. *U. S. v. Dillin*, (C. C. A. 1909) 168 Fed. 913, 94 C. C. A. 337.

For money received in a fiduciary capacity.—See *McKay v. Garcia*, (1873) 6 Ben. 556, 16 Fed. Cas. No. 8,844, which was an action of debt brought against a foreign consul for money received in a fiduciary capacity. It was held that under the Act of Feb. 28, 1839, the source of R. S. sec. 990, in connection with the law of the state (New York) which provided for the arrest and imprisonment of a defendant in an action for money received in a fiduciary capacity, the defendant was liable to arrest in the action.

Judgment prior to date of Act.—A state law of 1838, abolishing imprisonment for debt except in certain cases, adopted by the Act of Congress of 1839, could not have the effect to release from imprisonment a defendant held on a *capias ad satisfaciendum*, dated 1838, and issued on a judgment rendered the same year. *Wilber v. Ingersoll*, (1840) 2 McLean 322, 29 Fed. Cas. No. 17,632.

Conditions prescribed.—When a discharge from imprisonment is sought under the provisions of a state statute, it must be upon the conditions prescribed, as where the statute provides "that no person shall be released from imprisonment under this Act who neglects or refuses to schedule in manner and form as provided by this Act [concerning insolvent debt-

ors]." *Stroheim v. Deimel*, (C. C. A. 1897) 77 Fed. 802, 46 U. S. App. 639, 23 C. C. A. 467.

Where a state (Massachusetts) statute declares that imprisonment for debt is abolished, but expressly allows a creditor to imprison his debtor upon complying with certain conditions prescribed by the Act, and this not by way of punishment of the debtor but as a remedy to enforce payment of the debt, it does not abolish imprisonment for debt within the meaning of the Act of Congress. *Matter of Freeman*, (1855) 2 Curt. 491, 9 Fed. Cas. No. 5,083. See also *Campbell v. Hadley*, (1859) 1 Sprague 470, 4 Fed. Cas. No. 2,358; *Catherwood v. Gapete*, (1854) 2 Curt. 94, 5 Fed. Cas. No. 2,513; *U. S. v. Walsh*, (1867) Deady 281, 28 Fed. Cas. No. 16,635.

"Modification."—A Massachusetts insolvent law providing that a debtor who has received his certificate of discharge shall be forever thereafter discharged and exempt from arrest and imprisonment in any suit or upon any proceeding for or on account of any debt or demand which might have been proved against his estate was held to be a "modification" of the general law of imprisonment for debt. *Low v. Durfee*, (1880) 5 Fed. 256, wherein the court said: "By this Act, . . . all modifications upon imprisonment for debt are adopted. Is not the express exemption of discharged insolvents from imprisonment upon provable debts a modification upon imprisonment for debt? I so consider it. It is certainly a modification of the general law of imprisonment for debt, and that is what the statute means."

Obligation not impaired.—When a remedy against a debtor is taken away by a law abolishing imprisonment for debt, or by a proceeding under an insolvent law, the contract is not reached, nor its obligation impaired. *Gray v. Munroe*, (1839) 1 McLean 528, 10 Fed. Cas. No. 5,724. See *United States Bank v. Weisiger*, (1829) 2 Pet. 331, 7 U. S. (L. ed.) 441; *Snead v. M'Coull*, (1851) 12 How. 407, 13 Fed. Cas. No. 1,043; *King v. Riddle*, (1812) 7 Cranch 163, 3 U. S. (L. ed.) 304; *Mason v. Haile*, (1827) 12 Wheat. 370, 6 U. S. (L. ed.) 660.

Sec. 991. [Discharge from arrest or imprisonment on mesne or final process.] When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be

had before one of the commissioners of the circuit court for the district where the defendant is so held. [R. S.]

Act of Jan. 6, 1800, ch. 4, 2 Stat. L. 5; Act of Jan. 7, 1824, ch. 3, 4 Stat. L. 1; Act of April 22, 1824, ch. 39, 4 Stat. L. 19, 20; Act of March 2, 1867, ch. 180, 14 Stat. L. 543. See notes under the preceding R. S. sec. 990.

Unless the state statute is strictly followed, on a petition for the discharge of an imprisoned debtor, the court does not acquire jurisdiction, and a discharge then granted would render the marshal liable in an action for an escape. *Moran v. Secord*, (1883) 15 Fed. 509. See also *Slacum v. Simms*, (1809) 5 Cranch 363, 3 U. S. (L. ed.) 126; *Low v. Durfee*, (1880) 5 Fed. 256.

The provision that "all such proceedings shall be had before one of the commissioners of the Circuit Court for the district where the defendant is so held" is not open to the objection that Congress cannot constitutionally make such a function exercisable by any officer who is not appointed by the President with the advice and consent of the Senate. The function in question is not an independent one beyond the pale of an inferior officer's authority, but is merely incidental to the execution of final judicial process. *Russell v. Thomas*, (1874) 10 Phila. (Pa.) 239, 31 Leg. Int. (Pa.) 189, 21 Fed. Cas. No. 12,162.

Jurisdiction of court commissioners.—Where a judgment debtor is arrested on a writ issued out of the federal court on the ground that he had property which he refused to apply to a judgment against him, all proceedings to secure his release after commitment other than by petition in bankruptcy must be taken before a United States commissioner. *Johnson v. Crawford*, (1907) 154 Fed. 761.

Arrest matter of judicial discretion.—Where the state (North Carolina) law provides for the arrest of a defendant in an action for the recovery of damages on a cause of action not arising out of a contract, when the action is for an injury to person or character, such an arrest cannot be made except upon proceedings calling for the exercise of judicial discretion. "What amount of security the plaintiff shall give, and the amount and character of bail of defendant, are matters for the exercise of this discretion." *In re Bergen*, (1870) 2 Hughes 513, 3 Fed. Cas. No. 1,338.

Sec. 992. [Privileges of jail limits.] Persons imprisoned on process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective States are entitled to, and under the like regulations and restrictions. [R. S.]

Act of Jan. 6, 1800, ch. 4, 2 Stat. L. 4; Act of May 19, 1828, ch. 68, 4 Stat. L. 278; Act of Aug. 1, 1842, ch. 109, 5 Stat. L. 499.

The term "process" is broad enough to embrace all process upon which a person is imprisoned, and is applicable to cases where the imprisonment is on execution as well as meane process. *U. S. v. Noah*, (1825) 1 Paine 368, 27 Fed. Cas. No. 15,894.

In an action on a bond, which recited that if the principals, "from the time of executing this bond, shall continue true prisoners, in the custody of the jailer, within the limits of the jail yard, until they shall be lawfully discharged, and shall not depart without the exterior bounds of said jail yard until lawfully discharged from said imprisonment, . . . then the said obligation to be void," it was held that the parties to the bond are bound for nothing whatsoever but what is contained in the condition of the bond, whether it be or be not conformable with the law. So that where by the state (Massachusetts) law it was an escape for a debtor, having the liberty of the yard, to

be without the walls of the prison in the nighttime, it was no breach of the bond when the principals did not lodge in the nighttime within the walls of the jail, but went at large both day and night within the limits of the jail yard. *U. S. v. Knight*, (1840) 14 Pet. 301, 10 U. S. (L. ed.) 465.

A writ of habeas corpus is not a proper remedy in a civil cause in which judgment has been rendered against the petitioner, upon which a ca. sa. had issued, by which he was taken and held in confinement within the prison bounds upon a prison bounds bond. *Ex p. Wilson*, (1810) 6 Cranch 52, 3 U. S. (L. ed.) 149.

Refusal by the sheriff to take a bond for the privilege of jail liberties would render him liable to an action for false imprisonment. *U. S. v. Noah*, (1825) 1 Paine 368, 27 Fed. Cas. No. 15,894.

After taking a bond for the jail limits, the sheriff loses all authority and control over the prisoner, except that if he should

discover that the bail taken is insufficient he may confine the prisoner in jail until good and sufficient bail be offered; he is not bound to receive the prisoner when

offered to be surrendered. *U. S. v. Noah*, (1825) 1 Paine 368, 27 Fed. Cas. No. 15,894.

Sec. 993. [Goods taken on a fieri facias, how appraised.] When it is required by the laws of any State that goods taken in execution on a writ of fieri facias shall be appraised, before the sale thereof, the appraisers appointed under the authority of the State may appraise goods taken in execution on a fieri facias issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such State. And the marshal, in whose custody such goods may be, shall summon the appraisers, in the same manner as the sheriff is, by the laws of such State, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraisements under the laws of the State. [*R. S.*]

Act of March 2, 1793, ch. 22, 1 Stat. L. 335.

Sec. 994. [Death of marshal after levy or after sale.] When a marshal dies, or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements, or hereditaments, and before sale or other final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed, or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements, or hereditaments, under process from a court of the United States, and before a deed for the same is executed by him to the purchaser, such court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser, upon his paying the purchase-money and costs remaining unpaid. [*R. S.*]

Act of May, 7, 1800, ch. 45, 2 Stat. L. 61.

Sale after removal from office.—In *Doolittle v. Bryan*, (1852) 14 How. 563, 14 U. S. (L. ed.) 543, it was held that a sale of land by a marshal, on a venditioni exponas, after his removal from office, the sale being returned to the court and confirmed by it, on motion, and a deed ordered to be made to the purchaser at the sale, by the new marshal, was valid. But see *U. S. v. Arkansas State Bank*, (1846) Hempst. 460, 26 Fed. Cas. No. 14,515; *Stewart v. Hamilton*, (1849) 4 McLean 534, 23 Fed. Cas. No. 13,429.

But in *Overton v. Gorham*, (1841) 2 McLean 509, 18 Fed. Cas. No. 10,626, it was held that a sale of land, made by a marshal who was removed from office and

a successor appointed after the levy and before the sale, was irregular, notwithstanding that before the sale he was not notified of his removal, nor of the appointment of his successor. "His functions were terminated by the act of removal." But see *Bowerbank v. Morris*, (1801) Wall. C. C. 119, 3 Fed. Cas. No. 1,726.

An amendment to the return on the writ of execution under which a late marshal acted in making a sale of lands may be directed by the court to be made by the late marshal, in order to furnish information to his successor by which he may finish the execution of a power and perfect title by making a proper deed. *Ex p. Worley*, (1884) 19 Fed. 586.

Sec. 3470. [Purchase on execution.] At every sale, on execution, at the suit of the United States, of lands or tenements of a debtor, the United

States may, by such agent as the Solicitor of the Treasury shall appoint, become the purchaser thereof; but in no case shall the agent bid in behalf of the United States a greater amount than that of the judgment for which such estate may be exposed to sale, and the costs. Whenever such purchase is made, the marshal of the district in which the sale is held shall make all needful conveyances, assignments, or transfers to the United States. [R. S.]

Act of May 26, 1824, ch. 172, 4 Stat. L. 51.

Sec. 3471. [Discharge of poor debtor by Secretary of the Treasury.] Any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States, which he is unable to pay, may, at any time after commitment, make application, in writing, to the Secretary of the Treasury, stating the circumstances of his case, and his inability to discharge the debt; and thereupon the Secretary may make, or require to be made, an examination and inquiry into the circumstances of the debtor, by the oath of the debtor, which the Secretary, or any other person by him specially appointed, is authorized to administer, or otherwise, as the Secretary shall deem necessary and expedient, to ascertain the truth; and upon proof made to his satisfaction, that the debtor is unable to pay the debt for which he is imprisoned, and that he has not concealed or made any conveyance of his estate, in trust, for himself, or with an intent to defraud the United States, or to deprive them of their legal priority, the Secretary is authorized to receive from such debtor any deed, assignment, or conveyance of his real or personal estate, or any collateral security, to the use of the United States. Upon a compliance by the debtor with such terms and conditions as the Secretary may judge reasonable and proper, the Secretary must issue his order, under his hand, to the keeper of the prison, directing him to discharge the debtor from his imprisonment under such execution. The debtor shall not be liable to be imprisoned again for the debt; but the judgment shall remain in force, and may be satisfied out of any estate which may then, or at any time afterward, belong to the debtor. The benefit of this section shall not be extended to any person imprisoned for any fine, forfeiture, or penalty, incurred by a breach of any law of the United States, or for moneys had and received by any officer, agent, or other person, for their use; nor shall its provisions extend to any claim arising under the postal laws. [R. S.]

Act of June 6, 1798, ch. 49, 1 Stat. L. 561, 562.

Statute is not exclusive.—The provisions of this statute, investing the Secretary of the Treasury with power to discharge imprisoned poor debtors of the United States, are not exclusive of any other rights or remedies they may have under any other statute, as under section 990, R. S.; such statutes are cumulative. *U. S. v. Tetlow*, (1872) 2 Lowell 159, 28 Fed. Cas. No. 16,456.

"Discharged on payment of costs" can only be regarded as applying to the costs of suit accruing in the case or cases in which the debtor was imprisoned; the expenses of the examination come within the terms of the appropriation "for defraying the expenses of suits in which the

United States are concerned." (1841) 3 Op. Atty-Gen. 614.

Sureties on a bond for the payment of duties are not discharged from liability by reason of the discharge of the principal from imprisonment. The statutory provision that the judgment shall remain good and sufficient in law does not change the common-law rule that the release of a debtor, whose person is in execution, is a release of the judgment itself. The release of the principal on condition that he should pay the costs, and assign and convey to the use of the United States all his property, is not such a compromise as will exonerate the sureties. *U. S. v. Stansbury*, (1828) 1 Pet. 573, 7 U. S. (L. ed.)

267. See also *Hunter v. U. S.*, (1831) 5 Pet. 173, 8 U. S. (L. ed.) 86; *Hunt v. U. S.*, (1812) 1 Gall. 32, 12 Fed. Cas. No. 6,900; *U. S. v. Sturges*, (1826) 1 Paine 525, 27 Fed. Cas. No. 16,414; (1820) 1 Op. Atty.-Gen. 367.

. An assignment of the debtor's real and

personal estate is a necessary preliminary to his discharge under the Act of 1798 (now this section), and the Secretary of the Treasury has no discretion to make an exception as to the debtor's bedding, etc. (1820) 5 Op. Atty.-Gen. 727.

Sec. 3472. [Discharge by the President.] Whenever any person is imprisoned upon execution for a debt due to the United States, which he is unable to pay, and his case is such as does not authorize his discharge by the Secretary of the Treasury, under the preceding section, he may make application to the President, who, upon proof made to his satisfaction that the debtor is unable to pay the debt, and upon a compliance by the debtor with such terms and conditions as the President shall deem proper, may order the discharge of such debtor from his imprisonment. The debtor shall not be liable to be imprisoned again for the same debt; but the judgment shall remain in force, and may be satisfied out of any estate which may then, or at any time afterward, belong to the debtor. [R. S.]

Act of March 3, 1817, ch. 114, 3 Stat. L. 399.

Confinement under special process.—The Act clearly relates to persons confined under the ordinary legal process, that is to say, of execution founded on judgment. It does not contemplate cases of confinement under any special process, such as under a warrant of distress. If the defendant confess judgment and a *capias* issue, the President will be at liberty to interpose his authority. (1829) 2 Op. Atty.-Gen. 285; (1818) 1 Op. Atty.-Gen. 231.

The discharge of a principal debtor by the President, under the provisions of this statute, does not discharge the sureties of such debtor, nor furnish them with any defense against the judgment in force against them. (1822) 5 Op. Atty.-Gen. 746.

The discharge of one surety by order of the President does not operate as an exoneration of a co-surety. "The Act of Congress, by virtue of which the discharge was made, is a mere release of the person, but does not affect the debt." *U. S. v. Beattie*, (1829) Gilp. 92, 24 Fed. Cas. No. 14,554. See (1820) 1 Op. Atty.-Gen. 367.

Marshal's fees not paid.—Where the President ordered an absolute and unconditional discharge of an imprisoned debtor

without any arrangement as to the payment of fees due to the marshal from the debtor, the marshal's power or right to compel payment from him was taken away by authority of the United States; and the right of the marshal to claim his poundage fees from the government is clearly established. *U. S. v. Ringbold*, (1834) 8 Pet. 150, 8 U. S. (L. ed.) 894.

The defendant, upon being ordered by the President to be discharged, and being held in custody by the marshal for fees, agreed with the marshal to pay those fees by instalments, and that if he should make default, the marshal should obtain a new *ca. sa.* and arrest him. He made default and the marshal took out a new *ca. sa.* in the name of the United States for his fees. Upon this new *ca. sa.* he was arrested, but the court refused to order the defendant to be committed. *U. S. v. Smith*, (1826) 3 Cranch C. C. 66, 27 Fed. Cas. No. 16,327.

Refund money.—The President has not power under this statute to order money paid into the treasury by judgment and execution, upon the penalty of a bond, to be refunded several years after the payment was made. (1829) 2 Op. Atty.-Gen. 189.

An act to regulate the manner in which property shall be sold under orders and decrees of any United States courts.

[Act of March 3, 1893, ch. 225, 27 Stat. L. 751.]

[SEC. 1.] [Real estate, how sold under order or decree of court.] That all real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the Court-house of the

county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct. [27 Stat. L. 751.]

Act not retroactive but prospective.—"The Act of Congress, having been passed after the decree in question was rendered, must be given a retroactive or retrospective application, if it applies in this case. The Act not only contains no expression of an intention that it shall be retrospective, but, on the contrary, seems to show on its face that it was expected to operate only prospectively. In each section of the Act the expression occurs, in regard to details of either the sale or advertisement, 'as the court rendering said order or decree of sale may direct.' It is a general rule that statutes are not given a retroactive effect unless the contrary intention is clearly expressed." *Central Trust Co. v. Sheffield, etc., Coal, etc., Co.*, (1894) 60 Fed. 16.

Statute mandatory.—This Act, prescribing the manner in which "all real estate or any interest in land sold under any order or decree of any United States court shall be sold," etc., is mandatory and deverts such courts of the discretion which theretofore existed of making sales otherwise than by public auction as therein prescribed, and a sale otherwise made is illegal and void and does not bind the purchaser even after confirmation, who cannot be required to pay for and accept a title which might be subsequently impeached for palpable legal defect in the proceeding itself under which the sale was made. *Cumberland Lumber Co. v. Tunis Lumber Co.*, (C. C. A. 1909) 171 Fed. 352, 96 C. C. A. 244.

In *Godchaux v. Morris*, (C. C. A. 5th Cir. 1903) 121 Fed. 482, 57 C. C. A. 434, it was held that the failure of the commissioner to offer separately a small parcel of the land of small value, as directed by the terms of the decree, was a mere irregularity which would not defeat confirmation, unless loss or injury resulted, and it was further held that where a federal court had jurisdiction to order a sale of real estate, the fact that its decree directed that the sale be made at a place other than the courthouse of the county, parish or city in which the property, or the greater part thereof, is located, or upon the premises, did not render the sale void, nor constitute ground for refusing confirmation, since the decree, although erroneous, is binding unless reversed on appeal. But in this case, although the sale was public, the direction to sell otherwise than provided in the statute, apparently was error which would have been corrected on appeal.

Following *Godchaux v. Morris*, *supra*, it was held in *Laneburgh v. McCormick*, (C. C. A. 4th Cir. 1915) 224 Fed. 874, 140 C. C. A. 296, wherein a sale was attacked

as a nullity because under the order of the court the sale was made in the city of Charleston and not as required by the statute on the premises or at the courthouse door of the county in which the land was situated, that the court having jurisdiction to order the sale, the mistake of directing that it be made at a place different from that required by statute did not make the sale void for want of jurisdiction but was an error to be corrected by appeal or by direct application to the trial court.

See also *National Nickel Co. v. Nevada Nickel Syndicate*, (C. C. A. 1901) 112 Fed. 44, 50 C. C. A. 113, in which case the special master carried out the directions of the decree of foreclosure and order of sale, including the direction as to the publication of the notice. "It is conceded by the court below, and cannot be denied, that, had the plaintiff in error made objection to the order of sale at the proper time, the court would have been obliged to modify the decree, and order the sale of the property upon notice published and posted as required by the Act of Congress. . . . The law does not permit a party to stand by in silence while judicial proceedings are in progress affecting his rights, and withhold objections to erroneous procedure until other rights have intervened, and then challenge their validity on account of such erroneous procedure." And see *Nevada Nickel Syndicate v. National Nickel Co.*, (1900) 103 Fed. 391; *Black v. Black*, (1896) 77 Fed. 785.

To what courts applicable.—Undoubtedly the Act of March 3, 1893, applies not only to federal courts then in existence, but also to those subsequently created, unless something in the organic Act exempts them, and governs as well any possible new forms of judicial sales under decrees as foreclosure, execution, and partition sales then known. *In re Britannia Min. Co.*, (C. C. A. 7th Cir. 1913) 203 Fed. 450, 121 C. C. A. 395.

Sale of street railroad under mortgage.—In *Provident Life, etc., Co. v. Camden, etc., R. Co.*, (C. C. A. 1910) 177 Fed. 854, 101 C. C. A. 68, it was held that the fact that the method of advertisement of the property of a street railroad company to be sold under a foreclosure decree did not conform to the method designated in the mortgages was immaterial, as such foreclosure was governed by this Act.

Bankruptcy.—Bankruptcy sales are not governed by this Act but by section 70 b of the Bankruptcy Act (see *BANKRUPTCY*, vol. 1, p. 1204). *Robertson v. Howard*, (1913) 229 U. S. 254, 33 S. Ct. 854, 57 U. S. (L. ed.) 1174, *reversing* (1910) 83 Kan. 453, 112 Pac. 162. And

to the same effect see *In re National Min. Exploration Co.*, (D. C. Mass. 1911) 193 Fed. 232; *In re Britannia Min. Co.*, (C. C. A. 7th Cir. 1913) 203 Fed. 450, 121 C. C. A. 395, *reversing* (W. D. Wis. 1912) 197 Fed. 459.

So it has been held that a court of bankruptcy is not limited in its sales of assets of bankrupts by this Act; but the Bankruptcy Act confers upon such courts full equitable powers in the administration of estates, and they may, for good cause shown, order either real or personal property sold at private sale. *In re Edes*, (1905) 135 Fed. 595.

The Act of March 3, 1893, seems to relate to judicial sales pursuant to some order or decree creating or declaring a right to sell, which right could not be

exercised but for the order or decree; sales necessarily authorized and ordered by the court; sales void but for such order or decree; sales divesting the title of the former owner. Sales in bankruptcy are not like these in character. *In re La France Copper Co.*, (D. C. Mont. 1913) 205 Fed. 207.

Amendment of order directing sale.— Upon the removal of a county seat after the original order directing a sale had been made it was held proper for the court to modify or amend the order so as to make the decree conform to the statute by directing that the sale of the property be had at the courthouse in the new county seat. *Fulton Inv. Co. v. Dorsey*, (C. C. A. 8th Cir. 1915) 220 Fed. 298, 136 C. C. A. 108.

SEC. 2. [Personal property.] That all personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner. [27 Stat. L. 751.]

SEC. 3. [Publication.] That hereafter no sale of real estate under any order, judgment, or decree of any United States Court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper. [27 Stat. L. 751.]

"For at least four weeks" means four weeks of seven days each, and a "publication of a notice of sale once a week for only twenty-seven days before the day of sale is not a 'previous publication' of such a notice 'once a week for at least four weeks prior to such sale' as required by" this statute, and by the decree of the court. *Wilson v. Northwestern Mut. Life Ins. Co.*, (C. C. A. 1894) 65 Fed. 38, 27 U. S. App. 526, 12 C. C. A. 505.

Debtor may waive statutory requirements.—"The provision of the statute of the United States requiring that in all cases four weeks' notice should be given of the time of sale was intended for the benefit and protection of the judgment debtor, and created a privilege and right which the judgment debtor in any case

may insist upon or waive." *Nevada Nickel Syndicate v. National Nickel Co.*, (1900) 103 Fed. 399.

Provisions of state statute.—Where there was a newspaper printed in the county in which the property was situated, and the notice was published in that newspaper, in compliance with the provisions of the state statute and this section, it is sufficient though the notice of the sale of the property was not posted on the door of the courthouse and in five other public places, as directed by the state statute in the case of execution sales of property situated in the counties in which no newspaper is printed. *Elgutter v. Northwestern Mut. Life Ins. Co.*, (C. C. A. 1898) 86 Fed. 500, 58 U. S. App. 643, 30 C. C. A. 218.

EXECUTIVE

See PRESIDENT

EXECUTIVE DEPARTMENTS

- R. S. 158. *Application of Provisions of This Title*, 245.
- R. S. 159. *Word "Department,"* 249.
- R. S. 160. *Salaries of Heads of Departments*, 249.
- R. S. 161. *Departmental Regulations*, 250.
- R. S. 162. *Hours of Business*, 253.
- R. S. 173. *Chief Clerks to Supervise Subordinate Clerks*, 253.
- R. S. 174. *Chief Clerks to Distribute Duties, etc.*, 253.
- R. S. 175. *Duty of Chief on Receipt of Report*, 253.
- R. S. 176. *Disbursing Clerks*, 254.
- R. S. 177. *Vacancies; How Temporarily Filled*, 255.
- R. S. 178. *Vacancies in Subordinate Offices*, 256.
- R. S. 179. *Discretionary Authority of the President*, 256.
- R. S. 180. *Temporary Appointments Limited to Thirty Days*, 257.
- R. S. 181. *Restriction on Temporary Appointments*, 257.
- R. S. 182. *Extra Compensation Disallowed*, 257.
- R. S. 189. *Employment of Attorneys or Counsel*, 258.
- R. S. 192. *Expenditure for Newspapers*, 259.

Act of March 3, 1883, ch. 128, 260.

- Sec. 1. *Rented Buildings to be Annually Reported by Heads of Departments*, 260.

Act of Feb. 16, 1889, ch. 171, 260.

- Useless Papers in Departments to be Reported to Congress — Examination and Sale*, 260.

Act of March 3, 1893, ch. 211, 260.

- Sec. 4. *Closing Departments for Deceased Ex-Officials Prohibited*, 260.
- 5. *Monthly and Quarterly Reports as to Condition of Business — Bringing up Arrears*, 261.

Act of March 2, 1895, ch. 189, 261.

- Sec. 1. *Disposition of Useless Papers — Further Provisions*, 261.

Act of Feb. 24, 1899, ch. 187, 261.

- Sec. 1. *Recording Clocks Not to be Used*, 261.

Act of June 22, 1906, ch. 3514, 262.

- Sec. 5. *Employees to Serve Three Years in One Department Before Transfer to Another*, 262.
- 6. *Details of Civil Employees to Departments from Outside of District of Columbia Restricted*, 262.

Act of May 22, 1908, ch. 186, 263.

- Sec. 4. *Annual Reports of Traveling Expenses of Department Employees at Washington*, 263.

Act of March 4, 1915, ch. 141, 263.

- Sec. 1. *Detail of Employees to Office of President*, 263.
- 5. *Subscriptions to Periodicals — Payment in Advance*, 263.

CROSS-REFERENCES

Salaries of Heads of Departments, see CONGRESS.

Care of Public Property and Seat of Office, see PUBLIC PROPERTY, BUILDINGS AND GROUNDS.

See generally AGRICULTURE; CIVIL SERVICE; COMMERCE DEPARTMENT; INTERIOR DEPARTMENT; JUSTICE, DEPARTMENT OF; LABOR DEPARTMENT; NAVY; POSTAL SERVICE; STATE DEPARTMENT; TREASURY DEPARTMENT; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

Sec. 158. [Application of provisions of this Title.] The provisions of this Title shall apply to the following Executive Departments:

First. The Department of State.

Second. The Department of War.

Third. The Department of the Treasury.

Fourth. The Department of Justice.

Fifth. The Post-Office Department.

Sixth. The Department of the Navy.

Seventh. The Department of the Interior. [R. S.]

"This title" to which reference is here made comprises R. S. secs. 158-198.

The Department of Agriculture was established as an executive department by an Act of Feb. 9, 1889, ch. 122, given under the title AGRICULTURE, and the above section amended so as to include the same.

The Department of Commerce and Labor was established by an Act of Feb. 14, 1903, ch. 552, § 1, given under the title COMMERCE DEPARTMENT, and the foregoing section amended to include said department.

The Department of Labor was established and the foregoing section amended to include said Department by an Act of March 4, 1913, ch. 141, § 1, given under the title LABOR DEPARTMENT.

Executive departments.—The term "executive departments" in the federal statutes refers only to those departments specified in this section. The heads of these departments compose the Cabinet of the Executive. No board, commission, bureau or office which is not expressly or by implication under the control of the head of one of these departments can be considered as belonging properly to an executive department. (1898) 22 Op. Atty-Gen. 62; (1912) 29 Op. Atty-Gen. 410. The terms "departments," or "executive departments," as used in the Acts of Congress and in the Revised Statutes, invariably apply to one or more of the several executive departments mentioned in this section, or included within its terms by subsequent enactments, unless a different meaning is clearly indicated by the context. (1907) 26 Op. Atty-Gen. 209.

The term "department," as used in laws relating to the civil service, is distinguished from "office," "bureau," and "branch;" and subordinates of the several executive departments are distinguished from employees of the last-mentioned governmental agencies. (1907) 26 Op. Atty-Gen. 209.

The several executive departments are by law established at the seat of government; they have no existence elsewhere. Only those bureaus and offices can be deemed bureaus or offices in any of these departments which are constituted such by the law of its organization. The department, with its bureaus or offices, is in contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. Thus the office of postmaster, or of collector of internal revenue, or of pension agent, or of consul, is not properly a departmental office—not an office in the department having supervision over the branch of the public service to which it belongs. True, an official relation exists here between the office and the department, one, moreover, of subordination of the former to the latter; but this does not make the office a part of the department. (1877) 15 Op. Atty-Gen. 262.

Exposition of the establishment of the executive departments of the United States.—The Constitution does not specify the subordinate, ministerial, or administrative functionaries, by whose agency or counsels the details of the public business

are transacted. It recognizes the existence of such official agents and advisers, but leaves the number and the organization of those departments to be determined by Congress. In the exercise of this duty, the constitutional Congress proceeded at an early day of its first session (July 27, 1789, 1 Stat. L. 28, ch. 4) to establish the "department of foreign affairs," with "a principal officer therein" to be called the secretary for the department of foreign affairs. This Act was the commencement of the organization of executive departments under the Constitution. On Sept. 15, 1789, by Act of Congress (1 Stat. L. 68, ch. 14, § 1), the department denominated the "department of foreign affairs" was changed to that of the "department of state." Next after establishing the department of foreign affairs and at the same session (Aug. 7, 1789, 1 Stat. L. 49, ch. 7), Congress established the "department of war," with its chief officer therein to be called the secretary for the department of war. Following, at the same session, came a "department of treasury" (not the treasury), the head of this department, however, being called the secretary of the treasury. At the same session (Sept. 24, 1789, 1 Stat. L. 73) followed "An Act to establish the judicial courts of the United States," wherein, by section 35 of said Act, provision was made for the appointment of an attorney-general, and by another Act of the same session (Sept. 22, 1789, 1 Stat. L. 70) a postmaster-general was temporarily appointed, but not to be in the same high official relation to the government as that officer occupies at the present time. Such was the original basis of the executive organization of the government. The Secretary of State for political and foreign affairs, the Secretary of War for military and naval matters, the Secretary of the Treasury for those of finance, and the Attorney-General for judicial and legal affairs — these were the immediate superior ministerial officers of the President, as well as his constitutional counselors during the whole period of the administration of the first President of the United States. (1854) 6 Op. Atty-Gen. 326.

✓ **Threefold relation of executive department.**—The Attorney-General, in a communication addressed to the President in 1854, in defining the relations of the executive department, declared that "heads of departments have a threefold relation, namely: 1st, to the President, whose political or confidential ministers they are, to execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion; 2d, to the law, for where the law has directed them to perform certain acts, and where the rights of individuals are dependent on those acts, then in such cases a head of department is an officer of the

law, and amenable to the laws for his conduct; and 3d, to Congress, in the conditions contemplated by the Constitution. This latter relation, that of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty, and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the Government." (1854) 6 Op. Atty-Gen. 326.

✓ **Scope of authority of heads of departments.**—Holding that the Secretary of War had no authority to accept bills of exchange on behalf of the government and that such authority must be sought for mainly in the Acts of Congress, in *The Floyd Acceptances*, (1868) 7 Wall. 666, 19 U. S. (L. ed.) 169, the court said: "We have no officer in this government from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to the fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law."

✓ **Relation of Chief Executive to the various departments.**—The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. *Williams v. U. S.*, (1843) 1 How. 290, 11 U. S. (L. ed.) 135, affirming (1839) 5 Cranch C. C. 619, 28 Fed. Cas. No. 16,715.

The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. So a reservation of lands made at the request of the Secretary of War, for purposes in his department, was considered as being, in legal contemplation, the act of the President. *Wilcox v. Jackson*, (1839) 13 Pet. 498, 10 U. S. (L. ed.) 264; *U. S. v. Farden*, (1878) 99 U. S. 10, 25 U. S. (L. ed.) 267; *Wolsey v. Chapman*, (1879) 101 U. S. 755, 25 U. S. (L. ed.) 915; *Scott v. Carew*, (1904) 196 U. S. 100, 25 S. Ct. 193, 49 U. S. (L. ed.) 403; *U. S. v. Tichenor*, (C. C. Ore. 1882) 12 Fed. 415;

U. S. v. Cutler, (1856) 2 Curt. 617, 25 Fed. Cas. No. 14,911; McCollum v. U. S., (1881) 17 Ct. Cl. 92.

The acts of the heads of departments, within the scope of their powers, are in law the acts of the President. In legal contemplation the head of a department is an arm of the executive. *Wolsey v. Chapman*, (1879) 101 U. S. 755, 25 U. S. (L. ed.) 915; *Runkle v. U. S.*, (1886) 122 U. S. 543, 7 S. Ct. 1141, 30 U. S. (L. ed.) 1167; *Medkirk v. U. S.*, (1909) 44 Ct. Cl. 469.

The President may act through the heads of the different departments, and if the head of one of the executive departments acts it will be presumed, in the absence of evidence to the contrary, that he acted by direction of the President. *Northern Pac. R. Co. v. Mitchell*, (E. D. Wash. 1913) 208 Fed. 469.

But no such power has been delegated to other subordinate officers of the government, whether civil or military, and the acts of such officers without authorization from the President or from Congress, are ineffectual for any purpose. *U. S. v. Tichenor*, (C. C. Ore. 1882) 12 Fed. 415; *Northern Pac. R. Co. v. Mitchell*, (E. D. Wash. 1913) 208 Fed. 469. There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. *Runkle v. U. S.*, (1886) 122 U. S. 543, 7 S. Ct. 1141, 30 U. S. (L. ed.) 1167; (1854) 6 Op. Atty.-Gen. 583; (1854) 6 Op. Atty.-Gen. 680; (1855) 7 Op. Atty.-Gen. 453; (1863) 10 Op. Atty.-Gen. 527.

Where the action required of the President is judicial in its character, not administrative, as, where as Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial, it was held that it cannot be delegated to the head of a department. So a sentence by a court-martial of dismissal of a commissioned officer from service in time of peace, approved by the Secretary of War but not approved by the President, was held to be inoperative. *Runkle v. U. S.*, (1886) 122 U. S. 543, 7 S. Ct. 1141, 30 U. S. (L. ed.) 1167.

But in *U. S. v. Fletcher*, (1892) 148 U. S. 84, 13 S. Ct. 552, 37 U. S. (L. ed.) 378, the case of *Runkle v. U. S.*, *supra*, was questioned upon the ground that the circumstances disclosed by the report of that case were so exceptional as to render it hardly a safe precedent in any other. And it was held that an order approving a sentence of court-martial signed by the Secretary of War was a sufficient authentication of the judgment of the President.

Similarly the Attorney-General ruled that an order made and signed by the Secretary of War, announcing the approval by the President of a court-martial sentence, is sufficiently authenticated by the President, the presumption being that it was made at the direction of the President. (1877) 15 Op. Atty.-Gen. 290.

Duties imposed by Congress.—There are certain political duties imposed upon many officers in the executive departments the discharge of which is under the direction of the President. But Congress may impose upon any executive officer any duty they may think proper, which is not repugnant to the Constitution, and in such cases the duty and responsibility grow out of and are subject to the control of the law and not to the direction of the President. This is emphatically the case where the duty enjoined is of a mere ministerial character. *Kendall v. U. S.*, (1838) 12 Pet. 524, 9 U. S. (L. ed.) 1181.

Conclusiveness of decision of head of department.—Where a final decision has been made by the proper department against one who claims to be a public creditor, such decision cannot be opened after a change has taken place in the head of the department. (1857) 9 Op. Atty.-Gen. 32; (1859) 9 Op. Atty.-Gen. 300.

The head of a department cannot, in a matter involving judgment and discretion, reverse the decision and action of his predecessor, even in a matter relating to the general affairs and management of the business of the department. *Lavalette v. U. S.*, (1864) 1 Ct. Cl. 147; *Jackson v. U. S.*, (1884) 19 Ct. Cl. 504.

The incumbent of a department may review a predecessor's decisions only as to mistakes in matters of facts arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterward discovered and produced. But where a credit has been given or an allowance made by the head of a department, and it is alleged to be an illegal allowance, the courts must be resorted to, to settle the rights between the United States and the party to whom the credit was given. *U. S. v. Bank of Metropolis*, (1841) 15 Pet. 377, 10 U. S. (L. ed.) 774. See also (1831) 2 Op. Atty.-Gen. 463; (1849) 5 Op. Atty.-Gen. 87; (1849) 5 Op. Atty.-Gen. 122; (1852) 5 Op. Atty.-Gen. 664; (1869) 13 Op. Atty.-Gen. 33; (1870) 13 Op. Atty.-Gen. 226; (1871) 13 Op. Atty.-Gen. 387; (1882) 17 Op. Atty.-Gen. 315.

But in (1861) 10 Op. Atty.-Gen. 56, the Attorney-General said: "I know of no statute which prohibits the head of a department from examining and allowing a claim which has before been rejected by his predecessor, even where no new evidence is adduced, and without a statutory provision I presume that he would have

the power to do so. But whilst these decisions are not, therefore, of final effect, they are certainly entitled to great respect, and should not be lightly overthrown.

When not conclusive.—The findings of the land officers that certain lands were agricultural and not coal lands, although not open to collateral attack, are not conclusive against the government when it seeks by suit to cancel a patent issued under the commutation provision of the Homestead Law, upon the ground that it was obtained by means of false and fraudulent proofs. In such a suit the action of the land officers is given appropriate effect by treating it as presumptively right and as requiring the government to carry the burden of proving the fraud. *Washington Securities Co. v. U. S.*, (1913) 234 U. S. 76, 34 S. Ct. 725, 58 U. S. (L. ed.) 1220, *affirming* (C. C. A. 9th Cir. 1912) 194 Fed. 59, 114 C. C. A. 79.

A construction placed upon a statute by the Postmaster-General relating to second-class mail matter does not bind his successor in office so as to require him to await legislative change before giving a different construction to the Act. *Columbian Correspondence College v. Wynne*, (1905) 25 App. Cas. (D. C.) 149, *following* *Payne v. Houghton*, (1903) 22 App. Cas. (D. C.) 234, *affirmed* (1904) 194 U. S. 88, 24 S. Ct. 590, 48 U. S. (L. ed.) 888, *appeal dismissed* (1906) 200 U. S. 615, 26 S. Ct. 758, 60 U. S. (L. ed.) 621.

Decision may be opened.—The final decision of a case before a head of department is binding upon his successors in the same department, but such a decision may be opened by a resolution or Act of Congress directing it to be done. (1868) 12 Op. Atty.-Gen. 355.

Appeal to President.—As a general rule, the President ought not to entertain appeals from the heads of bureaus or other inferior officers of the executive departments. (1863) 10 Op. Atty.-Gen. 527. And it would be a precedent of doubtful propriety for the President to entertain an appeal from the decision of the head of a department respecting a private claim against the government. (1863) 10 Op. Atty.-Gen. 528.

Not binding on courts.—The executive departments are not judicial or even quasi-judicial in character, and their action, while binding on each other, is not binding on the courts. *Alire v. U. S.*, (1865) 1 Ct. Cl. 233.

Resolutions of Congress as affecting head of department.—Separate resolutions of either House of Congress cannot command or control the executive action of a head of department. (1854) 6 Op. Atty.-Gen. 680.

Department of State.—It is to the Department of State that a reference must be made for the official acts of the Presi-

dent in relation to those public measures which he may establish and which are more immediately connected with the duties of some other department. Nevertheless, the President may direct some other department to make known the measures which he may think proper to establish. They are equally his acts whether they emanate from the Department of State or from any other department. *Lockington v. Smith*, (1817) Pet. C. C. 486, 15 Fed. Cas. No. 8,448.

The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. *U. S. v. Eliason*, (1842) 16 Pet. 291, 10 U. S. (L. ed.) 968; (1862) 10 Op. Atty.-Gen. 171.

The Secretary of the Interior has no control whatever over the employment of men by the superintendent of public printing. He cannot fix their wages or supervise the action of the superintendent in that particular. He does not pay them, and has no control whatever of the funds out of which they are paid. He may pay the superintendent for printing done upon the order of his department, but the superintendent disburses without any accountability to him. In short, the superintendent seems to have a department of his own, in which he is in a sense supreme. *U. S. v. Allison*, (1875) 91 U. S. 303, 23 U. S. (L. ed.) 372.

A proclamation setting apart certain lands as a forest reservation may be made by the Secretary of the Interior. It is not necessary that the President sign the proclamation. It will be considered as having been done by the secretary with his approval. *U. S. v. Blendauer*, (D. C. Mont. 1903) 122 Fed. 703, *reversed* on other grounds (C. C. A. 9th Cir. 1904) 128 Fed. 910, 63 C. C. A. 636.

The Postmaster-General in the exercise of the duties of his office appears to be legally independent of the President, who has no authority to prescribe his duties or to control him in the exercise of his official functions. *U. S. v. Kendall*, (1837) 5 Cranch C. C. 163, 26 Fed. Cas. No. 15,517.

Attorney-General as agent of President.—Where a statute (the Confiscation Act) declared "it shall be the duty of the President to cause the seizure," etc., it implied that the seizure was to be made by the agents of the President. And a direction given by the Attorney-General to seize property liable to confiscation under the Act must be regarded as a direction given by the President. *The Confiscation Cases*, (1873) 20 Wall. 92, 22 U. S. (L. ed.) 322.

An opinion of the Attorney-General, addressed to the head of an executive department, is merely advisory and cannot be regarded as a determination of the case to which it refers, unless it appears from the record that the official to whom it was addressed adopted the advice it contained. (1857) 9 Op. Atty.-Gen. 32.

An assistant secretary of the treasury is not a deputy, and cannot, therefore, act in the name of and for the person he assists, but only with him and under his direction, unless otherwise expressly provided by law. *U. S. v. Adams*, (C. C. Ore. 1885) 24 Fed. 348.

Power of executive department to impose fines.—The power of an executive department to impose fines, penalties and forfeitures (as by the Postmaster-General on mail contractors) is derived from stipulations to that effect in the contracts. There is no warrant for it outside of contract. (1857) 9 Op. Atty.-Gen. 32.

Immunity of heads of departments from civil suits.—The same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. *Spaulding v. Vilas*, (1895) 161 U. S. 483, 16 S. Ct. 631, 40 U. S. (L. ed.) 780.

Signature of public officers.—Heads of departments cannot certify by delegation, unless when specially authorized to do so

by act of Congress. (1855) 7 Op. Atty.-Gen. 594.

The Government Printing Office, the Interstate Commerce Commission and the Smithsonian Institution are independent of any of the executive departments mentioned in this section. (1907) 26 Op. Atty.-Gen. 209.

The Bureau of Insular Affairs is an integral part of the War Department. (1907) 26 Op. Atty.-Gen. 209.

The superintendent of public printing is not under the control of any one of the executive departments. Apparently he is more responsible to Congress than to any other authority. *U. S. Allison*, (1875) 91 U. S. 303, 23 U. S. (L. ed.) 372.

The Civil Service Commission is not attached in any wise to any of the executive departments, nor is it subject in any wise to the control of any of the heads of those departments. It is subject to no regulation or control except that of the President himself. (1898) 22 Op. Atty.-Gen. 62.

The office of surgeon-general is one of the distinct or separate bureaus of the War Department. *Parish v. U. S.*, (1879) 100 U. S. 500, 25 U. S. (L. ed.) 763.

An employee in the surgeon-general's office in Washington was held to be an employee of an executive department within the provision of a statute granting additional compensation to certain clerks and employees of the executive departments in Washington. *Schaeffer v. U. S.*, 11 Ct. Cl. 730.

The warden of the jail in the District of Columbia was held to be a bureau or division of the Department of the Interior. *U. S. v. Allison*, (1875) 91 U. S. 303, 23 U. S. (L. ed.) 372.

Judicial notice.—Courts are bound to notice matters of historical notoriety, such as the appointment of a member of the President's Cabinet. *Frederick v. Goodbee*, (1908) 120 La. 783, 45 So. 606.

Sec. 159. [Word "Department."] The word "Department" when used alone in this Title, and Titles five, six, seven, eight, nine, ten, and eleven, means one of the Executive Departments enumerated in the preceding section. [R. S.]

The additional Departments subsequently established were included in this definition. See the notes to the preceding R. S. sec. 158.

Sec. 160. [Salaries of heads of Departments.] Each head of a Department is entitled to a salary of ten thousand dollars a year, to be paid monthly. [R. S.]

Act of March 3, 1873, ch. 226, 17 Stat. L. 486.

By the Act of Jan. 20, 1874, ch. 11, 18 Stat. L. 4, given under the title CONGRESS, so much of the Act from which the above section was drawn as provided for an increase of the salaries mentioned to \$10,000 was repealed, thereby restoring the salaries to \$8,000.

By the Act of Feb. 26, 1907, ch. 1635, § 4, given under the title *CONGRESS*, the compensation of the heads of executive departments who are members of the President's Cabinet was increased to \$12,000.

More particular provisions with reference to the salaries of the heads of the departments will be found under the various departmental titles.

Sec. 161. [Departmental regulations.] The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. [*R. S.*]

Act of July 27, 1789, ch. 4, 1 Stat. L. 28; Act of Sept. 15, 1789, ch. 14, 1 Stat. L. 68; Act of Aug. 7, 1789, ch. 7, 1 Stat. L. 49; Act of Sept. 2, 1789, ch. 12, 1 Stat. L. 65; Act of June 8, 1872, ch. 335, 17 Stat. L. 283; Act of April 30, 1798, ch. 35, 1 Stat. L. 553; Act of June 22, 1870, ch. 150, 16 Stat. L. 163; Act of March 3, 1849, ch. 108, 9 Stat. L. 395.

Regulations made for the government of the department only.—This section, while giving authority to the heads of departments to prescribe regulations, explicitly provides that they must not be inconsistent with law. No authority is created by the statute which enables the heads of departments to make rules for the conduct of persons not connected with the departments, but such regulations, when made, are exclusively for the government of the department, and the conduct of its officers, and the preservation of the papers and property belonging to the department. (1883) 17 Op. Atty.-Gen. 524.

Regulations become a part of the law.—In *U. S. v. Barrows*, (1869) 1 Abb. 351, 24 Fed. Cas. No. 14,529, it was held that a regulation of the Treasury Department promulgated in conformity to an Act of Congress becomes a part of the law, and is of as binding force as if incorporated in the body of the Act itself.

Under the regulations of the Internal Revenue Department promulgated with the approval of the Secretary of the Treasury, providing that officers of the department "will decline to testify as to facts contained in the records or coming to their knowledge in their official capacity, and this prohibition is hereby extended to include also internal revenue storekeepers and gaugers and agents," a storekeeper and gauger stationed at a distillery has no right to divulge information in regard to the business of the distiller obtained by him solely in his official capacity as an internal revenue officer, even when called as a witness in a state court. *Stegall v. Thurman*, (1910) 175 Fed. 813.

Form.—The regulations mentioned in this section need not be promulgated in any set form, nor in writing, but may consist of established usages and practices which have become a kind of common law of the department. *Haas v. Henkel*, (1909) 216 U. S. 462, 30 S. Ct. 249, 54

U. S. (L. ed.) 569, *affirming* (1906) 167 Fed. 211.

Usage as at common law in executive departments.—The head of an executive department, in the distribution of its various duties and responsibilities, is often compelled to exercise his discretion. He is, however, limited in the exercise of his power by the law; but, because of this fact, he need not show a statutory provision for all of his acts. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those acting within their respective limits. *U. S. v. Macdaniel*, (1833) 7 Pet. 1, 8 U. S. (L. ed.) 587.

Purpose of regulations.—Where rights, duties, and obligations are defined by statute they cannot be taken away or abridged by the regulations of an executive department. The object and purpose of such regulations is to carry into effect the law in respect to which they may be promulgated. *Campbell v. U. S.*, (1882) 107 U. S. 407, 2 S. Ct. 759, 27 U. S. (L. ed.) 592; *Laurey v. U. S.*, (1897) 32 Ct. Cl. 259.

It was the evident purpose of Congress in all the legislative enactments which support the regulations "not inconsistent with law" and promulgated by heads of departments, to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly, such a purpose is within the just scope of legislative power. *Ex p. Curtis*, (1882) 106 U. S. 371, 1 S. Ct. 381, 27 U. S. (L. ed.) 232.

Departmental regulations cannot alter laws as enacted.—Regulations promulgated by the heads of executive departments, while they have the force and effect of a statute if not inconsistent with law, may not be extended so as to alter or amend a law already enacted by Congress.

"The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted." *Morrill v. Jones*, (1882) 106 U. S. 466, 1 S. Ct. 423, 27 U. S. (L. ed.) 267.

Regulations cannot prescribe criminal offense.—Regulations of a department cannot prescribe a criminal offense. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted "in violation of a public law, either forbidding or commanding it." *U. S. v. Eaton*, (1892) 144 U. S. 677, 12 S. Ct. 764, 36 U. S. (L. ed.) 591.

Regulations for government of executive departments.—In *Boake v. Comingore*, (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846, it was held that regulations prescribed by the heads of the executive departments, not inconsistent with law, for the "custody, use, and preservation of the records, papers, and property" of the department, are consistent with the Constitution, and that it is competent for such head of a department to take from a subordinate all discretion as to permitting such records, papers, and property in his custody to be used for any other purpose than that which appertains to the business of that department, and reserve for his own determination all matters of that character. A state court cannot impose the duty upon a federal officer having the custody of such papers to produce the same as evidence, nor punish by process for contempt the refusal of a subordinate either to obey a subpoena duces tecum or to testify concerning matters connected with his department, in violation of prescribed regulations lawfully emanating from his executive head. See also *In re Huttman*, (1895) 70 Fed. 699; *In re Weeks*, (1897) 82 Fed. 729.

In the case of *In re Hirsch*, (1896) 74 Fed. 928, Shipman, C. J., in an elaborate opinion expressed an opinion contrary to that rendered in the foregoing cases, *In re Huttman* and *In re Weeks*; but the subsequent decision of the questions involved in all of those cases, in *Boake v. Comingore*, (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846, supports the views expressed in the cases of *In re Huttman* and *In re Weeks*, *supra*.

Resolutions coercing heads of departments.—The authority of each head of a department is a parcel of the executive power of the President. To coerce a head of a department, therefore, is to coerce the President, and this can only be accomplished by law, constitutional in its nature, and enacted in accordance with the forms of the Constitution. No separate resolution of either house of Congress can coerce a head of a department, unless in some particular in which the

law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness. (1854) 6 Op. Atty-Gen. 690.

When mandamus may issue against executive heads of departments.—A writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment and discretion. When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive heads of departments, that is, a service which they are bound to perform without further question, then, if they refuse, the mandamus may issue to compel them. *U. S. v. Blaine*, (1891) 139 U. S. 306, 11 S. Ct. 607, 35 U. S. (L. ed.) 163; *U. S. v. Guthrie*, (1854) 17 How. 284, 15 U. S. (L. ed.) 102. See also *Wap. Reeside*, (1848) Brun. Col. Cas. 571, 20 Fed. Cas. No. 11,656; *McElrath v. McIntosh*, (1848) Brun. Col. Cas. 559, 16 Fed. Cas. No. 8,781.

Conclusiveness of action of heads of executive departments.—The Constitution and statute place the executive departments and their heads under the complete power and control of the President, as the means of carrying his will and orders into effect. But it does not follow from this that the head of a department is a mere clerk, to register the orders and execute the commands of his superior officer; on the contrary, by reason of the nature and requirements of the position, the highest responsibilities attach, and it constantly demands the soundest judgment and discretion; and where the incumbent exercises such judgment and discretion, in respect to any purely executive function appertaining to that department, every other department of the government is bound thereby. It is conclusive. *Floyd Acceptance Case*, (1866) 1 Ct. Cl. 270.

Civil Service Commission not attached to executive departments.—By the term "executive departments," when used in the federal statutes, is properly understood to mean only those departments specified in R. S. sec. 158, *supra*, p. 245, each of which is represented by one particular head; the Department of Agriculture having been added thereto by subsequent legislation. The heads of these departments constitute the Cabinet of the executive department. No board, commission, bureau or office which does not come under the control of the head of one of these departments, either expressly or by implication, can properly be classed as belonging to an executive department. The Civil Service Commission created by Act of Jan. 16, 1883, 22 Stat. L. 403, ch. 27 (see *CIVIL SERVICE*), is not attached in any wise to any of the executive departments, nor under the control of a department

presided over by a cabinet officer, or subject to any regulation or control save that of the President himself. (1898) 22 Op. Atty.-Gen. 62.

Superintendent of public printing not subject to departmental regulations.—The superintendent of public printing seems to have a department of his own, in which he is in a sense supreme. He is not under the control of any one of the executive departments. *U. S. v. Allison*, (1875) 91 U. S. 303, 23 U. S. (L. ed.) 372. See **PUBLIC PRINTING**.

Chiefs of division subject to regulations.—In the Department of Agriculture the term "chief of division" appears to be recognized by Congress in the appropriation acts as attached to the person in charge of the several divisions of natural science which are employed in accomplishing the objects of that department. Such chiefs of divisions are subject to all the regulations in accordance with law which may be promulgated by the head of the department. (1894) 20 Op. Atty.-Gen. 703.

Regulations as to hours of labor, etc.—Under the provisions of this section, authorizing the heads of departments to prescribe regulations, there seems to be no limitation to the right of such heads to demand service of their subordinates, and applications for annual or sick leave and reasons for extending or limiting hours of labor are matters intrusted by statute to the discretion of departmental heads. (1894) 20 Op. Atty.-Gen. 728.

Heads of departments no authority to dictate residence of subordinates.—The Act of March 3, 1849, organizing the Department of the Interior (see **INTERIOR DEPARTMENT**), while it gives to the head of that department a supervisory power over the accounts of marshals, clerks, etc., creates no authority to dictate where they shall live. (1857) 9 Op. Atty.-Gen. 23.

Executive power is in the President and through him in the executive departments.—The Constitution vests the executive power of the government in the President. But in view of the physical impossibility of his performing, in person, all the executive duties and functions of the government, the Constitution anticipates that the public business will be distributed among "executive departments," conducted by "heads of departments," whose constitutional power is included in, and a delegated part of, that of the President. (1854) 6 Op. Atty.-Gen. 583.

Instructions from heads of executive departments presumed to be those of the President.—As a general rule, the direction of the President is to be presumed in all of the instructions and orders issuing from the competent departments, and official instructions issued by the heads of the several executive departments, civil and military, within their respective jurisdictions, are presumed to be valid

and lawful, without containing express reference to the direction of the President. (1855) 7 Op. Atty.-Gen. 453. And see (1862) 10 Op. Atty.-Gen. 171; (1877) 15 Op. Atty.-Gen. 291; *Wilsox v. Jackson*, (1839) 13 Pet. 498, 10 U. S. (L. ed.) 264; *U. S. v. Eliason*, (1842) 16 Pet. 291, 10 U. S. (L. ed.) 968; *Confiscation Cases*, (1873) 20 Wall. 92, 22 U. S. (L. ed.) 320; *U. S. v. Farden*, (1878) 99 U. S. 10, 25 U. S. (L. ed.) 267; *Wolsey v. Chapman*, (1879) 101 U. S. 755, 25 U. S. (L. ed.) 915; *Runkle v. U. S.*, (1887) 122 U. S. 543, 7 S. Ct. 1141, 30 U. S. (L. ed.) 1167; *U. S. v. Fletcher*, (1893) 148 U. S. 84, 13 S. Ct. 552, 37 U. S. (L. ed.) 378.

Regulations of Postmaster-General.—Under this section, regulations of the Postmaster-General relating to the method of determining the salary of postmasters, based on the gross receipts of office, were held valid. *U. S. v. Foster*, (1914) 233 U. S. 515, 34 S. Ct. 666, 58 U. S. (L. ed.) 1074.

Under this section, pursuant to which the Postmaster-General intrusted the determination of matters pertaining to the second-class mailing privilege to the third assistant postmaster-general, it was held to be immaterial to the right of a publisher to have an order excluding his publication from the mails as second-class mail matter reviewed by the courts that the hearing was before the third assistant postmaster-general, if the order was made by the Postmaster-General. *Lewis Pub. Co. v. Wyman*, (1907) 152 Fed. 787.

In *Lewis Pub. Co. v. Wyman*, (C. C. A. 1910) 182 Fed. 13, 104 C. C. A. 453, it was held that the Postmaster-General was authorized to limit the number of sample copies a published who was entitled to mail his publication at second-class rates might send out under those rates to an amount equal to that of the publisher's legitimate subscriptions.

Transfer of duties of clerks.—Where the position of disbursing clerk of the bureau of the census became vacant as a result of the transfer of the incumbent thereof to the position of disbursing clerk of the Department of Commerce and Labor, it was the opinion of the Attorney-General that the department had no authority within this section to transfer the duties formerly performed by the disbursing clerk of the bureau of the census to the disbursing clerk of the Department of Commerce and Labor. (1911) 29 Op. Atty.-Gen. 247.

Powers conferred under this section.—The power conferred by this section is administrative and not legislative. *U. S. v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

Passing upon the constitutionality of the Act of July 27, 1789, now R. S. sec. 161, as well as the specific authority conferred under it, the court, in *Butler v. White*, (C. C. W. Va. 1897) 83 Fed. 578, said:

"That Act has been in force from the day of its passage to the present time. Here is a power conferred by the authority of Congress upon the head of each department, and is in no sense a delegated power of legislation. The evident purpose of Congress was to furnish each department with authority to regulate the conduct of its officers and employees and the distribution and performance of

the business of the office. If such a power to legislate had been delegated under that Act, the courts of this country would long since have been invoked to pass upon the power of Congress to delegate a power to the head of any department which alone belonged to it. But long acquiescence in the Act is of itself sufficient evidence of the right of Congress to pass it."

Sec. 162. [Hours of business.] From the first day of October until the first day of April, in each year, all the Bureaus and offices in the State, War, Treasury, Navy, and Post-Office Departments, and in the General Land-Office, shall be open for the transaction of the public business at least eight hours in each day; and from the first day of April until the first day of October, in each year, at least ten hours in each day; except Sundays and days declared public holidays by law. [R. S.]

Act of July 4, 1836, ch. 352, 5 Stat. L. 112.

Hours of labor and leaves of absence to department employees, see **CIVIL SERVICE**, vol. 2, p. 145.

Closing on decease of ex official, see section 4 of the Act of March 3, 1893, ch. 211, *infra*, p. 260.

R. S. secs. 153 to 172 are given under **CIVIL SERVICE**, vol. 2, p. 146 *et seq.*

Place appointed for transaction of public business.—In all appointments to subordinate positions in any of the executive departments, the employee is required to take the oath of office "and enter on duty." It is impossible that there is, or can be, any other place for the performance of official duty than in the public buildings provided for that purpose, and which are to be kept open during stated hours for the transaction of public business. *Palmer's Case*, (1881) 17 Ct. Cl. 230.

Saturday afternoons.—"Every Saturday after twelve o'clock noon" is a holiday for all purposes within the District of Columbia, and is therefore one of the "days declared public holidays by law" within the meaning of the statutes regulating the number of hours of labor which must be required of all clerks and employees in the executive departments. Consequently, heads of departments are not obliged to require labor of such clerks, etc., after the hour of noon on Saturdays. (1903) 25 Op. Atty.-Gen. 40.

Sec. 173. [Chief clerks to supervise subordinate clerks.] Each chief clerk in the several Departments, and Bureaus, and other offices connected with the Departments, shall supervise, under the direction of his immediate superior, the duties of the other clerks therein, and see that they are faithfully performed. [R. S.]

Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 525.

Sec. 174. [Chief clerks to distribute duties, etc.] Each chief clerk shall take care, from time to time, that the duties of the other clerks are distributed with equality and uniformity, according to the nature of the case. He shall revise such distribution from time to time, for the purpose of correcting any tendency to undue accumulation or reduction of duties, whether arising from individual negligence or incapacity, or from increase or diminution of particular kinds of business. And he shall report monthly to his superior officer any existing defect that he may be aware of in the arrangement or dispatch of business. [R. S.]

Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 525.

Sec. 175. [Duty of chief on receipt of report.] Each head of a Department, chief of a Bureau, or other superior officer, shall, upon receiving each

monthly report of his chief clerk, rendered pursuant to the preceding section, examine the facts stated therein, and take such measures, in the exercise of the powers conferred upon him by law, as may be necessary and proper to amend any existing defects in the arrangement or dispatch of business disclosed by such report. [R. S.]

Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 525.

Further provisions as to reports were made by the Act of March 3, 1893, ch. 211, § 5, given as amended, *infra*, p. 261. See generally the title ESTIMATES, APPROPRIATIONS, AND REPORTS.

Sec. 176. [Disbursing clerks.] The disbursing clerks authorized by law in the several Departments shall be appointed by the heads of the respective Departments, from clerks of the fourth class; and shall each give a bond to the United States for the faithful discharge of the duties of his office according to law in such amount as shall be directed by the Secretary of the Treasury, and with sureties to the satisfaction of the Solicitor of the Treasury; and shall from time to time renew, strengthen, and increase his official bond, as the Secretary of the Treasury may direct. Each disbursing clerk, except the disbursing clerk of the Treasury Department, must, when directed so to do by the head of the Department, superintend the building occupied by his Department. Each disbursing clerk is entitled to receive, in compensation for his services in disbursing, such sum in addition to his salary as a clerk of the fourth class as shall make his whole annual compensation two thousand dollars a year. [R. S.]

Act of March 3, 1853, ch. 97, 10 Stat. L. 209, 211; Act of March 3, 1855, ch. 175, 10 Stat. L. 669; Act of March 3, 1873, ch. 226, 17 Stat. L. 485 (492).

Duties and pay of disbursing clerks.—The Act of March 3, 1853, 10 Stat. L. 211, ch. 97, § 3, provided for the appointment of a disbursing officer for each department from one of the clerks of class No. 4, whose pay was scaled at eighteen hundred dollars per annum, to superintend the buildings of their respective departments, and for such service they were to receive the sum of two hundred dollars in addition to their regular salaries, making their entire salary equal to two thousand dollars per annum, and were required to execute bond. This Act did not relate to the State Department, which, by Act of March 3, 1855, 10 Stat. L. 669, ch. 175, § 4, was brought within the same provisions enacted in behalf of the other departments by the Act of 1853. Such clerk or disbursing officer is not entitled to any commission over and above the amount of his said salary of two thousand dollars for keeping and disbursing the funds of his department and other services enumerated. *Stubbs's Case*, (1861) 10 Op. Atty.-Gen. 31.

Adjustment of accounts of disbursing officers.—Vast sums of money are paid to parties for salaries and on other accounts by disbursing officers before the claims have passed the treasury accounting. All of such officers are under bonds,

and responsible for the legality and correctness of their payments. Their accounts are finally settled through the proper accounting officers, but not until each and every item therein has been subjected to careful examination and adjustment, and only such are allowed as are found to be properly and sufficiently vouched for and shown to have been legally and rightly paid. All others are rejected, and the disbursing officer and his bondsmen are held liable for any balances found against him upon such final settlement. *McKnight's Case*, (1877) 13 Ct. Cl. 304.

Duty and pay of chief clerk of national board of health.—By the Act of July 1, 1879, 21 Stat. L. 46, ch. 61, § 5, "the chief clerk of the national board of health shall act as disbursing agent for the board, and shall give bond conformably to section 176 of the Revised Statutes, for the faithful performance of that duty, and for that service he shall receive three hundred dollars per annum in addition to his salary as chief clerk." This provision is mandatory, and the Secretary of the Treasury has no authority under this section to diminish or take away the salary. *Dunwoody v. U. S.*, (1892) 143 U. S. 578, 12 S. Ct. 465, 36 U. S. (L. ed.) 269, (1887) 22 Ct. Cl. 269. See HEALTH AND QUARANTINE.

Sec. 177. [Vacancies; how temporarily filled.] In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease. [R. S.]

Act of July 23, 1868, ch. 227, 15 Stat. L. 168.

General application.—The Act of July 23, 1868, is general in its application to all departments of the government. (1903) 24 Op. Atty-Gen. 646.

Authority of assistants to act implied by signature as such to documents.—The signature of a "first or sole assistant," as the acting head of a department, when attached to a document of that department, implies that one of the conditions provided in this section, which authorizes him to act in that capacity, had arisen. *Miller v. New York*, (1883) 109 U. S. 385, 3 S. Ct. 228, 27 U. S. (L. ed.) 971; *Marsh v. Nichols*, (1888) 128 U. S. 605, 9 S. Ct. 168, 32 U. S. (L. ed.) 538.

Assistant head of departments—authority to act.—It cannot be doubted that under the provisions of this section and R. S. sec. 161, *supra*, p. 250, the Secretary of the Treasury may assign to the assistant secretary or secretaries of that department the duty of determining appeals from assessments made by collectors of customs duties, and in the absence or sickness of the head of that department such assistant secretary may lawfully perform his duties in respect to such matters which have to be determined, settled, and adjudicated in that department. *U. S. v. Peralta*, (1856) 19 How. 543, 15 U. S. (L. ed.) 678; *Parish v. U. S.*, (1879) 100 U. S. 500, 25 U. S. (L. ed.) 763; *Chadwick v. U. S.*, (1880) 3 Fed. 758, (1888) U. S. v. Adams, (1885) 24 Fed. 348; *John Shillito Co. v. McClung*, (C. C. A. 1892) 51 Fed. 868, 6 U. S. App. 128, 2 C. C. A. 526; (1888) 19 Op. Atty-Gen. 133.

Presumption of authority.—In *In re Jem Yuen*, (1910) 188 Fed. 350, it was held that where an appeal from a deportation order was heard and decided by the acting secretary of commerce and labor, it would be presumed, the contrary not appearing, that the acting secretary was at the time lawfully exercising the secretary's powers, as he was authorized to do by this section.

Duties regarding Tariff Act.—Under this section and R. S. sec. 161, *supra*, p. 250, authorizing the head of each department to prescribe regulations not inconsistent with law for the government of the department, and R. S. sec. 245 (see TREASURY DEPARTMENT) providing that "assistant secretaries of the treasury shall . . . perform such . . . duties in the office of the Secretary of the Treasury as may be prescribed by the secretary or by law."

it was held that the Secretary of the Treasury could require an assistant secretary to "ascertain, determine, and declare" the amount of foreign sugar bounties, under the Tariff Act of 1897, that being a duty assigned "the Secretary of the Treasury" by said Act, and where an assistant secretary issued a declaration under said section it was presumed, in the absence of evidence to the contrary, that he performed a duty in accordance with law, and that the declaration was properly issued. *Franklin Sugar Refining Co. v. U. S.*, (1910) 178 Fed. 743.

Construction of presidential order.—A presidential order authorizing another to perform the duties of the Secretary of Labor in the absence of the secretary and the assistant secretary must be applied strictly only in the absence of the secretary and assistant secretary. However inconvenient it may be if the secretary and assistant are not absent, and particularly if both are present, the performance of their duties by another is unauthorized by statute. *See p. Tsuie Shue*, (N. D. Cal. 1914) 218 Fed. 256, wherein it appeared that a Chinese person was excluded from entry by the local immigration officers and had taken an appeal to the Secretary of Labor and that notwithstanding the fact that such secretary and his assistant were present at their posts of duty in the department at Washington the appeal was not heard by them or either of them, but was heard and determined by another pursuant to the following executive order: "Pursuant to the authority contained in section 179 of the Revised Statutes, I hereby authorize and direct J. B. Densmore, Solicitor of the Department of Labor, to perform the duties of the Secretary of Labor during the absence of the Secretary of Labor and the assistant secretary of labor." Holding that the appellant had been deprived of a fair hearing in that his appeal had been heard and determined by one not authorized to do so, the court said: "In the case at bar it is practically conceded, and conclusively established, that the appeal was not determined by the acting secretary in the absence of the secretary and assistant secretary, but that, on the contrary, both were present and performing the duties of their office at the time the appeal was determined. The appellants were by law entitled to appeal to the Secretary of Labor, and

entitled to have their appeal heard and determined by him, except as above stated, and the determination of their

appeal by another, not authorized, is neither a fair hearing nor due process of law."

Sec. 178. [Vacancies in subordinate offices.] In case of the death, resignation, absence, or sickness of the chief of any Bureau, or of any officer thereof, whose appointment is not vested in the head of the Department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease. [R. S.]

Act of July 23, 1868, ch. 227, 15 Stat. L. 168.

Navy Department bureau offices.—In this section the words "the assistant or deputy of such chief or of such officer" can only refer to assistants or deputies whose appointment is specifically provided for by statute. There is no specific provision for the assignment of assistants to chiefs of bureaus from commissioned officers of the navy, and such officers are not authorized, under said section, to perform the duties of their chief in case of his absence or sickness. (1890) 10 Op. Atty.-Gen. 503.

An officer of the navy, detailed and assigned to duty by the Secretary of the Navy, as an assistant to the chief of a bureau cannot be authorized to perform the duties of such chief under the provisions of this section. The words "the assistant or deputy of such chief or of such officer" used in this section, refer only to assistants or deputies whose appointment is specifically provided for by statute. (1909) 28 Op. Atty.-Gen. 95.

A deputy comptroller of the currency may exercise the power and discharge the duties attached to the office of comptroller during a vacancy in that office or in the absence or inability of the comp-

troller. If necessary the court will also take judicial notice that a certain person was deputy comptroller and will assume that at the date of his certificate he was authorized to exercise the powers and discharge the duties of the comptroller and was therefore at the time acting comptroller. *Weitzel v. Brown*, (Mass. 1916) 112 N. E. 945.

Vacancies in offices of chiefs of bureaus.

—When the place of any chief of bureau named in section 10 of the Act of March 3, 1883, 22 Stat. L. 565, ch. 130 (see title *HOSPITALS AND ASYLUMS*) has been temporarily filled under this section, the person so temporarily acting may perform the duties of such officer as a member of the board of commissioners of the Soldiers' Home, just as he performs the duties of the officers in whose stead he is acting. (1901) 23 Op. Atty.-Gen. 473; (1892) 20 Op. Atty.-Gen. 483.

Assistant commissioner of patents.—As to the power of the assistant commissioner of patents to hear and decide an appeal taken to the commissioner in an interference proceeding, see *U. S. v. Duell*, (1901) 17 App. Cas. (D. C.) 575.

Sec. 179. [Discretionary authority of the President.] In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease. [R. S.]

Act of July 23, 1868, ch. 227, 15 Stat. L. 168; Act of June 22, 1870, ch. 150, 16 Stat. L. 162.

Who may be authorized to fill vacancy.

—The person who may be authorized and directed to perform the duties of a vacant office under this section must be an officer in a department. It is not sufficient that he has been appointed an officer by the President, by and with the advice and consent of the Senate; he must hold an

office in a department which is established by law. So officers of the navy designated by the Secretary of the Navy to act in an advisory capacity to him, but without executive authority over the other bureaus or officers of the Navy Department, cannot be legally designated by the President to act as Secretary of the Navy

Juring the absence or sickness of the secretary or assistant secretary. Such aids, although as rear-admirals and captains and commanders they are officers in the public service of the government, are not "other officers" in the departments eligible for such temporary appointment under the provisions of this section. (1909) 28 Op. Atty.-Gen. 95.

Vacancy caused by retirement.—A vacancy caused by the retirement of a head of a department may be temporarily filled, under this section. It may be well said that, in the eye of the law, a retired officer is "absent," he being incapable of rendering the service required. (1890) 19 Op. Atty.-Gen. 500.

Statute applies to existing and future vacancies.—The Act of July 23, 1868, ch. 227, 15 Stat. L. 168, from the time it took effect as a law, in all of its principal provisions, applied to all existing

vacancies caused by death or resignation. It embraced heads of departments, chiefs of bureaus, and other officers thereof. The reason for the enactment applied with the same force to an existing vacancy as to one which should thereafter occur. The words "in case of death, resignation, absence, or sickness" of an officer, are as appropriate to describe existing facts as those which take place in the future. *American Wood Paper Co. v. Glen's Falls Paper Co.*, (1870) 8 Blatchf. 513, 1 Fed. Cas. No. 321, 321a.

Acting secretary invested with authority in absence of chief.—In the absence of the Secretary of War, the authority with which he is invested can be exercised by the officer who, under the law, becomes for the time acting secretary of war. *Ryan v. U. S.*, (1890) 136 U. S. 66, 10 S. Ct. 913, 34 U. S. (L. ed.) 447.

Sec. 180. [Temporary appointments limited to thirty days.] A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than thirty days. [R. S.]

Act of July 23, 1868, ch. 227, 15 Stat. L. 168.

This section was amended so as to read as above given by the Act of Feb. 6, 1891, ch. 113, 26 Stat. L. 733. Prior to this amendment the last two words were "ten days."

Computation of time.—In construing the limitation of time imposed on temporary appointments, there has been some conflict in the opinions of the Attorney-General. In reply to an inquiry of the Secretary of the Treasury, Attorney-General Devens gave it as his opinion that the (then) ten days referred to in this section must be computed from the date the President acted in making a temporary appointment to fill a vacancy, and not from the date of the death or resignation of the head of a department. (1878) 15 Op. Atty.-Gen. 457.

But in (1891) 20 Op. Atty.-Gen. 8, this opinion was not accepted and it was held that where there is a vacancy in the head of a department, it could not be tem-

porarily filled for a longer period than the (then) ten days, either by operation of law or by designation of the President. See to the same effect (1884) 18 Op. Atty.-Gen. 50, 58 in conflict with former opinion (1883) 17 Op. Atty.-Gen. 535.

Power of President to fill vacancy limited to the time prescribed by statute.—When a vacancy has been temporarily filled once by the President for the period prescribed, the power conferred by statute is exhausted; it is not competent to the President to appoint either the same or another officer to perform thereafter the duties of the vacant office for an additional period. (1880) 16 Op. Atty.-Gen. 596; (1883) 17 Op. Atty.-Gen. 530.

Sec. 181. [Restriction on temporary appointments.] No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections one hundred and seventy-seven and one hundred and seventy-eight, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate. [R. S.]

Act of July 23, 1868, ch. 227, 15 Stat. L. 168.

Sec. 182. [Extra compensation disallowed.] An officer performing the duties of another office, during a vacancy, as authorized by sections one

hundred and seventy-seven, one hundred and seventy-eight, and one hundred and seventy-nine, is not by reason thereof entitled to any other compensation than that attached to his proper office. [R. S.]

Act of July 23, 1868, ch. 227, 15 Stat. L. 168.

Temporary officer not entitled to extra compensation.—The prohibition contained in this section concerning the extra compensation of officers was designed to be general and to apply to every officer performing the duties of an office temporarily vacant, whether the vacancy was caused by death, resignation, absence, or

sickness, and whether such duties devolved upon him by operation of the statute or appointment of the President, and such officer is not entitled to any salary other than that which he holds which involves an increase of compensation. (1862) 13 Op. Atty.-Gen. 8; (1871) 13 Op. Atty.-Gen. 512.

R. S. sec. 183 relates to authority to administer oaths to witnesses and is given under the title PUBLIC OFFICERS.

R. S. secs. 184-188 inclusive, relating to claims, are given under the title CLAIMS.

Sec. 189. [Employment of attorneys or counsel.] No head of a Department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same. [R. S.]

Act of June 22, 1870, ch. 150, 16 Stat. L. 164.

See the title JUSTICE, DEPARTMENT OF.

Attorney-General to control Department of Justice.—By the Act of June 22, 1870, ch. 150, 16 Stat. L. 164, Congress plainly intended to confine to the Department of Justice all the litigation and all of the law business in which the United States is interested, and which theretofore had been scattered among different public officers, departments, and branches of the government, and to break up a practice of frequently employing unofficial attorneys in the public service, by assigning to the Attorney-General the supervision and control thereof. *Perry v. U. S.*, (1893) 28 Ct. Cl. 483.

Prior to the enactment by Congress of the law of June 22, 1870, it was within the discretion of the heads of departments to employ a special counsel for the conduct of any legal business arising in their respective departments. The existence of this power to employ counsel was expressly recognized in the Act of Feb. 26, 1853, "to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District Courts of the United States," etc. See opinion of Hon. Caleb Cushing, (1855) 7 Op. Atty.-Gen. 141; and subsequent opinions holding, in effect, the same views, which were founded on the Act of Feb. 26, 1853, see *Bryan's Case*, (1861) 10 Op. Atty.-Gen. 41; (1868) 12 Op. Atty.-Gen. 368.

When district attorneys entitled to special compensation.—The question whether a United States district attorney is entitled to special compensation for services in examining titles to land proposed to be purchased by the government, has been discussed by different attorneys-general prior to the enactment of the Act of June 22, 1870, ch. 150, 16 Stat. L. 164, and they

have uniformly held that he is entitled thereto, upon the ground that such services are not included in the statutory provisions prescribing the fees of that officer. See (1855) 7 Op. Atty.-Gen. 46; (1866) 11 Op. Atty.-Gen. 433; (1868) 12 Op. Atty.-Gen. 416. These opinions bear date prior to the enactment of the Revised Statutes, but at the time they were given the law regulating the compensation of district attorneys was, in the main, substantially the same as at present. But their employment must be under authority of the Attorney-General, who shall fix the amount of their compensation, to be paid out of the appropriation made for the purchase of the land. (1887) 19 Op. Atty.-Gen. 63; *Weed v. U. S.*, (1897) 82 Fed. 414.

For opinions affecting the question of the authority of the heads of the several executive departments to employ counsel in matters specially relating to their respective departments, see further (1871) 13 Op. Atty.-Gen. 514 (Navy Department); (1872) 14 Op. Atty.-Gen. 13 (Navy Department); (1885) 18 Op. Atty.-Gen. 135 (Navy Department); (1878) 16 Op. Atty.-Gen. 99 (Treasury Department); (1893) 20 Op. Atty.-Gen. 655 (Treasury Department); (1885) 18 Op. Atty.-Gen. 124 (War Department); (1889) 19 Op. Atty.-Gen. 328 (Agricultural Department).

Employment of foreign counsel by Secretary of Navy.—In view of the above section the Secretary of the Navy is not warranted in employing counsel in a foreign country to institute a suit in behalf of the United States to recover money for injury to a United States war vessel, but should refer the matter to the Department

of Justice, which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that

such suits shall be brought in appropriate cases. (1895) 21 Op. Atty.-Gen. 195.

R. S. sec. 190, providing that persons formerly in departments are not to prosecute claims, is given in the title **CLAIMS**.

R. S. sec. 191 was as follows:

"SEC. 191. The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided." Act of March 30, 1868, ch. 36, 15 Stat. L. 54.

It is directly repealed by Act of July 31, 1894, ch. 174, § 8, 28 Stat. L. 208, which Act contains substitute provisions. See the title **TREASURY DEPARTMENT**.

For decisions and opinions under R. S. sec. 191, see (1869) 13 Op. Atty.-Gen. 6, 167; (1872) 14 Op. Atty.-Gen. 65; (1876) 15 Op. Atty.-Gen. 139, 596; (1877) 15 Op. Atty.-Gen. 192, 626; (1881) 17 Op. Atty.-Gen. 233; (1893) 20 Op. Atty.-Gen. 655; *U. S. v. Rand*, (C. C. A. 1892) 53 Fed. 348, 5 U. S. App. 230, 3 C. C. A. 556; *U. S. v. Windom*, (1891) 137 U. S. 636, 11 S. Ct. 197, 34 U. S. (L. ed.) 811; *Duval v. U. S.*, (1889) 25 Ct. Cl. 57; *Matter of Billings*, (1888) 23 Ct. Cl. 166; *Mississippi Cent. R. Co. v. U. S.*, (1888) 23 Ct. Cl. 32; *Baltimore, etc., R. Co. v. U. S.*, (1899) 34 Ct. Cl. 484; *Real Estate*

Sav. Bank's Case, (1880) 16 Ct. Cl. 352; *McKnight's Case*, (1877) 13 Ct. Cl. 307; *McKee's Case*, (1876) 12 Ct. Cl. 533; *Delaware River Steamboat Co.'s Case*, (1869) 5 Ct. Cl. 55; *U. S. v. Cadwalader*, (1835) Gilp. 563, 25 Fed. Cas. No. 14,706; *U. S. v. Jones*, (1855) 18 How. 92, 15 U. S. (L. ed.) 274; *U. S. v. Lynch*, (1890) 137 U. S. 280, 11 S. Ct. 114, 34 U. S. (L. ed.) 700; *Stanton v. U. S.*, (1889) 37 Fed. 252; *Erwin v. U. S.*, (1889) 37 Fed. 470; *Harmon v. U. S.*, (1890) 43 Fed. 560, *affirmed* (1893) 147 U. S. 268, 13 S. Ct. 327, 37 U. S. (L. ed.) 164.

Sec. 192. [Expenditure for newspapers.] The amount expended in any one year for newspapers, for any Department, except the Department of State, including all the Bureaus and offices connected therewith, shall not exceed one hundred dollars. [R. S.]

Act of Aug. 26, 1842, ch. 202, 5 Stat. L. 526.

As originally enacted this section contained the following provision: "And all newspapers purchased with the public money for the use of either of the Departments must be preserved as files for such Department." This was repealed by a provision of the Act of June 22, 1906, ch. 3514, § 7, 34 Stat. L. 449, which provided that: "So much of section one hundred and ninety-two of the Revised Statutes of the United States as requires newspapers purchased for the use of the Executive Departments to be preserved for the permanent files of such Departments be, and the same is hereby, repealed."

This section was further limited by a provision of the Army Appropriation Act of March 2, 1903, ch. 975, § 1, as follows: "That section one hundred and ninety-two, Revised Statutes, shall not apply to the subscriptions to newspapers by the military information division for the fiscal years ending June thirtieth, nineteen hundred, June thirtieth, nineteen hundred and one, June thirtieth, nineteen hundred and two, June thirtieth, nineteen hundred and three, and thereafter." [32 Stat. L. 929.]

Purchase of newspapers.—Questions as to the purchase of newspapers for the use of bureaus situated outside the seat of

government are to be decided by the Comptroller of the Treasury. (1895) 21 Op. Atty.-Gen. 178.

For R. S. secs. 193-196 inclusive, see the title **ESTIMATES, APPROPRIATIONS AND REPORTS**.

For R. S. sec. 197 see the title **PUBLIC PROPERTY, BUILDINGS AND GROUNDS**.

For a reference to R. S. sec. 198 see the title **PUBLIC DOCUMENTS**.

[SEC. 1.] **[Rented buildings to be annually reported by heads of departments.]** * * * It shall be the duty of the heads of the several executive departments to submit to Congress each year, in the annual estimates of appropriations, a statement of the number of buildings rented by their respective departments, the purposes for which rented, and the annual rental of each. [22 Stat. L. 552.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1883, ch. 128.

An act to authorize and provide for the disposition of useless papers in the Executive Departments.

[Act of Feb. 16, 1889, ch. 171, 25 Stat. L. 672.]

[Useless papers in Departments to be reported to Congress — examination and sale.] That whenever there shall be in any one of the Executive Departments of the Government an accumulation of files of papers, which are not needed or useful in the transaction of the current business of such Department and have no permanent value or historical interest, it shall be the duty of the head of such Department to submit to Congress a report of that fact, accompanied by a concise statement of the condition and character of such papers. And upon the submission of such report, it shall be the duty of the presiding officer of the Senate to appoint two Senators, and of the Speaker of the House of Representatives to appoint two Representatives, and the Senators and Representatives so appointed shall constitute a joint committee, to which shall be referred such report, with the accompanying statement of the condition and character of such papers, and such joint committee shall meet and examine such report and statement and the papers therein described, and submit to the Senate and House, respectively, a report of such examination and their recommendation. And if they report that such files of papers, or any part thereof, are not needed or useful in the transaction of the current business of such Department, and have no permanent value or historical interest, then it shall be the duty of such head of the Department to sell as waste paper, or otherwise dispose of such files of papers upon the best obtainable terms after due publication of notice inviting proposals therefor, and receive and pay the proceeds thereof into the Treasury of the United States, and make report thereof to Congress. [25 Stat. L. 672.]

This Act was amended by the Act of March 2, 1895, ch. 189, § 1, *infra*, p. 261.

Disposition of useless papers.—The opinion of the Secretary of the Treasury, in which the Attorney-General concurred, was that the clause in the Act of Congress of Aug. 5, 1882, 22 Stat. L. 228, ch. 389, whereby the Secretary of the Treasury was authorized to sell or otherwise dispose of useless papers accumulating in the office

of the auditor of the treasury for the Post Office Department, was impliedly repealed by the general and comprehensive Act of Feb. 16, 1889, 25 Stat. L. 672, ch. 171, for the reason that there was an insuperable repugnancy between the two statutes. (1895) 21 Op. Atty-Gen. 151.

SEC. 4. [Closing Departments for deceased ex-officials prohibited.]
That hereafter the Executive Departments of the Government shall not be

closed as a mark to the memory of any deceased ex-official of the United States. [27 Stat. L. 715.]

This section 4 and the following part of section 5 are from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1893, ch. 211.

SEC. 5. [Monthly and quarterly reports as to condition of business — bringing up arrears.] * * * Hereafter it shall be the duty of the head of each Executive Department to require monthly reports to be made to him as to the condition of the public business in the several bureaus or offices of his Department at Washington; and in each case where such reports disclose that the public business is in arrears, the head of the Department in which such arrears exist shall require, as provided herein, an extension of the hours of service to such clerks or employees as may be necessary to bring up such arrears of public business. Hereafter it shall be the duty of the head of each Executive Department, or other Government establishment at the seat of government, not under an Executive Department, to make at the expiration of each quarter of the fiscal year a written report to the President as to the condition of the public business in his Executive Department or Government establishment, and whether any branch thereof is in arrears. [27 Stat. L. 715, as amended by 30 Stat. L. 317.]

See the note to the preceding section 4 of this Act. This section of said Act of March 3, 1893, ch. 211, 27 Stat. L. 715 was amended to read as above given by section 7 of the Legislative, Executive, and Judicial Appropriation Act of March 15, 1898, ch. 68, 30 Stat. L. 317.

The first part of section 5 of the Act of March 3, 1893, ch. 211, amended as above stated, relates to hours of labor and leaves of absence for departmental employees, and is given under the title CIVIL SERVICE, vol. 2, p. 164.

[SEC. 1.] [Disposition of useless papers — further provisions.] * * * That the Act entitled "An Act to authorize and provide for the disposition of useless papers in the Executive Department," approved February sixteenth, eighteen hundred and eighty-nine, be, and the same is hereby, amended so as to include in its provisions any accumulation of files of papers of a like character therein described now or hereafter in the various public buildings under the control of the several Executive Departments of the Government. [28 Stat. L. 933.]

This is from the Sundry Civil Appropriation Act of March 2, 1895, ch. 189. The Act of Feb. 16, 1889, ch. 171, amended by the text is given *supra*, p. 260.

[SEC. 1.] [Recording clocks not to be used.] * * * No money appropriated by this Act shall be used for expense of repairing recording clocks used for recording time of clerks or other employees in any of the Executive Departments at Washington, nor shall there hereafter be used in any of the Executive Departments at Washington any such recording clocks. [30 Stat. L. 864.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Feb. 24, 1899, ch. 187. It is broader than a similar provision contained in the Deficiency Appropriation Act of July 7, 1898, ch. 571, viz.: "That no recording clocks used for

recording time of clerks or other employees shall be purchased for use in any of the executive departments at Washington, District of Columbia, except from moneys specifically appropriated therefor." [30 Stat. L. 655.]

SEC. 5. [Employees to serve three years in one department before transfer to another.] It shall not be lawful hereafter for any clerk or other employee in the classified service in any of the Executive Departments to be transferred from one Department to another Department until such clerk or other employee shall have served for a term of three years in the Department from which he desires to be transferred. [34 Stat. L. 449.]

The foregoing section 5 and the following section 6 are from the Legislative, Executive, and Judicial Appropriation Act of June 22, 1906, ch. 3514.

Construction.—The language of this section imports that the persons to whom it applies are actually in the departments at the seat of government, or that the performance of duties away from such departments is by direct orders from and under supervision by those departments. (1907) 26 Op. Atty.-Gen. 254.

This section does not apply to employees and subordinates in post offices, pension agencies, customs houses, ordnance establishments, sub-treasuries, navy yards, and quartermasters' establishments. (1907) 26 Op. Atty.-Gen. 254.

The term "department," as used in laws relating to the civil service is distinguished from "office," "bureau," and "branch;" and subordinates of the several executive departments are distinguished from employees of the last-mentioned governmental agencies. (1907) 26 Op. Atty.-Gen. 209.

Transfer from independent office to a department.—It is lawful for the Civil Service Commission to consent to the transfer of a classified employee from an independent office of the government to a department or another independent office or bureau, although such employee may not have served three years in the office or bureau from which he seeks transfer, as is required by this section of clerks and

employees of the executive departments. (1907) 26 Op. Atty.-Gen. 209.

The "field force" of an executive department—that is, its classified employees under its immediate control, as inspectors, examiners, and agents, though employed usually or invariably away from the seat of government—are governed by the above-mentioned statutory provision with regard to transfers. (1907) 26 Op. Atty.-Gen. 209.

Philippine commission—Isthmian canal commission.—The provisions of this section are not applicable to the Philippine commission or to the Isthmian canal commission. (1907) 26 Op. Atty.-Gen. 209.

Employees of forest service.—Classified employees on the rolls of the forest service, Department of Agriculture, in Washington, are required by the terms of this section to serve three years before their transfer to other departments is permissible. (1909) 27 Op. Atty.-Gen. 421.

Waiver of three-year limit.—The Civil Service Commission has authority under clause (a), sec. 8, of Civil Service Rule X, within its discretion and in view of all the circumstances of the case, to waive the three-year limit of time required by this section for service of clerks in one executive department before transfer to another. (1908) 27 Op. Atty.-Gen. 100.

SEC. 6. [Details of civil employees to departments from outside of District of Columbia restricted.] Hereafter it shall be unlawful to detail civil officers, clerks, or other subordinate employees who are authorized or employed under or paid from appropriations made for the military or naval establishments, or any other branch of the public service outside of the District of Columbia, except those officers and employees whose details are now specially provided by law, for duty in any bureau, office, or other division of any Executive Department in the District of Columbia, except temporary details for duty connected with their respective offices. [34 Stat. L. 449.]

See the note to the preceding section 5 of this Act.

SEC. 4. [Annual reports of traveling expenses of department employees at Washington.] It shall be the duty of the head of each Executive Department and other Government establishment at Washington to submit to Congress at the beginning of each regular session a statement showing in detail what officers or employees (other than special agents, inspectors, or employees, who in the discharge of their regular duties are required to constantly travel) of such Executive Department or other Government establishment have traveled on official business from Washington to points outside of the District of Columbia during the preceding fiscal year, giving in each case the full title of the official or employee, the destination or destinations of such travel, the business or work on account of which the same was made, and the total expense to the United States charged in each case. [35 Stat. L. 244.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 22, 1908, ch. 186.

[SEC. 1.] [Detail of employees to office of President.] * * * That employees of the executive departments and other establishments of the executive branch of the Government may be detailed from time to time to the office of the President of the United States for such temporary assistance as may be necessary. [38 Stat. L. 1007.]

This and the following section 5 are from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141. Identical provisions relating to details of employees have occurred in similar Appropriation Acts for prior years.

SEC. 5. [Subscriptions to periodicals—payment in advance.] That hereafter subscriptions to periodicals, which have been certified in writing by the respective heads of the executive departments or other Government establishments to be required for official use, may be paid in advance from appropriations available therefor. [38 Stat. L. 1049.]

See the note to the preceding section 1 of this Act.

EXECUTIVE MANSION

See PUBLIC PROPERTY, BUILDINGS AND GROUNDS

EXECUTORS AND ADMINISTRATORS

See CLAIMS; INTERNAL REVENUE; NATIONAL BANKS; PATENTS; PUBLIC LANDS

EXEMPTIONS

See BANKRUPTCY; INTERNAL REVENUE; JUDICIARY; MILITIA; PENSIONS;
and consult the General Index

EXPATRIATION

See CITIZENSHIP

EXPEDITING ACTS

See INTERSTATE COMMERCE; TRADE COMBINATIONS AND TRUSTS

EXPERIMENT STATIONS

See AGRICULTURE

EXPORTS

See IMPORTS AND EXPORTS

EXTENSION WORK

See EDUCATION

EXTORTION

See CUSTOMS DUTIES; INTERNAL REVENUE; PENAL LAWS

EXTRADITION

- R. S. 5270. *Fugitives from the Justice of a Foreign Country*, 265.
R. S. 5271. *Evidence on the Hearing*, 281.
R. S. 5272. *Surrender of the Fugitive*, 282.
R. S. 5273. *Time Allowed for Extradition*, 283.
R. S. 5274. *Continuance of Provisions Limited*, 283.
R. S. 5275. *Protection of the Accused*, 283.
R. S. 5276. *Powers of Agent Receiving Offenders Delivered by a Foreign Government*, 284.
R. S. 5277. *Penalty for Opposing Agent, etc.*, 284.
R. S. 5278. *Fugitives from Justice of a State or Territory*, 285.
R. S. 5279. *Penalty for Resisting Agent, etc.*, 311.
Act of Aug. 3, 1882, ch. 378, 312.
 Sec. 1. Extradition Cases to be Heard Publicly, etc., 312.
 3. Subpœna of Witnesses for Defendant — Costs, 312.
 4. Witness Fees, Costs, etc., Certified to and Paid by Secretary of State, etc., 313.
 5. Evidence on Hearing, 313.
 6. Repeal, 315.

Act of June 28, 1902, ch. 1301, 315.

- Sec. 1. Fees and Costs — Out of What Appropriations Payable*, 315.

CROSS-REFERENCE

Escape of Prisoners, see PENAL LAWS.

Sec. 5270. [Fugitives from the justice of a foreign country.] Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his

warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. *Provided*, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein by the commission of any of the following offenses, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery; burglary, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering, or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: *And provided further*, That no return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial. [R. S.]

Act of Aug. 12, 1848, ch. 167, 9 Stat. L. 302.

This section was amended to read as above given by the Act of June 6, 1900, ch. 793, 31 Stat. L. 656. The amendment consisted in adding the three provisos.

Sections 5270 to 5280 constitute title LXVI of the Revised Statutes, "Extradition."

The provisions of R. S. secs. 5270-5277 inclusive, with their amendments were made applicable to the Philippine Islands by an Act of Feb. 6, 1905, ch. 454, § 1, 33 Stat. L. 698. See the title PHILIPPINE ISLANDS.

- I. Constitutionality, 267.
- II. Jurisdiction of federal government over extraditions, 267.
- III. Treaty as affecting right to extradition, 267.
- IV. Applicability to future treaties, 269.
- V. Construction of treaties, 269.
- VI. Foreign governments, 271.
- VII. Necessity and sufficiency of demand for extradition, 271.
- VIII. Complaint, 272.
- IX. Warrant of arrest, 273.
 - 1. Foreign, 273.
 - 2. Domestic, 274.
- X. Bail, 274.
- XI. Jurisdiction to hear complaint, 275.
- XII. Hearing on complaint, 275.
- XIII. Adjournments, 277.
- XIV. Decision and subsequent proceedings, 278.
 - 1. In general, 278
 - 2. Review of decision, 278.
 - 3. Second warrant of arrest, 279.
- XV. Method of surrender as defense to crime, 280.
- XVI. Trial for different offense, 281.

I. CONSTITUTIONALITY

Applicability of fifth amendment.—The provision of the fifth amendment, that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury," does not apply to persons held in extradition proceedings to answer such crimes in foreign countries. *Ex p. La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

Applicability of sixth amendment.—The provision of the sixth amendment, requiring the accused in criminal prosecutions "to be confronted with the witnesses against him," obviously applies to criminal prosecutions tried here, and not to persons extradited for trial under treaties with foreign countries whose laws may be entirely different. *Ex p. La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

Due process of law.—Where an extradition treaty subsists with a foreign government under the Constitution and law of the land, a surrender of an alleged fugitive in pursuance thereof is in accordance with the due process of law clause of the Constitution. *Ex p. Charlton*, (1911) 185 Fed. 880, *affirmed* 229 U. S. 447.

Constitutionality of proviso.—This Act is not unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. *Neely v. Henkel*, (1901) 180 U. S. 109, 21 S. Ct. 302, 45 U. S. (L. ed.) 448, *affirming In re Neely*, (1900) 103 Fed. 626.

II. JURISDICTION OF FEDERAL GOVERNMENT OVER EXTRADITION

Exclusive jurisdiction of federal government.—The foreign intercourse of this country has been conferred upon the federal government, and the treaties which govern the rights and conduct of the parties, and the Acts of Congress relating thereto, are in their nature exclusive; though it can hardly be admitted that, even in the absence of treaties or Acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of the Union and a foreign government. *U. S. v. Rauscher*, (1886) 119 U. S. 407, 7 S. Ct. 234, 30 U. S. (L. ed.) 425; (1841) 3 Op. Atty-Gen. 661. See *Ex p. Holmes*, (1840) 12 Vt. 631.

A state law, providing that the governor may, in his discretion, deliver over to justice any person found within the state who shall be charged with having committed, without the jurisdiction of the United States, any crime except treason, is unconstitutional and void. *Matter of Vogt*, (1872) 44 How. Pr. (N. Y.) 171; *People v. Curtis*, (1872) 50 N. Y. 321, 10 Am. Rep. 483.

The executive of a state has no power to cause a fugitive criminal to be arrested, for the purpose of delivering him up, at the request of a private person, without the interference of the government of the country within whose territorial jurisdiction the offense is alleged to have been committed, or of the United States. *Com. v. Deacon*, (1832) 10 Serg. & R. (Pa.) 125.

III. TREATY AS AFFECTING RIGHT TO EXTRADITION

Rule stated.—Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. This appears to have been the object of this section, which is applicable to all foreign governments with which we have treaties of extradition, and by its very terms applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 67 U. S. (L. ed.) 1274, 46 L. R. A. (N. S.) 397.

But without a stipulation by treaty, however fit it might seem in point of comity or morals to surrender citizens of other countries to answer for offenses committed at home against their own laws, it is usually considered that there is no political obligation under the law of nations to do it. *Matter of Sheazle*, (1845) 1 Woodb. & M. 66, 21 Fed. Cas. No. 12,734.

A nation whose citizen or subject commits a crime within its own jurisdiction, and is afterward found within that of

another, has no right by the law of nations, upon its demand, to have him delivered up by that other, for the purpose of being tried where the crime was committed. *Jose Ferreira dos Santos's Case*, (1835) 2 Brock. 493, 7 Fed. Cas. No. 4,016.

When a treaty provides for the extradition of fugitives charged with particular crimes, the reciprocal duty of either nation to deliver up to the justice of the other, persons charged with crime, is confined to the particular cases for which the treaty has provided. But the existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise its own discretion as an incident to its sovereignty in cases not coming within the terms of the treaty. *Ex p. Foss*, (1894) 102 Cal. 347, 36 Pac. 669, 41 A. S. R. 182, 25 L. R. A. 593.

One accused of having committed a crime in a foreign country cannot be remanded to the foreign government for trial unless the case is provided for by the terms of some treaty. *U. S. v. Davis*, (1837) 2 Sumn. 482, 25 Fed. Cas. No. 14,932.

Where a complaint charges an offense covered by treaty and another offense not included in the treaty, the court will assume that the foreign jurisdiction will respect its convention and not try the person charged with the crime upon other charges than those upon which extradition is allowed. *Kelly v. Griffin*, (1916) 241 U. S. 6, 36 S. Ct. 487.

It is the established rule of the United States neither to grant, nor to ask for, extradition of criminals unless in cases for which stipulation is made by express convention. (1854) 6 Op. Atty-Gen. 431; (1853) 6 Op. Atty-Gen. 85.

The President would not be justified in directing the surrender of a person, in order that he may be brought to trial in the country where he is supposed to have committed an offense, when there is no stipulation by treaty between the two governments for the mutual delivery of fugitives. (1831) 2 Op. Atty-Gen. 452; (1833) Op. Atty-Gen. 559.

Effect of conflicting treaty.—The effect of a treaty of a later date than a statute is to supersede the statute in so far as there is a necessary conflict. *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L. R. A. (N. S.) 397.

Offense not included in treaty.—As to offenses not covered by an extradition treaty between two countries, they stand toward each other as though there were no treaty, and either may exercise its discretion as to the surrender of a fugitive on demand of the other; and where such a demand has been acceded to, either under the obligation of a treaty or as an act of comity, the accused is triable in the courts of the country to which he is

returned on the charge upon which he was surrendered. *Greene v. U. S.*, (C. C. A. 1907) 154 Fed. 401, 85 C. C. A. 251, *affirming* (1906) 146 Fed. 803. There can be no extradition at the request of a foreign nation charging the offense of murder on the high seas or piracy, when the treaty is confined expressly to persons who are charged with having committed certain offenses within the jurisdiction of either nation. (1798) 1 Op. Atty-Gen. 83.

To warrant the extradition of a person to Italy under section 7, article 2 of the treaty of March 23, 1868, 15 Stat. L. 630 (see title TREATIES), which provides for the extradition of persons charged with "the embezzlement of public moneys committed within the jurisdiction of either party or public officers or depositors," where the accused was charged with having as treasurer of a hospital embezzled its funds, it was held that the proof must show that the hospital was a public institution, that the accused as its treasurer was a public officer or depositor, and that the money taken was public money. *Ex p. Ronchi*, (1908) 164 Fed. 288.

Specifically named crimes.—When a treaty provides for the extradition of persons charged with a specifically named crime, it includes all acts which were at the date of the treaty held in both countries to constitute the crime specified. If, since the date of the treaty, there has been passed a statute giving the name of that crime to some act not so called before, such act, although designated as that crime, will not constitute an extraditable offense under the treaty. *In re Cross*, (1890) 43 Fed. 517. But see *Muller's Case*, (1863) 5 Phila. (Pa.) 289, 20 Leg. Int. (Pa.) 301, 17 Fed. Cas. No. 9,913.

When a treaty provides for the extradition of persons accused of a common-law offense, such as "burglary," a person indicted for an offense which, by a state statute, is defined as burglary in the third degree, is not charged with having committed an extraditable offense. But this is not a matter of which the accused can complain; the question of good faith is for the government. *Adrianse v. Lagrave*, (1874) 59 N. Y. 110, 17 Am. Rep. 317.

Must be a crime in both countries.—The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties. *Wright v. Henkel*, (1903) 190 U. S. 40, 23 S. Ct. 781, 47 U. S. (L. ed.) 948. And it is enough if the particular variety of crime is criminal in both jurisdictions. So where the charge was perjury, the treaty would not be made a dead letter because some possible false statements might fall within the Canadian law, that would not be perjury by the law of Illinois. *Kelly v. Griffin*, (1916) 241 U. S. 6, 36 S. Ct. 487.

Crime under state statutes.—As there is no common law of the government of the United States, it must have been the intention in the treaties to give effect to the specific crimes mentioned as understood in the legislation of the several states. *Muller's Case*, (1863) 5 Phila. (Pa.) 289, 20 Leg. Int. (Pa.) 301, 17 Fed. Cas. No. 9,913. But see *In re Windsor*, (1865) 6 B. & S. 522, (Eng.) 118 E. C. L. 522.

Crimes anterior to treaty.—In some of the treaties entered into by the United States with foreign powers it is expressly stipulated that the treaty shall not apply to crimes committed before its date, while in others only certain anterior crimes are excepted, and in others there is no exception of such crimes. Where the language of the treaty admits of such a construction, and where such crimes are not expressly excepted, they are included in its operation. *In re De Giacomo* (1874) 12 Blatchf. 391, 7 Fed. Cas. No. 3,747. And see also *In re Stupp*, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

Accusation.—Unless required by the terms of the treaty, there need be no such authorized public accusation of equivalent effect with what is in the United States called an indictment or presentment. So far as concerns mere accusation in the country whose government makes the application, any proceeding in that country under which evidence has been or might lawfully be taken there, with a view either to a future criminal prosecution or to deciding whether to institute one, satisfies the requirements of the treaty. *Muller's Case*, (1863) 5 Phila. (Pa.) 289, 20 Leg. Int. (Pa.) 301, 17 Fed. Cas. No. 9,913.

Political offenses.—It is seldom that persons are surrendered for mere political offenses. *Matter of Scheele*, (1845) 1 Woodb. & M. 66, 21 Fed. Cas. No. 12,734. The question as to whether the accused is wanted (in the legal sense of that term) upon a criminal charge and that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters and that the treaty is not actually used as a subterfuge, is to be determined by the government of the United States through the Secretary of State. *In re Lincoln*, (E. D. N. Y. 1915) 228 Fed. 70.

Offense in the house of foreign minister.—As to the right to surrender to a foreign government one who has committed an offense in the house of a foreign minister, see *Republica v. De Longchamps*, (1784) 1 Dall. (Pa.) 111, 1 U. S. (L. ed.) 59. The case was prior to the Federal Constitution.

IV. APPLICABILITY TO FUTURE TREATIES

Applies to future treaties.—This section "is evidently intended to apply to treaties that might thereafter be made, as well as to treaties then existing." It was so held

in *Ex p. Van Hoven*, (1876) 4 Dill. 411, 28 Fed. Cas. No. 16,858, and the Act of Aug. 12, 1848, which was substantially the same as this section, expressly declared that these provisions are to be applied "in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition." *Castro v. De Uriarte*, (S. D. N. Y. 1883) 16 Fed. 93.

V. CONSTRUCTION OF TREATIES

Construction of treaties.—In the construction and carrying out of extradition treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent, since an exact correspondence between the laws of the two countries cannot be expected, and the only purpose of extradition is to put the accused on trial under the laws of his own country. *U. S. v. Greene*, (1906) 146 Fed. 766.

The construction of an extradition treaty, made by the Constitution a part of the supreme law of the land, is for the courts, and they are not bound by the construction placed thereon by the executive or diplomatic branches of the government, or by the foreign country with which the treaty is made. *Ex p. Charlton*, (1911) 185 Fed. 880.

This section and an extradition treaty between the United States and a foreign country must be construed together to determine the requisites of a formal demand for the surrender of a fugitive, except that a treaty, when later, controls where it is in irreconcilable conflict with the statute. *Ex p. Charlton*, (1911) 185 Fed. 880.

If one construction of a treaty assures a reasonable opportunity for each government to furnish the other the proofs necessary to justify the continued detention of suspected criminals, while another construction facilitates the escape of fugitives from justice and tends to impede the punishment of crime, the former is to be preferred in the absence of compelling words to the contrary. (1908) 27 Op. Atty-Gen. 4.

While the phraseology of the treaties should not be applied with too much latitude, an adherence to it so close as to exclude reasonable cosmopolitan interpretation of them should be not less avoided as too narrow. *Muller's Case*, (1863) 5 Phila. (Pa.) 289, 20 Leg. Int. (Pa.) 301, 17 Fed. Cas. No. 9,913.

Treaty with Italy.—In *Ex p. Fuders*, (1908) 162 Fed. 591, it was held that article 1 of the extradition treaty of 1868 between the kingdom of Italy and the United States (Act March 23, 1868, 15 Stat. L. 629, see title TREATIES), which provides for extradition from one country to the other of persons charged with crime in the demanding country, "provided that this shall be done only upon such evidence of criminality as according to the laws of

the place where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed," does not warrant the return to Italy of a person there charged with murder, where the only evidence presented of his connection with the offense is hearsay.

In *Ex p. Charlton*, (1911) 185 Fed. 880, affirmed 229 U. S. 447, it was held that the court would not declare that the extradition treaty between the United States and Italy, referred to in the preceding paragraph, is abrogated merely because Italy refuses to surrender its subjects committing crimes in the United States and then fleeing to Italy, where the United States has dealt with the treaty as subsisting, and has honored the requisition of the Italian government for the surrender of its citizens, and that the court would not go behind such acts and say that the treaty has been ended.

It was also held that the word "persons" in the extradition treaty between the United States and Italy, entered into in 1868, 24 Stat. L. 1001 (see title TREATIES), providing for the surrender of persons charged with enumerated crimes, is sufficiently broad to embrace citizens and subjects of the contracting parties; and a citizen of the United States, who while in Italy commits an offense, and who then flees to the United States, is within the treaty and may be extradited thereunder, though Italy has always construed the word so as to include its citizens and subjects. *Ex p. Charlton*, (1911) 185 Fed. 880.

Treaty with Mexico.—The forty days during which a prisoner may be detained under the terms of article X of the treaty of February 22, 1899, 31 Stat. L. 1825 (see title TREATIES), with Mexico, "to await the production of the documents upon which the claim for extradition is founded," must be considered as meaning forty days prior to the production of the documents to the State Department in the United States, or to the corresponding branch of the Mexican government; and if such documents are thus produced within the forty days, the suspected criminal has no absolute right or release under the treaty, but may be detained for a reasonable additional period to afford time for an investigation into his probable guilt or innocence. (1908) 27 Op. Atty-Gen. 4.

Treaty with Great Britain.—The treaty of July 12, 1889, art. 3, 26 Stat. L. 1509 (see title TREATIES), between the United States and Great Britain, provides that no person surrendered by or to either country shall be tried for any offenses committed prior to his extradition other than the offense for which he was surrendered. Article 6 provides that the extradition fugitives under that treaty and the treaty of 1842 (see title TREATIES) shall be carried out in conformity to the

laws regulating extradition in force in the surrendering state. The Canadian Extradition Act is said to provide that it does not authorize the issue of an extradition warrant to any state or country in which the person may be tried after extradition for any other offense than that for which he was extradited, unless assurance is first given that he shall not be so tried. R. S. sec. 5275, *infra*, p. 283, provides for the security against lawless violence of persons extradited into this country, until they have been tried for the offenses for which they have been extradited, etc., and for a reasonable time thereafter. It has been held that one extradited from Canada is not immune from trial for another offense committed after his extradition, and before given opportunity to return to Canada, and that though the Canadian officials might have refused to surrender him without receiving the assurance referred to in the Canadian Act, as, by surrendering him without such assurance, the rights of the United States and the state were limited only by the treaty. *Ex p. Collins*, (1907) 151 Cal. 340, 90 Pac. 827, 91 Pac. 397, 129 A. S. R. 122.

An indictment charging a conspiracy to defraud the United States between an officer and agent of the government and his codefendants, which sets out facts showing a corrupt agreement between the defendants and overt acts by means of which the purpose of such agreement was effected and the government defrauded, charges fraud by an agent and participation therein by the other defendants, within the meaning of clauses 4 and 10 of article 1 of the extradition treaty of 1890 (Act March 25, 1890, 26 Stat. L. 1509, see title TREATIES) between Great Britain and the United States, and is sufficient to warrant their extradition for trial thereunder. *U. S. v. Greene*, (1906) 146 Fed. 766.

An information in extradition proceedings charging accused with "assault with intent to kill and murder" sufficiently brings the offense within article 10 of the treaty with Great Britain, authorizing extradition of persons charged with "assault with intent to commit murder." *U. S. v. Piazza*, (1904) 133 Fed. 998.

The omission of the words "or be punished" from the provision of article 3 of the extradition treaty of July 12, 1889, 26 Stat. L. 1508 (see title TREATIES), with Great Britain, that no person extradited "shall be triable or be tried" for any crime or offense committed prior to his extradition other than the offense for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered, does not justify the imprisonment, upon a former conviction for another and different offense, of a person extradited from Canada for an offense against the United States, until he has

had an opportunity to return to Canada — especially where extradition has been refused for the other offense — since this omission is inadequate to overcome the positive provisions of R. S. secs. 5272, 5275, and the otherwise manifest scope and object of the treaty, and the earlier Ashburton treaty of 1842, which are to limit imprisonment as well as the trial to the crime for which extradition has been demanded and granted. *Johnson v. Browne*, (1907) 205 U. S. 309, 27 S. Ct. 539, 51 U. S. (L. ed.) 816.

The words "*made criminal by the laws of both countries*" in a treaty should not be interpreted as limiting its scope to Acts of Congress, and eliminating the operation of the laws of the states. To do so would largely defeat the object of extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the states, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common-law crimes of the United States, and in most of the states the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Wright v. Henkel*, (1903) 190 U. S. 40, 23 S. Ct. 781, 47 U. S. (L. ed.) 948.

Jurisdiction.—By treaty between the United States and Prussia, "the mutual delivery of criminals, fugitives from justice, in certain cases," was provided for, when the offense was "committed within the jurisdiction of either party." The statute of Prussia provided that a Prussian might be prosecuted according to the criminal law of Prussia, who, in a foreign country, had committed an act which, according to the laws of Prussia, was considered a crime or misdemeanor, and which was punishable by the laws of the place where it had been committed. It was held that a Prussian who was charged with having committed a crime in Belgium was within the "jurisdiction" of Prussia, and should be surrendered upon the request of the government of the German empire. *In re Stupp*, (1873) 11 Blatchf. 124, 23 Fed. Cas. No. 13,562.

After the above decision was rendered, upon commitment by the commissioner to await the issuing of a warrant for the surrender of the accused, the Secretary of State submitted the question to the Attorney-General, who advised that the "jurisdiction" referred to in the treaty was not the jurisdiction of the person, under the Prussian statute, but the territorial jurisdiction of the demanding party, and that the accused was not demandable. (1873) 14 Op. Atty-Gen. 281.

VI. FOREIGN GOVERNMENTS

Cuba.—*Within the meaning of this Act, Cuba is a foreign territory.*—It cannot be regarded in any constitutional, legal, or international sense a part of the territory

of the United States. *Neely v. Henkel*, (1901) 180 U. S. 109, 21 S. Ct. 302, 45 U. S. (L. ed.) 448, *affirming In re Neely*, (1900) 103 Fed. 626.

Embezzler of Cuban public funds.—It was held that a case of a public employee, who had charge of the collection and deposit of moneys of the department of posts of the city of Havana, and who was alleged to have taken and embezzled certain of the public funds of Cuba, came within the provisions of this Act; and that the court below having found that there was probable cause to believe the accused guilty of the offenses charged, the extradition order was proper, and no ground existed for his discharge on habeas corpus. *Neely v. Henkel*, (1901) 180 U. S. 109, 21 S. Ct. 302, 45 U. S. (L. ed.) 448, *affirming In re Neely*, (1900) 103 Fed. 626.

Where a crime was committed on a vessel registered at a Cuban port, Cuba being at that time under a military governor appointed by the United States, it was held that as Cuba was at the time a foreign country, and removed from the jurisdiction of the United States Constitution, the defendant was amenable to the laws of Cuba, and the federal courts had no jurisdiction of the matter. *U. S. v. Assia*, (1902) 118 Fed. 915, *following Neely v. Henkel*, (1901) 180 U. S. 109, 21 S. Ct. 302, 45 U. S. (L. ed.) 448.

Porto Rico.—Extradition from a state or territory of the United States to Porto Rico is not authorized by the statute relating to extradition to foreign countries. *In re Kopel*, (1906) 148 Fed. 505.

VII. NECESSITY AND SUFFICIENCY OF DEMAND FOR EXTRADITION

Necessity.—No prior demand by a foreign government is necessary before the arrest of a fugitive from the justice of such government in extradition proceedings. *Ex p. Zentner*, (1910) 188 Fed. 344; *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

From whom demand must come.—Demands of extradition must come from the supreme executive authority of the nation demanding it. *International Extradition*, (1854) 7 Op. Atty-Gen. 6.

Notification of escape by foreign local officer.—A mere notification by the local officer of a foreign government that an alleged criminal has escaped is not sufficient *prima facie* evidence of the guilt of the accused to warrant the interposition of the President. *International Extradition*, (1854) 7 Op. Atty-Gen. 6.

"Request" equivalent to a "demand."—Where an extradition treaty, providing for the surrender of persons committing enumerated crimes, exists between the United States and a foreign government, a "request" by the foreign government for the surrender of a fugitive is a sufficient

"demand" for the surrender. *Ex p. Charlton*, (1911) 185 Fed. 880, *affirmed* 229 U. S. 447.

VIII. COMPLAINT

Form and contents.—*Show authority of commissioner.*—It is not necessary for the complaint to show that the commissioner had authority to issue the warrant in question, if it shows that he had authority for the issuance of warrants in such extradition cases as would include the one in question. *In re Farez*, (1869) 7 Blatchf. 34, 345, 491, 8 Fed. Cas. No. 4,644, 4,645, 4,646; *Ex p. Lane*, (1881) 6 Fed. 36.

Technicality.—The complaint is not required to be as precise, technical, and formal as an indictment, it being necessary only that the substance of the offense be clearly set forth, so that the court can see that the complaint alleges the commission of one or more of the crimes enumerated in the treaty. *In re Roth*, (1883) 15 Fed. 506; *In re Hendrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,369; *In re Farez*, (1869) 7 Blatchf. 34, 345, 491, 8 Fed. Cas. No. 4,644, 4,645, 4,646, where the court said: "It certainly could never have been intended by the treaty-making power, that an alleged fugitive should be arrested upon a complaint less specific than such as would be required in the case of an offense committed in the United States."

So it has been held that good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty of crime as to make it proper that he should be tried. *Gluckaman v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

Under article 10 of the extradition treaty with Great Britain of 1842, a complaint for the arrest and examination of an alleged offender is not required to set out the offense with the particularity of an indictment, but is sufficient if it conforms to the requirements of a preliminary complaint under the local law where the accused is found. *In re Herakovitz*, (1901) 136 Fed. 713. Of similar effect see *Ex p. Zentner*, (1910) 188 Fed. 344.

Upon information and belief.—A complaint made before the commissioner solely upon information and belief is bad, but if the complainant has no personal knowledge of the facts, it may be made upon information and belief, provided the source of such information and the grounds of such belief be stated, and a properly certified copy of the indictment or equivalent proceeding which has been found in a foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and Act of Congress, be annexed to the

complaint. *Rice v. Ames*, (1901) 180 U. S. 371, 21 S. Ct. 406, 45 U. S. (L. ed.) 577.

So it has been held that a complaint made upon information and belief is sufficient where it sets forth that it is made by authority of and at the request of the proper officials of the requesting country, and that the information upon which it is based was communicated to the complainant by those officials. While it is advisable that certified copies of the foreign complaint and warrant be attached to and made a permanent part of the complaint, yet it is sufficient if those documents, alleging positively the respondent's guilt, are presented to the commissioner with the complaint, and if depositions showing probable cause are produced at the hearing. *Powell v. United States*, (C. C. A. 6th Cir. 1913) 206 Fed. 400, 124 C. C. A. 282.

A complaint made upon information and belief alone is fatally defective; but "if depositions have been taken in a foreign country tending to show the accused guilty of the crime, or if an indictment has been found against him, or if the representative of the foreign government demanding his extradition has fully informed himself with regard to the particular events by conversations with persons who witnessed them, he may make a complaint upon information and belief; but in such case . . . he should set forth with some particularity the sources and details of his information, or the grounds for supposing the defendant to be guilty." *Ex p. Lane*, (1881) 6 Fed. 34.

The fact that the first count of the complaint was solely upon information and belief does not impair the sufficiency of other counts which purport on their face to be made upon personal knowledge of the complainant. *Rice v. Ames*, (1901) 180 U. S. 371, 21 S. Ct. 406, 45 U. S. (L. ed.) 577.

It has been held that a complaint, specific in its charges, made upon oath by the consul-general of a foreign country, who does not profess to any personal knowledge of the matters charged against the petitioner, but whose information consists of telegrams and depositions, is sufficient to authorize his remand for examination to the commissioner who issued the warrant. *Ex p. Van Hoven*, (1876) 4 Dill. 415, 28 Fed. Cas. No. 16,859.

The irregularity, if any, in making a complaint in extradition proceedings on information and belief, without attaching thereto the record of the foreign court which is the basis of the proceedings, is cured by the production at the hearing of such record, which is sufficient to justify the detention of the accused. *Yordi v. Nolte*, (1909) 215 U. S. 227, 30 S. Ct. 90, 54 U. S. (L. ed.) 170, *affirming* (W. D. Tex. 1909) 166 Fed. 921.

Necessity for incorporation of foreign

record in complaint.—To give jurisdiction to a United States commissioner of a proceeding to extradite a fugitive from the justice of a foreign state, the record of proceedings before the foreign court, and the depositions of witnesses therein contained, upon which the extradition proceeding is based, need not be attached to the complaint, if they are in the custody and keeping of the one making the complaint, and the commissioner is possessed of the information which they contain, which is sufficient to satisfy him that the proceeding is based upon real grounds. *Yordi v. Nolte*, (1909) 215 U. S. 227, 30 S. Ct. 90, 54 U. S. (L. ed.) 170, *affirming* (W. D. Tex. 1909) 166 Fed. 921.

The "complaint under oath" must be on behalf of the foreign government that is authorized by treaty to have the surrender made; and where the proceeding is initiated by a person in his private capacity, there must be satisfactory evidence before the commissioner, before the proceeding is closed, that it is promoted by the foreign government or carried on by its authority. *In re Ferrelle*, (1886) 23 Fed. 878.

Where, in extradition proceedings under the treaty of 1842 between the United States and Great Britain, and the statutes, the complaint filed before the commissioner did not disclose the fact that the proceedings were initiated by the demanding government, or that the party filing the affidavit was acting otherwise than in his private capacity, yet it appeared in the examination before the commissioner, or elsewhere than in the complaint, that the proceedings were, in reality, initiated and carried on by the foreign government, and that the complaining witness was acting under direct authority for such government, it was held that all requirements in this respect were satisfactory, as the substance rather than the form should be regarded. *In re Herres*, (1887) 33 Fed. 165, *reversing In re Herres*, (1887) 32 Fed. 583.

"The judge has nothing to do with the question whether the government of the foreign country has duly authorized an application for the extradition to be made. The law is, that when complaint is made on oath the judge is to examine the evidence of criminality, and, if he deems it sufficient to sustain the charge, shall certify the same to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of the foreign government." *In re Dugau*, (1874) 2 Lowell 367, 7 Fed. Cas. No. 4,120.

Evidence of special authority from the demanding government to the party making the complaint is not necessary; if the consular title is appended to the signature of the complaining party and no presumption can arise from the complaint that it

was made otherwise than as and for the foreign government, it is sufficient. *In re Grin*, (1901) 112 Fed. 790.

The complaint need not set forth that a mandate for arrest has been issued by the executive department. *In re Macdonnell*, (1873) 11 Blatchf. 79, 16 Fed. Cas. No. 8,771.

What amounts to a charge of crime.—For the purposes of extradition, one who, in his absence, has been convicted in *contumaciam* of a criminal offense in a foreign country, is to be regarded only as charged with, and not convicted of, the offense. *Ex p. Fudera*, (1908) 162 Fed. 591.

Facts stated do not constitute crime.—While it may be unnecessary, in the complaint required by statute, to state any facts, yet if the charge of a crime is made in general terms, and the complaint also contains all the facts on which that charge is made, and on the admitted facts it clearly appears that no such crime has been committed, the complaint then disproves the general charge, and takes away the foundation for the warrant. *Matter of Heilbonn*, (1863) 1 Park. Crim. (N. Y.) 429.

Crime described by different names.—If the complaint intelligibly describes and identifies the offense, and if the offense so described is punishable by the laws of both countries, and if by any name it is included in the extradition treaty, that is enough. *Powell v. U. S.*, (C. C. A. 6th Cir. 1913) 206 Fed. 400, 124 C. C. A. 282. See also *Greene v. U. S.* (C. C. A. 1907) 154 Fed. 401, 85 C. C. A. 251, *affirming* (1906) 146 Fed. 803.

Verification.—A complaint sworn to upon information and belief is sufficient in proceedings for the extradition of a person to a foreign country, where it is supported by the testimony of witnesses who are stated to have deposed, and who therefore must be presumed to have been sworn. *Glucksman v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

Officer authorized to administer oath.—The oath to a complaint will be sufficient if made before any officer authorized to administer oaths, such as a United States commissioner. *In re Grin*, (1901) 112 Fed. 790, *affirmed* (1902) 187 U. S. 181, 23 S. Ct. 98, 47 U. S. (L. ed.) 130.

IX. WARRANT OF ARREST

1. Foreign

Foreign warrant or proceedings unnecessary.—"It is not a necessary preliminary step to an investigation here, under an extradition treaty, that a warrant of arrest should have been issued, or proceedings had, against the accused, in the foreign jurisdiction." *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67; *In re Thomas*,

(1874) 12 Blatchf. 370, 23 Fed. Cas. No. 13,887.

Sufficiency of foreign warrant.—When the record in the case disclosed an authenticated copy of a document, signed by "The Examining Magistrate of Royal Superior Court of Munich, Meidinger, Royal Councillor," to which was attached the court seal, and which, after description of the accused, recited the charge made against him, the provisions of the German code, his flight and probable guilt, and concluded with, "The arrest of Schorer for the purpose of being placed under examination is ordered because the accused has fled," it was held to be sufficient assuming that a warrant was necessary. *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

Necessity for certificate of Secretary of State.—Under this section a certificate of the Secretary of State that application for the extradition of the person named has been made by the foreign government is not necessary to the issuance of such warrant, even where, as in case of Russia, the treaty provides for such certificate. *In re Schlippenbach*, (1908) 164 Fed. 783.

2. Domestic

Prerequisites to issuance and sufficiency.

—**Upon complaint on oath.**—The commissioner has no power to issue the warrant, and no jurisdiction under the statute, until a complaint on oath be made before him. *Matter of Heilbronn*, (1853) 1 Park. Crim. (N. Y.) 429; *Ex p. McCabe*, (1891) 46 Fed. 363.

Commissioner's authority.—Where a warrant is issued by a United States commissioner for the arrest of the accused under an extradition treaty, it must show on its face that such commissioner has been duly authorized by a United States court to issue the same. *Ex p. Lane*, (1881) 6 Fed. 34; *In re Kelley*, (1885) 25 Fed. 270; *Ex p. McCabe*, (1891) 46 Fed. 363; *In re Farez*, (1869) 7 Blatchf. 34, 8 Fed. Cas. No. 4,644; *In re Macdonnell*, (1873) 11 Blatchf. 79, 16 Fed. Cas. No. 8,771.

The description of the offense in the warrant of arrest may follow the words of the treaty. *Castro v. De Uriarte*, (1883) 16 Fed. 95; *In re Macdonnell*, (1873) 11 Blatchf. 79, 16 Fed. Cas. No. 8,771.

Issue of executive mandate no prerequisite.—The issuing of an executive mandate in a case of extradition is not, unless required by an extradition treaty with the foreign government, the prerequisite to the entertaining of proceedings and the issuing of a warrant of arrest by a magistrate. *In re Herres*, (1887) 33 Fed. 165, reversing 32 Fed. 583; *Castro v. De Uriarte*, (1883) 16 Fed. 93; *In re Thomas*, (1874) 12 Blatchf. 370, 23 Fed. Cas. No. 13,887; *In re Orpen*, (1898) 86 Fed. 760; *Ex p. Ross*, (1869) 2 Bond 252, 20 Fed. Cas. No. 12,069; *International*

Extradition, (1856) 8 Op. Atty-Gen. 240; *International Extradition*, (1853) 6 Op. Atty-Gen. 91; *In re Kelley*, (1874) 2 Lowell 339, 9 Am. L. Rev. 167, 14 Fed. Cas. No. 7,655.

But in *In re Farez*, (1869) 7 Blatchf. 34, 8 Fed. Cas. No. 4,644, it was held that the warrant for the arrest must show a requisition by the foreign government, and an authorization by the United States government. See also *In re Kaine*, (1852) 14 How. 103, 14 U. S. (L. ed.) 345; *In re Henrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,369; *In re Stupp*, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563; *In re Heilbronn*, (1854) 12 N. Y. Leg. Obs. 65, 11 Fed. Cas. No. 6,323. And see *In re Macdonnell*, (1873) 11 Blatchf. 79, 16 Fed. Cas. No. 8,771, where this point is *quære*.

Request of foreign government.—A warrant is valid notwithstanding that it does not appear that the proceedings were instituted at the request or by the authority of the foreign government, although such request or authority must appear at some stage of the proceedings. *In re Orpen*, (1898) 86 Fed. 760; *In re Adutt*, (1893) 55 Fed. 376; *In re Mineau*, (1891) 45 Fed. 188; *International Extradition*, (1856) 8 Op. Atty-Gen. 240.

But in *In re Farez*, (1869) 7 Blatchf. 34, 8 Fed. Cas. No. 4,644, it was held that the warrant for the arrest must show that the foreign government has made requisition, and that the United States government has authorized the apprehension of the accused. See also *In re Kaine*, (1852) 14 How. 103, 14 U. S. (L. ed.) 345; *In re Henrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,369; *In re Stupp*, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

Taken from state custody.—A judgment debtor committed to state jail on executions and writs of attachment in civil actions against the body of the prisoner as an absconding debtor, may be taken from such custody by a writ of habeas corpus issuing from a federal court upon the petition of a United States deputy marshal who holds a commissioner's warrant for the arrest of the prisoner on extradition proceedings for forgery in Canada, but to be returned to the jailer if those proceedings fail. *In re Mineau*, (1891) 45 Fed. 188.

X. BAIL

Rule stated.—It has been held that a federal court has power independently of statute to admit to bail in a case of foreign extradition pending examination, but such power should be exercised only under the most pressing circumstances. However, where the plaintiff in an action in New York involving his whole fortune was arrested on an extradition warrant from Canada the day before the trial of his case was to begin, at the instance of the adverse party, it was held that the hard-

ship was such that the court was justified in enlarging him on bail until the trial of his case could be completed. *In re Mitchell*, (1909) 171 Fed. 289.

Bail cannot be granted where there is a continuance of the proceedings in order that further evidence of probable guilt of the accused may be obtained, in the matter of extradition from a foreign country, as no provision is made therefor. *In re Carrier*, (1893) 57 Fed. 578.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but this section and R. S. sec. 5273 are inconsistent with its allowance after committal. *Wright v. Henkel*, (1903) 190 U. S. 40, 23 S. Ct. 781, 47 U. S. (L. ed.) 948.

XI. JURISDICTION TO HEAR COMPLAINT

The jurisdiction of the commissioner to hear and consider evidence and make the certificate is not dependent upon the fact that he issued the warrant of arrest. *In re Grin* (1901) 112 Fed. 790, *affirmed* in *Grin v. Shine*, (1902) 187 U. S. 181, 23 S. Ct. 98, 47 U. S. (L. ed.) 130.

"Where the warrant of arrest is returnable before a commissioner for hearing, it should be one who has been previously designated by the Circuit Court under which he holds his office, as a commissioner for that purpose." *In re Henrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,309, citing *In re Kaine*, (1852) 14 How. 103, 14 U. S. (L. ed.) 345.

XII. HEARING ON COMPLAINT

In general.—Under this section an alleged fugitive may be arrested under a warrant issued by the committing magistrate on the complaint of a representative of the foreign country, and the committing magistrate can only determine whether a certificate from the Secretary of State attesting that the requisition has been made by the foreign government has been issued, whether the offense charged against accused is extraditable under any treaty, whether the person brought before him is the one accused of crime, and whether there is probable cause for holding accused for trial, and the evidence in that respect must be such as, according to the law of the state in which accused is apprehended, is sufficient to commit him for trial. *Ex p. Charlton*, (1911) 185 Fed. 890, *affirmed* (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L. R. A. (N. S.) 397.

Precedent formalities.—Unless treaty stipulations require another or a different course to be pursued, the foreign country is authorized to institute the proceedings under this section without any precedent formalities. *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

Nature of hearing.—The proceeding to determine whether the accused should be extradited is not to be regarded as in the

nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, ultimately to answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L. R. A. (N. S.) 397.

Probable cause.—The only question to be determined by the commissioner is that of probable cause; or, to use the language common in treaties, whether there is such evidence of criminality as will justify the apprehension and commitment. *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

In order to justify a commissioner in issuing a certificate to the executive authority for the surrender of the accused in extradition proceedings, it is sufficient if the accused is held on competent legal evidence, and if probable cause exists for believing him guilty of the offense charged. The evidence need not be conclusive, nor must the commissioner be absolutely convinced of the guilt of accused. *U. S. v. Piazza*, (1904) 133 Fed. 998.

Extradition proceedings are like a preliminary examination; and if it appears that a crime has been committed, and that there is probable cause to believe that the defendant is guilty of that crime, substantial justice requires that he should be put upon trial. *In re Herres*, (1887) 33 Fed. 165; *Benson v. McMahon*, (1888) 127 U. S. 457, 8 S. Ct. 1240, 32 U. S. (L. ed.) 234.

A warrant of extradition can only be granted when there is evidence enough of the criminality of the accused, according to the laws of the state, to justify his apprehension and commitment for trial for the offense charged, if the same had been committed in the state. *Matter of Calder*, (1853) 2 Edm. Sel. Cas. (N. Y.) 374; *Matter of Washburn*, (1819) 4 Johns. Ch. (N. Y.) 106.

"The proof, in all cases under a treaty of extradition, should be not only competent, but full and satisfactory, that the offense has been committed by the fugitive in the foreign jurisdiction—sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offense with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order a surrender short of such proof." *Ex p. Kaine*, (1853) 3 Blatchf. 1, 14 Fed. Cas. No. 7,597.

Mixed law and fact.—"Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact." *Ornelas v. Ruiz*, (1896)

161 U. S. 502, 16 S. Ct. 689, 40 U. S. (L. ed.) 787.

Sufficiency of evidence.—A fugitive from the justice of a foreign government is not entitled to his discharge from arrest in extradition proceedings on habeas corpus for insufficiency of evidence, if the commissioner before whom he was examined had before him competent legal evidence on which to exercise his judgment whether the facts shown sufficiently establish petitioner's criminality for purposes of extradition. *Ex p. Zentner*, (1910) 188 Fed. 344.

Under the treaty of 1852 (see title **TREATIES**) of the United States with Prussia and other states of the Germanic Confederation for extradition of criminals, providing that they shall be delivered on such evidence of criminality as according to the laws of the place where the fugitive was found would justify his apprehension and commitment for trial, it is not necessary, to justify extradition, to present evidence sufficient to sustain a conviction; evidence justifying a committing magistrate in holding accused by imprisonment or by bail to await subsequent proceedings being sufficient, and the provisions of a state law that conviction cannot be had on the uncorroborated evidence of an accomplice would have no application. *Ex p. Glaser*, (1910) 176 Fed. 702, 100 C. C. A. 254.

Where, in extradition proceedings for murder, the evidence, though circumstantial, was so strong that, if produced before a committing magistrate in the state where petitioner was arrested and applied for habeas corpus, as proof of an assassination committed there, it would have been the commissioner's duty to hold accused to await subsequent proceedings, it is sufficient to sustain an order for his return. *In re Urzua*, (1911) 188 Fed. 540.

In *Elias v. Ramirez*, (1910) 215 U. S. 398, 30 S. Ct. 131, 54 U. S. (L. ed.) 253, reversing (1907) 11 Ariz. 256, 90 Pac. 323, it was held that the evidence was sufficient to justify commitment in extradition proceedings on a charge of forgery of railway wheat certificates purporting to show the true weight of carloads of wheat shipped from the United States to Mexico, where it was shown that the accused was a member of a firm of customs brokers which presented to the Mexican customs authorities certificates showing weights much less than the true weight; that the Mexican government was thereby defrauded of a large amount of import duties; that the accused was the principal, if not the only, beneficiary of the fraud, and that, instead of reparation or explanation, resort was had to flight.

It is fundamental in extradition proceedings instituted for the purpose of taking a citizen of the United States, residing in this country, to Canada, or

any part of Great Britain, for trial there on the claim that such citizen has committed a crime there (one within the treaty and laws), that such evidence must be produced as shows, first, that a crime was committed there, and, second, that there is at least reasonable ground to believe that the person sought to be deported is guilty of the offense charged. *Ex p. La Page*, (N. D. N. Y. 1914) 216 Fed. 256.

Sanity of accused.—On extradition proceedings for the removal to a foreign country of an alleged fugitive from the justice thereof, evidence of the insanity of accused at the time of the commission of the offense, or of the present sanity of the accused, is improper. *Ex p. Charlton*, (1911) 185 Fed. 880.

Place.—The preliminary examination of a person sought to be extradited under the treaties of Aug. 9, 1842, 8 Stat. L. 572, 576, and July 12, 1889, 26 Stat. L. 1508, 1510 (see title **TREATIES**) between the United States and Great Britain, on a conviction of murder, must be had in the state where he was found and arrested, in view of the provision of the 10th article of the earlier treaty, that the alleged fugitive criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where he is found, would justify his apprehension and commitment for trial if the crime had there been committed, and of the proviso in the Sundry Civil Appropriation Act of Aug. 18, 1894, 28 Stat. L. 416, ch. 301 (see title **CRIMINAL LAW**) by which it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest Circuit Court commissioner or the nearest judicial officer having jurisdiction, for a hearing, commitment, or taking bail for trial—notwithstanding those parts of the Act of Aug. 12, 1848, ch. 167, 9 Stat. L. 302, and of R. S. sec. 5270, which provide for bringing the accused in extradition proceedings before the justice, judge, or commissioner who issued the warrant of arrest. *Pettit v. Walshe*, (1904) 194 U. S. 205, 24 S. Ct. 657, 48 U. S. (L. ed.) 936, affirming (1903) 125 Fed. 572.

Certified copy of requisition.—Failure to produce a certified copy of a requisition from a foreign country before the commissioner in extradition proceedings was held to be cured, where a properly certified copy of the requisition on file in the office of the Secretary of State was submitted to the court at the hearing of a writ of habeas corpus. *In re Urzua*, (1911) 188 Fed. 540.

Necessity for showing acts charged are crime in foreign country.—The commissioner is not obliged to make extended inquiry as to the scope of the criminal jurisprudence of the demanding country, but is by the statute limited to determining whether there is sufficient evidence of

criminality to justify holding the accused for the particular offense, as we understand that offense by its description in the treaty and in our laws. *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

Necessity for demand.—The rule is well settled that, unless there is a provision in the treaty, a demand by one country upon another for the extradition of an alleged fugitive is not a step necessary to be taken prior to, or to be proven in, the proceedings before the extradition commissioner. *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

Translation of depositions.—Where certain depositions attached to extradition papers were in the German language, and the translator testified before the commissioner that he had dictated the translation to a typewriter, that he had examined and compared it as written out, and that the translation was correct, there being no claim by petitioner that the translation was in any respect inaccurate, it was held to be no objection to the translation that the typewriter did not also testify with reference thereto. *Ex p. Zentner*, (1910) 188 Fed. 344.

Identity of offense charged.—While the extradition of a person from a foreign country for trial in the United States and the indictment on which he is tried must be for the same criminal acts, it does not follow that the crime must have the same name in both countries, but it is sufficient if the acts in question are criminal in both countries and are within the terms of the treaty under which the extradition is granted. The persons surrendered by Canada to the United States, under sections 4 and 10 of article 1 of the extradition treaty of 1890 between Great Britain and the United States, to be tried for the crime of "participation in fraud by an agent or trustee," were tried for such crime where the indictment charged them with conspiracy with a disbursing officer of the government to defraud the United States by presenting false and fraudulent claims to such officer and by his allowance and payment of the same from public money in his hands, the acts and transactions charged and proved before the extradition commissioner and under the indictment being the same. *Greene v. U. S.*, (C. C. A. 1907) 154 Fed. 401, 85 C. C. A. 251, *affirming* (1906) 148 Fed. 803. See also *Powell v. U. S.* (C. C. A. 6th Cir. 1913) 206 Fed. 400, 124 C. C. A. 282.

The testimony of a party charged with extraditable crime before a United States judge cannot be admitted, although such judge is sitting in a state where such evidence is receivable. *In re Dugau*, (1874) 2 Lowell 367, 7 Fed. Cas. No. 4,120.

Variance.—A variance in proceedings for the extradition to a foreign country of a person charged with forgery and uttering forged paper, in that the complaint speaks of bills of exchange, while

the evidence shows the forged instruments to have been promissory notes, is not fatal, where the instruments are sufficiently identified. The effect of a variance between the complaint and the evidence in proceedings for the extradition of a person to a foreign country is to be decided on general principles, irrespective of the laws of the state where the proceedings are had. *Glucksman v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

In proceedings to extradite a petitioner for forgery alleged to have been committed in a foreign country, a variance between the complaint and the evidence as to the dates of the instruments alleged to have been forged is immaterial. *Ex p. Zentner*, (1910) 188 Fed. 344.

XIII. ADJOURNMENTS

Rule stated.—The commissioner may exercise a just and reasonable discretion in the matter of adjournments of the proceedings. *In re Macdonnell*, (1873) 11 Blatchf. 79, 16 Fed. Cas. No. 8,771; *Rice v. Ames*, (1901) 180 U. S. 371, 21 S. Ct. 406, 45 U. S. (L. ed.) 577, holding that the commissioner's power to adjourn was not controlled by a state statute limiting continuance to ten days; *In re Wadge*, (1883) 15 Fed. 866; *In re Ludwig*, (1887) 32 Fed. 774, holding that a discharge will not be granted unless the commissioner has abused his discretion by granting too long an adjournment; *International Extradition*, (1853) 6 Op. Atty-Gen. 91.

When the court is of opinion that the evidence produced is not sufficient to surrender the accused, a hearing on a warrant of extradition cannot be postponed indefinitely, and the discharge of the accused suspended until further evidence of his guilt may be brought from abroad. *Matter of Calder*, (1853) 2 Edm. Sel. Cas. (N. Y.) 374.

A United States commissioner sitting in extradition proceedings has authority to adjourn the proceedings for a reasonable time on representations of counsel for the petitioning country that additional evidence will be presented against the alleged criminal, although such alleged criminal had previously been arrested and discharged in extradition proceedings in connection with the same crime. *Ex p. Schorer*, (E. D. Wis. 1912) 195 Fed. 334, wherein the court said: "It was suggested that when the present proceeding was instituted the commissioner should not have entertained it unless the alleged new evidence was then and there presented. To that it can well be replied that this would call upon him in advance to determine the very purpose for which the second proceeding is instituted. The accused has a right to be heard upon the question whether the new evidence is such as supplies the alleged defect in the former proceedings, and he has a right to have this new evidence presented on the

second hearing just as it would have been presented on the first. If the second hearing should develop the same weaknesses disclosed upon the first, the accused ought to be discharged. But such weaknesses or added strength can develop only through a hearing of the proposed evidence; and unless and until it is reasonably clear that the rearrest and re-examination are in fact, or effect, furthering a course of harshness or oppression, or a policy or purpose ulterior to the honest and efficient performance of the treaty obligation, the proceedings before the commissioner should be allowed to take the course designed by the statute."

XIV. DECISION AND SUBSEQUENT PROCEEDINGS

1. In General

Technical objections to the form of documents in extradition are not given the weight once accorded to them; "and if the certificates, signatures, etc., are in substantial conformity to the requirements of the statute, and give reasonable assurance of authenticity, it is sufficient." *In re Neely*, (1900) 103 Fed. 626.

Finality of decision of country on which demand is made.—The question whether or not a fugitive shall be surrendered by a country in which he has sought asylum must of necessity be decided by the government of such country, and its decision, approved by its courts, that the offense charged is within the terms of an extradition treaty between that country and the one making the demand, is final, and the question cannot be again raised in the courts of the latter country after extradition. *Greene v. U. S.*, (C. C. A. 1907) 154 Fed. 401, 85 C. C. A. 251, *affirming* (1906) 146 Fed. 803.

Jurisdiction of commissioner.—The commissioner's jurisdiction over the case ends after he has certified the result of his finding to the Secretary of State and committed the prisoner to the proper jail. He has no authority to order a prisoner transported out of the judicial district in which he was arrested. (1909) 27 Op. Atty-Gen. 128.

2. Review of Decision

President cannot control.—The magistrate before whom the accused party is brought examines the case judicially, and the President has no control or direction over his decision. *International Extradition*, (1853) 6 Op. Atty-Gen. 91; *Matter of Calder*, (1853) 2 Edm. Sel. Cas. (N. Y.) 374.

But in *In re Heinrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,369, the court said that the President has the power to revise the opinion of the commissioner. If he should be of opinion that the evidence taken before the commissioner on the hearing was not sufficient to sustain the charge, then it should be his duty to withhold a warrant of extradition.

Habeas corpus.—"Having jurisdiction, . . . both of the accused and of the subject-matter, the finding by the commissioner of probable cause to believe the accused guilty of such offense is open only, on habeas corpus, to the inquiry whether there was legal evidence of facts before the commissioner on which to exercise his judgment, 'and not whether the legal evidence of facts was sufficient or insufficient to warrant his conclusions.'" *In re De Lautrec*, (C. C. A. 1900) 102 Fed. 878, 43 C. C. A. 42. See also *Matter of Wahl*, (1878) 15 Blatchf. 334, 28 Fed. Cas. No. 17,041; *Matter of Wiegand*, (1877) 14 Blatchf. 370, 29 Fed. Cas. No. 17,618; *Ex p. Van Aernam*, (1854) 3 Blatchf. 160, 28 Fed. Cas. No. 16,824; *Ex p. Van Hoven*, (1876) 4 Dill. 415, 28 Fed. Cas. No. 16,859; *Terlinden v. Ames*, (1902) 184 U. S. 270, 22 S. Ct. 484, 46 U. S. (L. ed.) 534; *Bryant v. U. S.*, (1897) 167 U. S. 104, 17 S. Ct. 744, 42 U. S. (L. ed.) 94; *Ornelas v. Ruiz*, (1896) 161 U. S. 502, 16 S. Ct. 689, 40 U. S. (L. ed.) 787; *Fong Yue Ting v. U. S.*, (1893) 149 U. S. 698, 13 S. Ct. 1016, 37 U. S. (L. ed.) 905; *In re Cortes*, (1890) 136 U. S. 330, 10 S. Ct. 1031, 34 U. S. (L. ed.) 464; *Benson v. McMahon*, (1888) 127 U. S. 457, 8 S. Ct. 1240, 32 U. S. (L. ed.) 234; *Sternaman v. Peck*, (C. C. A. 1897) 80 Fed. 883, 51 U. S. App. 312, 26 C. C. A. 214; *In re Fowler*, (1880) 4 Fed. 303; *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67; *In re Lincoln*, (E. D. N. Y. 1915) 228 Fed. 70; *In re Veremaitre*, (1850) 3 Am. L. J. (N. S.) 438, 28 Fed. Cas. No. 16,915; *In re Macdonnell*, (1873) 11 Blatchf. 170, 16 Fed. Cas. No. 8,772; *In re Kaine*, (1852) 10 N. Y. Leg. Obs. 257, 14 Fed. Cas. No. 7,598. But see *In re Heinrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,369.

The rule is well established that if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purpose of extradition, his decision cannot be reviewed on habeas corpus. *McNamara v. Henkel*, (1913) 226 U. S. 520, 33 S. Ct. 146, 57 U. S. (L. ed.) 330; *Bingham v. Bradley*, (1916) 241 U. S. 511, 36 S. Ct. 634.

Under this section, which vests justices of the Supreme Court, circuit and district judges and commissioners with concurrent jurisdiction to issue warrants and make examinations and commitments in extradition proceedings, the judgment of a commissioner in such a proceeding cannot be reviewed for error by a District Court on a writ of habeas corpus. *In re Herskovitz*, (1901) 136 Fed. 713.

The court, on habeas corpus for the discharge of an alleged fugitive from the

justice of a foreign country, held for removal thereto, may only determine whether the findings of the committing magistrate are based on competent evidence, and whether the foreign government has formally demanded the extradition of the fugitive. *Ex p. Charlton*, (1911) 185 Fed. 880.

In *In re Stupp*, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563, it was said that the court issuing the writ of habeas corpus "must inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion; nor, if there was legal and competent evidence of facts before the commissioner, for him to consider in making up his decision as to the criminality of the accused, is the court, on habeas corpus, to hold the proceedings illegal, and to discharge the prisoner, because some other evidence was introduced which was not legal or competent, but was held to be so by the commissioner, and was considered by him on the question of fact, or because the court, on a consideration of all the evidence which the commissioner considered, would have come to a different conclusion, or because the court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of facts from that at which the commissioner arrived."

When on the face of the complaint extraditable offenses are charged to have been committed, if petitioner desires to assert that it appears from the depositions taken before and the warrant of arrest issued by the foreign court, and the provisions of the criminal code, that such is not the fact, they should be set out. Petitioner cannot select a portion of the documents accompanying the complaint and ask the court to sustain his conclusion of law thereon, nor can he subsequently supply the inadequacy by a certiorari, which could do no more than bring up what he should have furnished in the first instance. *Terlinden v. Ames*, (1902) 184 U. S. 270, 22 S. Ct. 484, 46 U. S. (L. ed.) 534.

Commissioner's decision upon the weight of proof will not be interfered with, unless there be clear insufficiency in the evidence to afford a *prima facie* case against the accused. *In re Krojanker*, (1890) 44 Fed. 482; *In re Behrendt*, (1884) 22 Fed. 699; *Matter of Vandervelpen*, (1877) 14 Blatchf. 137, 28 Fed. Cas. No. 16,844.

When the evidence is not satisfactory

and far from convincing, but the facts and circumstances proved authorize conflicting presumptions and probabilities as to the guilt or innocence of the accused, it is the province of the commissioner to determine their import and whether they are such as to justify him in exercising his power to commit the accused to custody pending the action of the department of state. *Sternaman v. Peck*, (C. C. A. 1897) 80 Fed. 883, 51 U. S. App. 312, 26 C. C. A. 214.

Reviewing interlocutory decisions.—It is in no case proper to resort to the writ of habeas corpus, or to a succession of such writs, from day to day, for the purpose of reviewing the interlocutory decisions of the commissioner on questions of evidence. *In re Macdonnell*, (1873) 11 Blatchf. 79, 16 Fed. Cas. No. 8,771.

No right of appeal.—In extradition cases from a foreign country, the judge or magistrate acts under special authority conferred by treaties and Acts of Congress, and, no appeal from his decision being given by the law under which he acts, no right of appeal exists. Extradition of Muller, (1863) 10 Op. Atty-Gen. 501, citing *Matter of Metzger*, (1847) 5 How. 176, 12 U. S. (L. ed.) 104; *U. S. v. Ferreira*, (1851) 13 How. 40, 14 U. S. (L. ed.) 42; *In re Kaine*, (1852) 14 How. 103, 14 U. S. (L. ed.) 345.

Further certificate and amendment of complaint.—After a writ of certiorari has been issued and served upon the commissioner calling upon him to produce the record of the proceeding, he has no authority to add a further certificate to his return, or to amend the complaint. *Ex p. Lane*, (1881) 6 Fed. 34.

Ultior purpose in securing extradition.—Evidence of malice or an ulterior purpose on the part of the prosecuting witness at whose instance a criminal prosecution was instituted in a foreign country will not invalidate a commitment of the accused for extradition from this country. *In re Herskovitz*, (1901) 136 Fed. 713.

Where extradition proceedings for forgery were in the name of the German government under treaty with the United States, it was held that the attitude or motives of the persons alleged to have been defrauded were immaterial. *Ex p. Zentner*, (1910) 188 Fed. 344.

Identity.—A finding that the identity of the prisoner with the person whose extradition to a foreign country is sought is made out cannot be said to be erroneous where in addition to a photograph under seal of the foreign magistrate, which represents the prisoner, there are other facts tending to establish such identity. *Glucksmann v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

3. Second Warrant of Arrest

Allowance.—Where a district judge has ordered the discharge of a fugitive from

justice, the party may, upon the warrant of another judge, be rearrested and re-examined in the same manner, where there is a proper case made out. Extradition of Muller, (1863) 10 Op. Atty.-Gen. 501.

The prisoner being in legal custody under a warrant of arrest, and, while the proceedings were being carried on, another warrant on another charge having been issued, and he having been released under the first warrant through insufficiency of evidence, it was held that arrest under the second warrant was not illegal or invalid. *In re Macdonnell*, (1873) 11 Blatchf. 170, 16 Fed. Cas. No. 8,772.

Where there was a question upon the form of the first warrant whether the petitioner could be held upon it, and a second warrant was issued by the district judge upon a second complaint, and no order was made upon the first complaint and warrant, it was held that the court had the power to issue a second warrant and that the defendant's arrest thereunder was not void on habeas corpus. *Fergus, Petitioner*, (1887) 30 Fed. 607.

An extradition requires the assent of both the judicial and the executive, and the executive is the final tribunal to determine it; and whenever it appears that the executive has said that the alleged offense does not come within the scope of the extradition treaty, or where the executive says he is satisfied that the prosecution is instituted for political reasons, or to gratify private malice, and therefore the offender shall not be extradited, that concludes all further inquiry by the court. But when it is determined by the executive merely that the testimony is insufficient, this leaves it, as in other cases of preliminary examination, open for a second inquiry. If the commissioner should commit upon the second examination, and it should appear that he had no clearer or more convincing testimony as to the truth of the charge than was presented before, the court has power to review the testimony, and say that the executive having once passed upon it, the commissioner is bound to follow. *In re Kelly*, (1886) 26 Fed. 852.

Upon the discharge of one whose surrender has been asked for, if the decision was upon the legal merits of the case, pronounced after full investigation and consideration of them, a renewal of a foreign government's application ought not, perhaps, to be entertained, but until a decision founded upon adequate investigation and full consideration, the proceedings under successive applications for extradition are, in effect, if not in character, analogous to successive preliminary hearings before local committing magistrates under ordinary charges of crime. *Muller's Case*, (1863) 5 Phila. (Pa.) 289, 20 Leg. Int. (Pa.) 301, 17 Fed. Cas. No. 9,913.

XV. METHOD OF SURRENDER AS DEFENSE TO CRIME

Method of surrender no defense.—Where a fugitive has been surrendered, he cannot, as a matter of defense to a crime, attack the method of his surrender, and thereby seek to defeat justice. *Hall v. Patterson*, (1891) 45 Fed. 352. See also *Kelly v. State*, (1882) 13 Tex. App. 158.

The jurisdiction of the court is not impaired by the manner in which the accused is brought before it, so that he is not entitled to be released because his surrender was procured by the governor of a state requesting a foreign country, with which the United States had no treaty, to surrender him to a police officer of a city in the state. *People v. Pratt*, (1889) 78 Cal. 345, 20 Pac. 731.

Illegality in the mode of arrest in the country to which a fugitive has fled is not ground for his discharge, on motion of the accused. If the foreign nation complains, it is a matter which concerns the political relations of the two countries, and in that aspect is a subject not within the power of the state court. *State v. Brewster*, (1835) 7 Vt. 118. See *Kerr v. Illinois*, (1886) 119 U. S. 436, 7 S. Ct. 225, 30 U. S. (L. ed.) 421.

It is no ground for discharging a prisoner from arrest in a criminal matter that he has been forcibly brought within the jurisdiction. *Matter of Lagrave*, (1873) 45 How. Pr. (N. Y.) 301; *People v. Rowe*, (1858) 4 Park. Crim. (N. Y.) 253.

The question as to how the accused came into the United States, whether voluntarily or involuntarily, will not be considered. *In re Ezeta*, (1894) 62 Fed. 964; *In re Newman*, (1897) 79 Fed. 622.

Accused voluntarily surrenders.—If, while under arrest in a foreign country under extradition proceedings, a defendant enters into an agreement to return to the state in which the offense is charged to have been committed, and thereupon the extradition proceedings are abandoned, his appearance and trial are not upon extradition, and therefore no question can arise under the constitution, treaties, or laws of the United States of which the federal courts can take jurisdiction. *In re Cross*, (1890) 43 Fed. 517.

Used to aid civil suits.—If the criminal proceedings are a pretext to bring an accused person within the jurisdiction, so that he may be held to bail in a civil suit, and the creditors in whose suits the orders of arrest are issued instigate the criminal proceeding, and are instrumental in bringing the accused where the orders of arrest can be served, then the arrest is unlawful and cannot be maintained. But this rule does not apply to persons not concerned in the trick or device by which the party was brought within the jurisdiction of the

court. *Martin v. Woodhall*, (1889) 56 N. Y. Super. Ct. 439, 4 N. Y. S. 539; *Adriance v. Lagrave*, (1874) 59 N. Y. 110, 17 Am. Rep. 317.

XVI. TRIAL FOR DIFFERENT OFFENSE

Rule stated.—It had long been a vexed question whether a person brought within the jurisdiction of the court, under an extradition treaty and the statute, might be tried for an offense other than and different from that for which he had been extradited, until reasonable time and opportunity had been given him after his release or trial upon the charge for which he was extradited, in order that he might return to the country from which he had been extradited. All doubt, however, on this point has been set at rest by a decision of the United States Supreme Court in *U. S. v. Rauscher*, (1886) 119 U. S. 407, 7 S. Ct. 234, 30 U. S. (L. ed.) 425, which held that he could not be tried for the second offense without giving him such reasonable time, thus overruling the earlier decisions of *U. S. v. Caldwell*, (1871) 8 Blatchf. 131, 25 Fed. Cas. No. 14,707; *U. S. v. Lawrence*, (1876) 13 Blatchf. 295, 26 Fed. Cas. No. 15,573; *In re Miller*, (1885) 23 Fed. 32. See also the following cases holding as in *U. S. v. Rauscher*, *supra*: *Cosgrove v. Winney*, 174 U. S. 64, 19 S. Ct. 598, 43 U. S. (L. ed.) 897; *U. S. v. Watts*, (1882) 8 Sawy. 370, 14 Fed. 130; *Ex p. Hibbs*, (1886) 26 Fed. 421; *Ex p. Coy*, (1887) 32 Fed. 911; *Cohn v. Jones*, (S. D. Ia. 1900) 100 Fed. 639; *Com. v. Hawes*, (1878) 13 Bush (Ky.) 697, 26 Am. Rep. 242; *People v. Gray*, (1884) 66 Cal. 271, 5 Pac. 240; *People v. Hannan*, (1894) 9 Misc. 600, 30 N. Y. S. 370; *People v. Stout*, (1894) 81 Hun 336, 30 N. Y. S. 898; *State v. Vanderpool*, (1883) 39 Ohio St. 273, 48 Am. Rep. 431; *Blandford v. State*, (1881) 10 Tex. App. 627; *Treaty-Extradition*, (1901) 23 Op. Atty-Gen. 431; *In re Woodall*, (1888) 16 Cox C. C. (Eng.) 478.

It follows from this that a person extradited upon a particular charge cannot be convicted of a lesser offense, although the latter may be included in the offense for which he was so extradited. *People v. Stout*, (1894) 81 Hun 336, 30 N. Y. S. 898; *People v. Hannan*, (1894) 9 Misc. 600, 30 N. Y. S. 370.

This exemption from arrest and trial for a second offense, without time and opportunity given to return, extends also to arrest in civil cases. *In re Reinitz*, (1889) 39 Fed. 204.

The principle that a fugitive criminal brought under an extradition treaty into the jurisdiction of the state in which the

offense was committed is exempt from prosecution for offenses other than that for which he was extradited, does not apply to the case of a person brought forcibly into the jurisdiction without invoking the aid of any treaty. *Ker v. People*, (1884) 110 Ill. 627, 51 Am. Rep. 706, *affirmed* in *Kerr v. Illinois*, (1886) 119 U. S. 436, 7 S. Ct. 225, 30 U. S. (L. ed.) 421.

Where a complaint charges an offense covered by treaty and a second offense not included in the treaty, the court will assume that the foreign jurisdiction will respect its convention and not try upon other charges than those upon which the extradition is allowed. *Kelly v. Griffin*, (1915) 241 U. S. 6, 36 S. Ct. 487.

An order setting aside an indictment under which a fugitive has been extradited does not operate as an acquittal of the defendant for the offense therein charged, and is not a bar to his further prosecution for the same offense by indictment or information. *Ex p. Foss*, (1894) 102 Cal. 347, 36 Pac. 669, 41 A. S. R. 182, 25 L. R. A. 593.

Technical defect in indictment.—On the trial of one who has been extradited from a foreign country, the objection cannot be sustained that he is being tried for an offense for which he was not extradited because of a mere technical defect in the information or indictment under which his extradition was obtained. *In re Rowe*, (C. C. A. 1896) 77 Fed. 161, 40 U. S. App. 516, 23 C. C. A. 103, 35 L. R. A. 633.

New indictment for same offense.—Where a petitioner was extradited from Mexico under an indictment charging an extraditable offense, and thereafter the indictment was quashed in the demanding state, it was held that the petitioner was not entitled to a reasonable time to return to Mexico before being called on to answer a new indictment charging the same facts. *Ex p. Fischl*, (1907) 51 Tex. Crim. 63, 100 S. W. 773.

Offense committed subsequent to extradition.—A person extradited for a particular offense may be tried for a different offense committed subsequent to the time he was extradited without first being given a reasonable time to return to the country from which he was first extradited. Nor has he the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the state whose laws he has violated since his extradition and is not a matter of interest to the surrendering government. *Collins v. Johnston*, (1915) 237 U. S. 502, 35 S. Ct. 649, 59 U. S. (L. ed.) 1071.

Sec. 5271. [Evidence on the hearing.] In every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been

granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section. [R. S.]

Act of Aug. 12, 1848, ch. 167, 9 Stat. L. 302; Act of June 22, 1860, ch. 184, 12 Stat. L. 84.

Section 5271 is given above as originally enacted in the Revised Statutes. By the Act of June 19, 1876, ch. 133, 19 Stat. L. 59, this section was amended "so as to read as follows:" "In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section."

This amendatory Act, however, was repealed by section 6 of the Act of Aug. 3, 1882, ch. 378, given *infra*, p. 315, and the section as it stood originally therefore restored. See article on "Statutes and Statutory Construction," vol. 1.

Said Act of Aug. 3, 1882, ch. 378, § 6, *infra*, p. 315, likewise repealed so much of the foregoing section 5271 as was in conflict with said Act.

Object of section.—It is one of the objects of this section to obviate the necessity of confronting the accused with witnesses against him, and a construction of the section that would require a demanding government to send its citizens to another country where the fugitive is found, to institute legal proceedings, would defeat the whole object of an extradition treaty. *Bingham v. Bradley*, (1916) 241 U. S. 511, 36 S. Ct. 634.

See for construction of this section as it stood amended by the Act of June 19, 1876, *In re Fowler*, (1880) 4 Fed. 303.

Partial repeal of section 5271.—So much of the above section as is inconsistent with the provisions of the Act of Aug. 3, 1882, ch. 378, is repealed by section 6 of that Act, which is given *infra*, p. 315. *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

Authentication of depositions.—Under this section, providing that, where depositions are offered in evidence in an extradition case, they shall be admitted if they are properly authenticated to be received for similar purposes by the tribunals of the foreign country from which accused shall have escaped and the certificate of the principal diplomatic officers of the

United States in such country shall be proof that the depositions are so authenticated, depositions so authenticated are properly admitted, though some of them are not sworn to. *Ex p. Glaser*, (1910) 176 Fed. 702, 100 C. C. A. 254.

Certificate must show principal diplomatic or consular officer.—"The certificate should show upon its face that the officer who makes it is the principal diplomatic or consular officer of the United States resident in the country making the demand of extradition, and it should declare that the documents to which it is attached are properly and legally authenticated according to the laws of the country from which the fugitive escaped, so as to entitle them to be received as evidence for similar purposes by the tribunals of that country." *Extradition of Muller*, (1863) 10 Op. Atty-Gen. 501.

See notes under section 5 of the Act of Aug. 3, 1882, 22 Stat. L. 215, ch. 378, *infra*, p. 313.

Proof of identity.—Evidence of identity considered and held to be insufficient. *Ex p. La Mantica*, (S. D. N. Y. 1913) 206 Fed. 330.

Sec. 5272. [Surrender of the fugitive.] It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the

name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape. [R. S.]

Act of Aug. 12, 1848, ch. 167, 9 Stat. L. 302.

An extradition warrant issued under this section is not a warrant of arrest; and if a new arrest is to be made, it must be upon another proceeding before a judicial officer or commissioner under R. S. sec. 5270, *supra*, p. 265. *Vance's Case*, (1866) 12 Op. Atty.-Gen. 75.

Review of proceedings by the Secretary of State.—Where extradition proceedings are certified to the Secretary of State, he has authority to review them, and his discretion extends to a review of every question therein presented. (1881) 17 Op. Atty.-Gen. 184.

Sec. 5273. [Time allowed for extradition.] Whenever any person who is committed under this Title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered. [R. S.]

Act of Aug. 12, 1848, ch. 167, 9 Stat. L. 303.

Reasonable diligence not shown.—The fact that an officer of the demanding country is on his way hither to take the prisoner back to such country is not ground for refusing a discharge under this section to a party who, as a fugitive from justice, has been detained in jail without trial

for more than two months, when it is shown that, had reasonable diligence been exercised, such officer might have arrived before the application, and no sufficient cause is shown why the coming of the officer has been so long delayed. *In re Dawson*, (1900) 101 Fed. 253.

Sec. 5274. [Continuance of provisions limited.] The provisions of this Title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer. [R. S.]

Act of Aug. 12, 1848, ch. 167, 9 Stat. L. 303.

Sec. 5275. [Protection of the accused.] Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of

extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused. [R. S.]

Act of March 3, 1869, ch. 141, 15 Stat. L. 337.

Crimes committed subsequent to extradition.—Perjury committed by an extradited person at his trial makes him liable to indictment for such crime, as this section does not grant immunity for crimes committed by a person subsequent to his extradition. *Collins v. Johnston*, (1915) 237 U. S. 502, 35 S. C. 649, 59 U. S. (L. ed.) 1071, wherein the court said: "It is contended upon the authority of *U. S. v. Rauscher*, (1886) 119 U. S. 407, 430, 7 S. Ct. 234, 30 U. S. (L. ed.) 425; *Cosgrove v. Winney*, (1889) 174 U. S. 64, 19 S. Ct. 598, 43 U. S. (L. ed.) 897, and other cases, that the conviction and imprisonment of appellant under the second indictment are in contravention of the treaty of extradition between the United States and Great Britain, in that he was extradited for the sole purpose of being brought to trial upon the first indictment, and that while that charge was awaiting trial and final disposition, he could not, without violence to the treaty and § 5275 of the Rev. Stat. be tried, convicted, sentenced, and imprisoned upon another charge. It is alleged that the first indictment was dismissed upon motion of the prosecution on July 12, 1909; and that under the treaty and law he was entitled to a reasonable time thereafter in which to return to the country from which he was extra-

dited. In this form, and in others too numerous for mention, appellant reiterates the points that were decided against him by the supreme court of California (1907) 151 Cal. 340, whose judgment was affirmed by this court in (1909) 214 U. S. 113, 29 S. Ct. 573, 53 U. S. (L. ed.) 933, where the court said (p. 122): 'The contention of the plaintiff in error that the duty to afford opportunity to return after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed is not even plausible;' and further (p. 123): 'The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the state whose laws he has violated since his extradition, and we cannot see that it is a matter of any interest to the surrendering government. There is nothing in § 5275, Rev. Stat. *supra*, which gives the least countenance to the claims of the plaintiff in error.'

Subsequent arrest in civil action.—This section applies to a subsequent arrest not only for crime, but also on a civil action. *In re Reinitz*, (1889) 39 Fed. 204.

Sec. 5276. [Powers of agent receiving offenders delivered by a foreign government.] Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping. [R. S.]

Act of March 3, 1869, ch. 141, 15 Stat. L. 338.

Compensation of United States marshal acting as agent.—Where a United States marshal has, in pursuance of this section, been appointed as agent to go to a foreign country and take the delivery of a criminal, he is entitled to receive compensation for his services under the appropriation bills, where the amount was fixed by regulation of the department before his ap-

pointment. If not so fixed, he is entitled only to his expenses. *Extra Compensation*, (1888) 19 Op. Atty-Gen. 121.

Unlawful custody.—If the custody which the supposed agent exercised over the accused was unlawful in the beginning, this statute could not make the custody lawful afterward. *Matter of Lagrave*, (1873) 45 How. Pr. (N. Y.) 301.

Sec. 5277. [Penalty for opposing agent, etc.] Every person who knowingly and willfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his

custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year. [R. S.]

Act of March 3, 1869, ch. 141, 15 Stat. L. 338.

Sec. 5278. [Fugitives from justice of a State or Territory.] Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory. [R. S.]

Act of Feb. 12, 1793, ch. 7, 1 Stat. L. 302.

The foregoing R. S. sec. 5278 and the following R. S. sec. 5279 were made applicable to the Philippine Islands by an Act of Feb. 9, 1903, ch. 529, § 2, 32 Stat. L. 807. See the title **PHILIPPINE ISLANDS**.

- I. Introductory, 285.
- II. Authority of federal government over interstate extradition, 285.
 - 1. Rule stated, 285.
 - 2. Reliance of state governors on federal statutes, 286.
 - 3. State legislation in aid of federal enactments, 286.
- III. Jurisdiction of courts, 286.
- IV. Any state or territory, 286.
- V. Prerequisites to demand for extradition, 287.
- VI. Fugitive from justice, 288.
- VII. Indictment, information or affidavit, 290.
 - 1. Indictment, 290.
 - 2. Information, 291.
 - 3. Affidavit, 291.
- VIII. "Charged" with crime, 294.
- IX. Treason, felony or other crime, 296.
- X. Certified as authentic, 296.
- XI. Proceedings before governor, 298.
- XII. Warrant of arrest, 301.
- XIII. Bail, 304.
- XIV. Review, 304.
 - 1. By federal court, 304.
 - 2. By state courts, 305.
 - 3. Scope of review, 305.
 - 4. Review of courts of demanding state, 307.
 - 5. Production of papers, 307.
- XV. Subsequent proceedings in demanding state, 307.
- XVI. Fees and costs, 310.

I. INTRODUCTORY

Strict compliance with Act.—"The Act of Congress provides for a method that is summary in its effect, and it must, therefore, be strictly complied with." *Ex p. Morgan*, (1883) 20 Fed. 298.

International and state extradition.—The principles governing international extradition have no application to cases of extradition between states. *Knox v. State*, (1905) 164 Ind. 226, 73 N. E. 255, 108 A. S. R. 291, 3 Ann. Cas. 539.

II. AUTHORITY OF FEDERAL GOVERNMENT OVER INTERSTATE EXTRADITION

1. Rule Stated

Federal authority paramount.—The extradition of criminals is governed entirely by the Constitution and laws of the United States. No state can deal with other states, under the express terms of the Constitution, without the approval of Congress, and what the state cannot do its officers cannot do. *Malcolmson v. Gibbons*, (1885) 56 Mich. 459, 23 N. W. 166.

The power of Congress to legislate on the subject of interstate extradition is exclusive, and its law is the paramount law of the subject. *Ex p. McKean*, (1878) 3 Hughes 23, 16 Fed. Cas. No. 8,848.

A state has no sovereign power to surrender fugitives found within its limits to another jurisdiction, and can grant extradition only under the Federal Constitution

and statutes. *In re Kopel*, (1906) 148 Fed. 505.

The power of Congress to extend the extradition laws to all places within the territorial jurisdiction of the United States cannot be denied. *In re Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

2. Reliance of State Governors on Federal Statutes

State governors must rely on federal statutes.—In interstate extradition matters, state governors and their agents are compelled to rely upon federal statutes for authority to do the acts required thereby, and such statutes afford them justification. *State v. Justus*, (1901) 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325. See *Ex p. Smith*, (1842) 3 McLean 121, 22 Fed. Cas. No. 12,968; *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 90, Ann. Cas. 1912C 1295; *In re Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

3. State Legislation in Aid of Federal Enactments

Rule stated.—State legislation in aid of the federal enactments is not objectionable. The means by which the fugitive is "to be arrested and secured" are not provided by the Act of Congress, hence the legislature of a state may and should provide proper and adequate means and facilities for the accomplishment of such extradition. *Ex p. Ammons*, (1878) 34 Ohio St. 518; *Ex p. Walters*, (1913) 106 Miss. 439, 64 So. 2. See *Com. v. Johnston*, (1892) 12 Pa. Co. Ct. 263; *Ex p. Butler*, (1878) 18 Alb. L. J. 369.

A state statute authorizing any court or magistrate, on complaint against any person found within the state, charged with an offense committed in any other state, and liable by the Constitution and laws of the United States to be delivered over, etc., to issue a warrant and cause such person to be held for examination, and imprisoned or bailed for a limited time, is one which the legislature is competent to make and enforce, independently of the constitutional obligation to surrender such person to other states for trial and punishment. When a matter is one within the jurisdiction of the United States, the general rule in regard to conflicting laws of the United States and of the state is, not that the act of the state may not in some respects have the force of law, but that so far as it conflicts with that of the United States the state law is inoperative and void. *Com. v. Tracy*, (1843) 5 Metc. (Mass.) 536.

When a state statute prescribes the proceedings to be followed in the case of one charged with being a fugitive from justice, persons making an arrest on the pretense that the one arrested is a fugitive, without following the directions of the statute, are guilty of assault

and battery. *State v. Shelton*, (1878) 79 N. C. 605.

The law of the state should be construed in connection with the law of Congress of which it is a part. *Ex p. McKean*, (1878) 3 Hughes 23, 16 Fed. Cas. No. 8,848.

Under a state statute, "in order to hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state: 1. That a crime has been committed in the other state. 2. That the accused has been charged in that state with the commission of such crime. 3. That he has fled from justice and is within this state." *Ex p. Lorraine*, (1881) 16 Nev. 63.

The extradition of fugitives from the justice of a state is provided for by Const. U. S., art. 4, sec. 2, requiring that where a person charged in any state with crime shall flee from justice and be found in another state, he shall on demand of the executive of the state from which he fled be delivered up to be removed to that state, and by federal statutes enacted in furtherance of the provision, and a state statute in aid thereof need not be complied with. Thus, where a fugitive was arrested by an officer on information furnished him from the sister state, and on hearing the governor issued his warrant, it was held that the fugitive could not complain that he was not arrested in accordance with a state law providing for the arrest of a person charged in another state with crime. *Ex p. Bergman*, (1910) 60 Tex. Crim. 8, 130 S. W. 174.

III. JURISDICTION OF COURTS

State and federal courts.—State courts have concurrent jurisdiction with federal courts in extradition matters, but the judgments of the state courts are not necessarily decisive and do not conclude the federal courts, although they are entitled to great respect and are strongly advisory. *In re Roberts*, (1885) 24 Fed. 132.

The state courts are bound by the construction of the extradition laws adopted by the Supreme Court of the United States. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045, 117 A. S. R. 817.

IV. ANY STATE OR TERRITORY

Rule stated.—Territories are in the same position as states in regard to interstate extradition, and the executive of a territory has the same rights and is subject to the same duties as is the executive of a state. *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Ex p. Morgan*, (1883) 20 Fed. 298; *Ex p. Krause*, (W. D. Wash. 1915) 228 Fed. 547. See also *In re Romaine*, (1863) 23 Cal. 585.

Change of government from territorial to state.—Mere transition from terri-

torial to state government is insufficient of itself to abolish a crime committed against the territorial law, or to preclude the state from obtaining the return of a person to answer therefor by extradition proceedings; but, to prevent such return, it must appear that the offense no longer exists in the state. *Ex p. McCarthy*, (1909) 56 Tex. Crim. 209, 119 S. W. 682, 133 A. S. R. 964.

Alaska.—Under the Washington statute (Pierce's Code, § 2035; Ballinger's Annot. Codes & Stat. § 7016) providing that when a demand is made upon the governor of the state by the executive of any state or territory, in any case authorized by the Constitution and laws of the United States, for the delivery over of any person charged with crime, the governor shall, if satisfied that the demand is conformable to law and ought to be complied with, issue his warrant, etc., it has been held that the governor has authority to surrender a fugitive from justice upon the demand of the governor of the district of Alaska, made pursuant to section 303 of the Alaska Code of Criminal Procedure, expressly conferring upon the governor of that district power to make such demand. *In re Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

The executive authority of Alaska under this section has the same rights and bears the same duties as the governor of a state, the extradition laws being open to all the states and territories. *Ex p. Krause*, (W. D. Wash. 1915) 228 Fed. 547.

The Cherokee Nation being neither a state nor a territory, within the meaning of the constitutional clause and the Acts of Congress relating to interstate extradition, a state governor has, therefore, no authority to issue a warrant for the arrest of a fugitive from justice upon the requisition of a chief of such nation. *Ex p. Morgan*, (1883) 20 Fed. 298.

The District of Columbia not being a state, and therefore not coming within the constitutional and statutory provisions relating to extradition to and from states, the Act of March 3, 1801, 2 Stat. L. 115, ch. 24, was passed providing for the delivering up of criminals and fugitives from justice found within the District and requiring all executive and judicial officers to obey all lawful precepts or other process issued for that purpose, etc. Although this statute does not specifically provide for the return to the District of Columbia of fugitives from justice, yet under R. S. sec. 1014 (title CRIMINAL LAW, vol. 2, p. 654), it has been held that they may be so surrendered. *In re Buell*, (1875) 3 Dill. 116, 4 Fed. Cas. No. 2,102. See *Matter of Dana*, (1873) 7 Ben. 1, 6 Fed. Cas. No. 3,554.

In the District of Columbia, the chief justice of the Supreme Court thereof is charged with the same duties that in similar proceedings are imposed upon the gov-

ernors of the several states. *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450.

Porto Rico.—Precisely the same power to issue a requisition for the return of a fugitive criminal as is possessed under R. S. sec. 5278 by the governor of any organized territory, is given the governor of Porto Rico by the provisions of the Foraker Act of April 12, 1900, 31 Stat. L. 80, ch. 191, § 14 (see title PORTO RICO), that the laws of the United States not locally inapplicable shall be in force and effect in Porto Rico, and of section 17 (see title PORTO RICO), that the governor of Porto Rico shall have all the powers of governors of the territories of the United States that are not locally inapplicable. *People v. Bingham*, (1909) 211 U. S. 468, 29 S. Ct. 190, 53 U. S. (L. ed.) 286, *affirming* (1907) 189 N. Y. 124, 81 N. E. 773, which *affirmed* 117 App. Div. 411, 102 N. Y. S. 878; *In re Kopel*, (1906) 148 Fed. 505.

Although Porto Rico is not a territory incorporated into the United States, yet it is a completely organized territory and as such comprised within this section. (1912) 29 Op. Atty-Gen. 521.

V. PREREQUISITES TO DEMAND FOR EXTRADITION

No demand before complaint.—"Under the Constitution and Acts of Congress it is for the governor of the one state to determine whether he desires extradition, and for the governor of the other to decide whether he will grant it. Congress will not allow the demand to be made until the offender has either been indicted or otherwise complained of in the regular course of justice. There can be no demand before complaint." *Malcolmson v. Gibbons*, (1885) 58 Mich. 459, 23 N. W. 166.

Respective rights of demanding and asylum states.—Where a person is detained in one state because its laws have claims upon him, he cannot be extradited and taken to another state before the justice of the state holding him has been satisfied; that is, the right of the state demanding him is not superior to that of the state from which he is demanded. *Matter of Briscoe*, (1876) 51 How. Pr. (N. Y.) 422; *Taylor v. Taintor*, (1872) 16 Wall. 366, 21 U. S. (L. ed.) 287; *In re Troutman*, (1854) 24 N. J. L. 634; *State v. Allen*, (1840) 2 Humph. (Tenn.) 258; *Ex p. Hobbs*, (1893) 32 Tex. Crim. 312; 22 S. W. 1035, 40 A. S. R. 782; *In re Opinion of Justices*, (1909) 201 Mass. 409, 89 N. E. 174, 24 L. R. A. (N. S.) 799. This principle applies also where the process under which the accused is heard is a civil process. *In re Troutman*, (1854) 24 N. J. L. 634; *Matter of Briscoe*, (1876) 51 How. Pr. (N. Y.) 422. But there must have been an actual arrest before the principle applies. *In re Rosenblatt*, (1876) 51 Cal. 285; *Harriott's Petition*, (1892) 18 R. I. 12, 25 Atl. 349.

Of course this right may be waived by the state in which the fugitive is, and, upon surrender to the demanding state, it loses its jurisdiction. *Taylor v. Taintor*, (1872) 16 Wall. 306; 21 U. S. (L. ed.) 287; *In re Hess*, (1897) 5 Kan. App. 763, 48 Pac. 596.

Fugitive serving a sentence in asylum state.—The governor, otherwise than by exercising his pardoning power, has no power by virtue of the Federal Constitution, or otherwise, to grant an extradition demand issued by the governor of another state for the return of a fugitive from the justice of that state lawfully held in a penal institution under an unexpired sentence. *In re Opinion of Justices*, (1909) 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799.

But after the expiration of the term of sentence in the asylum state the governor of such state may issue his warrant and have such person arrested for rendition to the demanding state. *Kelly v. Mangum*, (Ga. 1916) 88 S. E. 556.

VI. FUGITIVE FROM JUSTICE

Who is "a fugitive from justice."—"To be a fugitive from justice in the sense of the Act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *Streep v. U. S.*, (1895) 160 U. S. 128, 16 S. Ct. 244, 40 U. S. (L. ed.) 365; *Ex p. Dickson*, (1902) 4 Indian Terr. 481, 69 S. W. 943; *In re White*, (C. C. A. 1893) 55 Fed. 54, 14 U. S. App. 87, 5 C. C. A. 29; *Ex p. Brown*, (1886) 28 Fed. 653; *In re Bloch*, (1898) 87 Fed. 981; *Matter of Voorhees*, (1867) 32 N. J. L. 141; *State v. Hall*, (1894) 115 N. C. 811, 20 S. E. 729, 44 A. S. R. 501, 28 L. R. A. 289; *Hibler v. State*, (1875) 43 Tex. 197; *State v. Richter*, (1887) 37 Minn. 436, 35 N. W. 9; *In re Sultan*, (1894) 115 N. C. 57, 20 S. E. 375, 44 A. S. R. 433, 28 L. R. A. 294; *Drinkall v. Spiegel*, (1896) 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486; *Depoilly v. Palmer*, (1906) 28 App. Cas. (D. C.) 324; *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125.

To be a fugitive from justice within the meaning of the provisions of U. S. Const., art. 4, sec. 2, and R. S. sec. 5278, it is only necessary that the accused, having been in the demanding state when the crime was committed, thereafter leave that state and be found within the territory of

another. *Appleyard v. Com.*, (1906) 203 U. S. 222, 27 S. Ct. 122, 51 U. S. (L. ed.) 161; *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

A person indicted the second time for the same offense is none the less a fugitive from justice because after the dismissal of the first indictment, on which he was originally extradited, he left the state with the knowledge of, or without objection by, the state authorities. *Bassing v. Cady*, (1908) 208 U. S. 386, 28 S. Ct. 392, 52 U. S. (L. ed.) 540, 13 Ann. Cas. 905.

One who does, within the state, an overt act, which is and is intended to be a material step toward accomplishing a crime, and then absents himself from the state and does the rest elsewhere, becomes a fugitive from justice for extradition purposes when the crime is complete, if not before. *Strassheim v. Daily*, (1911) 211 U. S. 280, 31 S. Ct. 558, 55 U. S. (L. ed.) 735; *State v. Gerber*, (1910) 111 Minn. 132, 126 N. W. 482.

One convicted of an offense against a state, who, before the expiration of that sentence, was delivered to the federal authorities to serve out a prior sentence, would at the end of such prior sentence be a fugitive from justice under the United States Constitution, and could be taken by the state under the direct provisions of this section. *People v. Benham*, (1911) 71 Misc. 345, 128 N. Y. S. 610.

Section 364 of the Criminal Code of Nebraska (Cobbey's Ann. Code 1901) does not authorize the extradition of a person charged with crime against the laws of another state without proof that the person so charged is a fugitive from the justice of the demanding state. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045, 117 A. S. R. 817.

For other cases on the question as to who is a fugitive from justice under the extradition laws, see *Ex p. Innes*, (Tex. Crim. 1915) 173 S. W. 291, *affirmed* (1916) 240 U. S. 127, 36 S. Ct. 290; *Kelly v. Mangum*, Ga. (1916) 88 S. E. 556; *People v. Baker*, (1911) 142 App. Div. 598, 127 N. Y. S. 382; *Coleman v. State*, (1908) 53 Tex. Crim. 93, 113 S. W. 17; *State v. Clough*, (1902) 71 N. H. 594, 53 Atl. 1086; *People v. Gardner*, (1807) 2 Johns. (N. Y.) 477; *Matter of Heyward*, (1848) 1 Sandf. (N. Y.) 701; *Johnson v. Ammons*, (1879) 7 Am. L. Rec. 662, 6 Ohio Dec. (Reprint) 747; *Com. v. Trach*, (1887) 3 Pa. Co. Ct. 65; *Simmons v. Com.*, (1813) 5 Bin. (Pa.) 617. See also *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450; *State v. Washburn*, (1871) 48 Mo. 240; *In re Greenough*, (1858) 31 Vt. 279.

Actual presence when crime committed.

—The party must have been actually present in the state by which the demand is made and in which the crime is alleged to have been committed, at the time of such commission, and thereafter have fled

therefrom. *Ex p. Smith*, (1842) 3 McLean 121, 22 Fed. Cas. No. 12,968. To the same effect see *Tennessee v. Jackson*, (E. D. Tenn. 1888) 36 Fed. 258; *Ex p. Hoffstot*, (S. D. N. Y. 1910) 180 Fed. 240, *affirmed* (1910) 218 U. S. 665, 31 S. Ct. 222, 54 U. S. (L. ed.) 1201; *Ex p. Graham*, (S. D. Cal. 1914) 216 Fed. 813; *Ex p. State*, (1833) 73 Ala. 503, 49 Am. Rep. 63; *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502; *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450; *Hartman v. Aveline*, (1878) 63 Ind. 344, 30 Am. Rep. 217, 28 L. R. A. 289; *O'Malley v. Quigg*, (1909) 172 Ind. 350, 88 N. E. 611; *Jones v. Leonard*, (1878) 50 Ia. 106, 32 Am. Rep. 116; *Matter of Mitchell*, (1885) 4 N. Y. Crim. 596; *People v. Baker*, (1911) 142 App. Div. 598, 127 N. Y. S. 382; *State v. Hall*, (1894) 115 N. C. 811, 20 S. E. 729, 44 A. S. R. 501, 28 L. R. A. 289; *Wilcox v. Nolze*, (1878) 34 Ohio St. 520, *cited in* *Henderson v. James*, (1895) 52 Ohio St. 242, 30 N. E. 805, 27 L. R. A. 290. In *Hyatt v. New York*, (1903) 188 U. S. 691, 23 S. Ct. 456, 47 U. S. (L. ed.) 657, *affirming* *People v. Hyatt*, (1902) 172 N. Y. 176, 64 N. E. 825, 92 A. S. R. 706, 60 L. R. A. 774, it was held that the presence of the relator on business for one day in the state eight days after the alleged commission therein of the act, did not, when he left the state, render him a fugitive from justice, there being no evidence or claim that he then committed any act which brought him within the criminal law of the state, or that he was indicted for any act then committed, and the complaint not having been made nor the indictments found until months after such departure.

In *Ex p. Hoffstot*, (1910) 180 Fed. 240, *affirmed* 218 U. S. 665, 31 S. Ct. 222, 54 U. S. (L. ed.) 1201, it was held that the petitioner, a resident of New York, indicted in Pennsylvania for conspiracy to bribe members of the Pittsburg city council, could not be extradited, in the absence of some proof that he had been physically present in Pennsylvania when the offense was committed, as otherwise he could not be a fugitive from justice of that state.

One who, within the jurisdiction of the state, has set in motion the machinery for crime and departs the jurisdiction before the commission of such crime, must be regarded as a "fugitive from justice." *In re Cook*, (1892) 49 Fed. 833, *affirmed* *Cook v. Hart*, (1892) 146 U. S. 183, 13 S. Ct. 40, 36 U. S. (L. ed.) 934.

One who goes into a state and commits a crime, and then returns home, is as much a fugitive from justice as though he had committed a crime in the state in which he resided and then fled to some other state. *In re Roberts*, (1885) 24 Fed. 132; *In re Keller*, (1888) 36 Fed. 681; *Kingsbury's Case*, (1870) 106 Mass. 223; *In re Sultan*, (1894) 115 N. C. 57, 20 S. E. 375, 44 A. S. R. 433, 28 L. R. A.

294; *Ex p. Swearingen*, (1880) 13 S. C. 74; *In re Hess*, (1897) 5 Kan. App. 763, 48 Pac. 596. See also *Adams' Case*, (1844) 7 Law Rep. 386.

Surrender of fugitive after requisition, to a third state.—Where the accused is brought into a state as a fugitive from justice he may be surrendered to the authorities of a third state as a fugitive without opportunity to return to the state in which he is domiciled. *Ex p. Innes*, (Tex. Crim. 1915) 173 S. W. 291, *affirmed* (1916) 240 U. S. 127, 36 S. Ct. 290. And see to the same effect, *Kelly v. Mangum*, (Ga. 1916) 88 S. E. 556.

Escaped convict.—A person who, after having been convicted of a crime committed within a state, when sought for, to be subjected to the sentence of the court, is found within another state, is a fugitive from justice within the meaning of the extradition statute. *Hughes v. Pfanz*, (C. C. A. 1905) 138 Fed. 980, 71 C. C. A. 234.

Motive inducing departure as material.—It has long been established that for purposes of extradition between the states it does not matter what motive induced the departure of the fugitive. *Drew v. Thaw*, (1914) 235 U. S. 432, 35 S. Ct. 137, 59 U. S. (L. ed.) 302.

Nor has the motive of the accused in leaving the state any bearing upon the question as to whether he is a fugitive from justice. *Ex p. Hoffstot*, (S. D. N. Y. 1900) 180 Fed. 240, *affirmed* (1910) 218 U. S. 665, 31 S. Ct. 222, 54 U. S. (L. ed.) 1201; *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125.

One found in another state on institution of prosecution against him, who refuses to return voluntarily, is a fugitive within the extradition law, though he left openly, not in flight or with any intent to avoid arrest; the manner of his leaving being immaterial. *Taylor v. Wise*, (Ia. 1910) 126 N. W. 1126.

The belief of the accused when leaving the demanding state, that he had not committed any crime against the laws of that state, does not prevent his being a fugitive from justice within the meaning of the provision of U. S. Const., art. 4, sec. 2, and R. S. sec. 5278. *Appleyard v. Massachusetts*, (1906) 203 U. S. 222, 27 S. Ct. 122, 51 U. S. (L. ed.) 161.

It is sufficient if a person charged with crime shall have fled from the justice of that state and be found in another state, though his presence there may be involuntary, and resulted from a rendition to that state from a third state. *People v. Sennot*, (1879) 20 Alb. L. J. 230.

Where a person charged with crime is brought into a state, under requisition, as a fugitive from justice, he may be surrendered to the authorities of another state as a fugitive, without opportunity to return to the state in which he is domiciled. *Ex p. Innes*, (Tex. Crim. 1915)

173 S. W. 291, *affirmed* under the title *Innes v. Tobin*, (1916) 240 U. S. 127, 36 S. Ct. 290.

And in *Kelly v. Mangum*, (Ga. 1916) 88 S. E. 556, *following* *Innes v. Tobin*, (1916) 240 U. S. 127, 36 S. Ct. 290, it was held that where a fugitive from justice from the state of Missouri was convicted for crime in a United States District Court of Alabama and was committed to the United States penitentiary in Georgia to serve his sentence, upon his release therefrom at the expiration of such term, upon requisition from the governor of Missouri, the governor of Georgia could issue his warrant and have such person arrested for rendition to the demanding state.

VII. INDICTMENT, INFORMATION OR AFFIDAVIT

1. Indictment

Necessity for.—The executive of a state upon whom demand is made for the arrest and extradition of a fugitive criminal has no power to issue his warrant of arrest for a crime committed in another state, so far as any authority has been conferred upon him by the federal statutes, unless he is furnished with a copy of the indictment or affidavit required by the provisions of this section. *Compton v. Alabama*, (1908) 214 U. S. 1, 29 S. Ct. 605, 53 U. S. (L. ed.) 885, *affirming* (1907) 152 Ala. 68, 44 So. 685.

Technical sufficiency.—As each state may prescribe its own form of pleading and court procedure to be observed in both criminal and civil cases, subject only to those provisions of the Constitution involving the protection of life, liberty, and property in all the states of the Union, it is sufficient in an extradition case under this statute, if the indictment, in substance, conforms to the laws of the state from which the demand arises, it not being necessary that it shall follow the technical rules of criminal pleading. *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Ex p. Sheldon*, (1878) 34 Ohio St. 319; *Wheeler v. Palmer*, (1914) 42 App. Cas. (D. C.) 395.

When an indictment appears to have been returned by a grand jury, and is certified as authentic by the governor of the demanding state, and substantially charges a crime, the sufficiency of the charge as a matter of technical pleading is to be tried and determined in the state in which the indictment was found. *Ex p. Graham*, (S. D. Cal. 1914) 216 Fed. 813; *Davis' Case*, (1877) 122 Mass. 324; *State v. O'Connor*, (1888) 38 Minn. 243, 36 N. W. 462; *State v. Goss*, (1896) 66 Minn. 291, 68 N. W. 772, 60 N. W. 1037, 47 A. S. R. 730; *State v. Clough*, (1902) 71 N. H. 594, 53 Atl.

1086; *Matter of Voorhees*, (1867) 32 N. J. L. 141; *Harris v. Magee*, (1911) 150 Ia. 144, 129 N. W. 742.

The technical sufficiency of an indictment is not open in extradition proceedings. *Drew v. Thaw*, (1914) 235 U. S. 432, 35 S. Ct. 137, 59 U. S. (L. ed.) 302.

In extradition proceedings "the executive warrant ought not to be pronounced void merely because of some technical defect in the foreign indictment or affidavit, provided the offense is substantially alleged or described." *Webb v. York*, (C. C. A. 1897) 79 Fed. 616, 49 U. S. App. 163, 25 C. C. A. 133 [*oiting* *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *Kurtz v. State*, (1886) 22 Fla. 36, 1 A. S. R. 173; *In re Roberts*, (1885) 24 Fed. 132; *In re Keller*, (1888) 36 Fed. 681; *Ex p. Pearce*, (1893) 32 Tex. Crim. 301, 23 S. W. 15; *In re White*, (1891) Fed. 237.]

"A requisition for the return of a fugitive from justice cannot be denied when the copy of the indictment or affidavit attached to the requisition is held sufficient by the courts of the state where the offense was committed, although it would not be held good by the courts of the state where the accused has taken refuge." *Webb v. York*, (C. C. A. 1897) 79 Fed. 616, 49 U. S. App. 163, 25 C. C. A. 133 [*oiting* *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Pearce v. Texas*, (1894) 155 U. S. 311, 15 S. Ct. 116, 39 U. S. (L. ed.) 164].

The legal sufficiency of the indictment is not to be determined by the officer granting the requisition warrant. *Depoilly v. Palmer*, (1906) 28 App. Cas. (D. C.) 324. It is a matter for the determination of the court having jurisdiction of the crime charged. *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450; *People v. Baker*, (1911) 142 App. Div. 598, 127 N. Y. S. 382; *In re Renshaw*, (1904) 18 S. D. 32, 99 N. W. 83, 112 A. S. R. 778.

Where extradition proceedings were instituted by Alabama to prosecute petitioner for an alleged homicide committed in that state, under the laws of which it was not essential that the indictment should charge either the time or venue of the offense, it was held that an indictment omitting such elements was not objectionable for that reason in the extradition proceedings. *Coleman v. State*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

For other cases on the question of technical sufficiency, see *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 1113, *affirming* (1907) 155 Fed. 663; *Strassheim v. Daily*, (1911) 221 U. S. 280, 31 S. Ct. 558, 55 U. S. (L. ed.) 735; *Ex p. Lewis*, (Nev. 1911) 115 Pac. 729.

Charge of indictable offense.—When the charge is by bill of indictment, the question whether the bill charges an indictable offense under the statute should

be left to the determination of the courts of the state in which the offense is alleged to have been committed. *In re Greenough*, (1858) 31 Vt. 279.

The omission to give the Christian names of the person charged with the offense in the indictment would not justify the executive of the state in refusing to surrender, nor the courts in releasing on habeas corpus. It may be a fully authorized mode of proceeding under the laws of the demanding state. *People v. Byrnes*, (1884) 33 Hun (N. Y.) 98.

Upon the objection that the indictment did not charge the same offense as the affidavit filed before the justice of the peace upon which the requisition was obtained, it was held that, where the affidavit charged the embezzlement of money, an indictment for embezzling property substantially charged the same offense. *Waterman v. State*, (1888) 116 Ind. 51, 18 N. E. 63.

Burden to show insufficiency.—In habeas corpus by prisoners held pursuant to an indictment found in a sister state, the burden is on relators to show that the indictment is insufficient by producing, if necessary, the statute under which it was found; and hence the fact that such statute was not submitted with the requisition papers to the governor under whose warrant relators were arrested will not justify the presumption that the law of the sister state is the same as that of the forum, under which the indictment would be insufficient. *In re Renshaw*, (1904) 18 S. D. 32, 99 N. W. 83, 112 A. S. R. 778.

Second indictment for same offense.—A second indictment for the same offense may serve as the basis for the second extradition of a person as a fugitive from justice, without violating any rights secured to him by the Federal Constitution or laws, where the first indictment on which the accused was originally extradited was dismissed on motion of the state's attorney before the accused was placed in jeopardy. *Bassing v. Cady*, (1908) 208 U. S. 386, 28 S. Ct. 392, 52 U. S. (L. ed.) 540, 13 Ann. Cas. 905.

2. Information

Rule stated.—While it is in the power of the states to provide for the prosecution and punishment of all manner of crime by information, and without indictment by a grand jury, still, if they wish to rely upon the provisions of the Constitution and laws of the United States relating to fugitives from justice, they must strictly observe and respect the conditions of the same. An information cannot be considered as the equivalent of an indictment, nor as such an affidavit as is required by law, when it is verified by the prosecuting attorney, who swears that he believes the contents thereof to

be true, not that they are true. "The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them, whose knowledge relative thereto justifies the testimony as to their truthfulness, and should not be the mere verification of a court paper by a public official, who makes no claim to personal information as to the subject-matter of the same." *In re Hart*, (C. C. A. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801.

The fact that a person whose extradition is sought has been charged with a crime in the demanding state must appear either by indictment or affidavit, and an information filed by the prosecuting attorney is not sufficient. *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 90, Ann. Cas. 1912C 1295; *Ex p. Bergman*, (1910) 60 Tex. Crim. 8, 130 S. W. 174; *Ex p. Lewis*, (Tex. Crim. 1914) 170 S. W. 1098; *Thorp v. Metzger*, (1913) 77 Wash. 62, 137 Pac. 330.

Prima facie evidence.—When prosecution by information has been adopted by a state making demand for rendition, it must be considered *prima facie* evidence of a crime charged against the accused under the laws of that state. *In re Van Sciever*, (1894) 42 Neb. 772, 60 N. W. 1037, 47 Am. St. Rep. 730. See *State v. Hufford*, (1869) 28 Ia. 391; *State v. Richardson*, (1885) 34 Minn. 115, 24 N. W. 354.

The Constitution of the United States does not prescribe the form in which the charge must be made; and while the statute speaks of an "indictment found or an affidavit made before a magistrate," it cannot be intended to exclude a case where the charge is in the form of a criminal information, as in this state (Wisconsin) all offenses are triable by information filed by the district attorney of the proper county, and it will be presumed that the demanding state has authorized prosecutions by information. *In re Hooper*, (1881) 52 Wis. 699, 58 N. W. 741.

So also in Michigan it has been held that an information is a sufficient basis for extradition. *People v. Stockwell*, (1904) 135 Mich. 341, 97 N. W. 765.

Sufficiency.—It is not necessary that the information charge precisely the same offense named in the original warrant of arrest, so long as it is based on the same transaction. *People v. Stockwell*, (1904) 135 Mich. 341, 97 N. W. 761.

3. Affidavit

Use and sufficiency.—It is not necessary that extradition proceedings under this section shall be based on an indictment, but a verified complaint or affidavit charging a person with a crime is sufficient to confer jurisdiction on the governor of

the state to which the defendant has fled. *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

Where the requisition is accompanied by a certified copy of an indictment against the fugitive the governor need not consider the sufficiency of the affidavit attached to the requisition. *Ex p. Law*, (1911) 2 Ala. App. 257, 56 So. 79.

The affidavit must be so explicit and certain that, if it were laid before a magistrate, it would justify him in committing the accused to answer the charge, an affidavit founded on belief or information not being sufficient. *Ex p. Morgan*, (1883) 20 Fed. 298; *In re Hart*, (C. C. A. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801; *Ex p. Rowland*, (1895) 35 Tex. Crim. 108, 31 S. W. 651.

Where an affidavit began, "State of Wisconsin, Municipal Court, City and County of Milwaukee," and was certified as "Sworn to before me, J. M., clerk of the Municipal Court," it was held that this fell sufficiently within the terms of this section requiring that the affidavit shall be made "before a magistrate." "The oath being administered, as certified to by the clerk of the court, in criminal proceedings for embezzlement in the court by law having cognizance and jurisdiction of such offenses, . . . attack upon the affidavit must fail." *In re Keller*, (1888) 36 Fed. 681.

Affidavits insufficient.—Where affidavits are filed with the governor of a state calling upon him for a requisition, such affidavits, notwithstanding that they are a part of the requisition papers, do not suffice, under this section, if the governor only certifies to the authenticity of an information. *Ex p. Hart*, (C. C. A. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801, reversing 59 Fed. 894.

Charges no crime.—If the charge is by way of affidavit against the alleged fugitive, and it appears clearly from the whole facts stated in the affidavit taken together that no crime has been committed, the executive has no authority to issue the warrant. *In re Greenough*, (1858) 31 Vt. 279.

Unless the affidavit charges the person sought with the commission of a crime it is fatally defective, and a warrant for his rendition is unauthorized. *People v. Brady*, (1874) 56 N. Y. 182. However, this defect, it seems, may be remedied by subsequent affidavit. *In re Fetter*, (1852) 23 N. J. L. 311, 57 Am. Dec. 382.

But in *Ex p. Swearingen*, (1880) 13 S. C. 74, the court refused to look into the question of the charge of the crime in the affidavit, for the reason that the certificate of the demanding governor should be conclusive of the fact that the crime was sufficiently charged.

Technical defect in foreign affidavit.—An executive warrant for the arrest of a

fugitive should be upheld when the foreign affidavit on which it is based is properly authenticated and charges with reasonable fullness and accuracy an offense committed within the foreign state. In such a proceeding the executive warrant ought not to be pronounced void merely because of some technical defect in the foreign affidavit, provided the offense is substantially alleged and is described. *Webb v. York*, (C. C. A. 8th Cir. 1897) 79 Fed. 616, 49 U. S. App. 163, 25 C. C. A. 133. See also *In re Strauss*, (C. C. A. 2d Cir. 1903) 126 Fed. 327, 63 C. C. A. 99.

Judicial proceeding necessary.—The affidavit must be one made in the due course of a judicial proceeding. It must show that a prosecution has been instituted against the person sought to be extradited and that such is pending, otherwise the magistrate in the state from which the prisoner is demanded will have no jurisdiction. *Ex p. Powell* (1884) 20 Fla. 806; *Smith v. State*, (1887) 21 Neb. 552, 32 N. W. 594.

On information and belief.—An affidavit for a requisition in extradition proceedings, made on information and belief, and not predicated on facts within the knowledge of the affiant, is insufficient. *Ex p. Smith*, (1843) 3 McLean 121, 22 Fed. Cas. No. 12,968; *Ex p. Morgan*, (W. D. Ark. 1883) 20 Fed. 298; *Ex p. Hart*, (C. C. A. 4th Cir. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801; *Ex p. Spears*, (1891) 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341; *People v. City Prison*, (1908) 60 Misc. 525, 112 N. Y. S. 492; *Ex p. Rowland*, (1895) 35 Tex. Crim. 108, 31 S. W. 651; *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077; *Mark v. Browning*, (Utah 1911) 115 Pac. 275.

This defect must be taken advantage of in the state upon which the demand is made. *Ex p. Baker*, (1901) 43 Tex. Crim. 281, 65 S. W. 91, 96 Am. St. Rep. 871.

But a complaint charging a crime sworn to by the county attorney as true without qualification is a sufficient affidavit as the basis of an extradition proceeding, as against the objection that the complaint was necessarily on information and belief and insufficient. *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064.

Authority of officer administering oath.—The affidavit must be sworn to before a magistrate. *Davis v. State*, (1914) 73 Tex. Crim. 49, 163 S. W. 442.

In *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 280, it was objected that the complaint or affidavit purported to be sworn to before a justice of the peace, but that there was no proof before the court that a justice of the peace in the state of California is authorized to administer an oath, and that the courts of Minnesota cannot presume that the statute law of

California is the same as in Minnesota. It was held that it would be implied from the executive authentication that the officer certifying to the jurat of the affidavit was such magistrate as he was therein represented to be.

A notary public who has no other power than to swear witnesses and take depositions in the state in which he is appointed, is not a "magistrate." *Ex p. Owen*, (1913) 10 Okla. Crim. 284. See also *Ex p. Powell*, (1884) 20 Fla. 806, 136 Pac. 197.

An affidavit made before a notary public, who under Georgia Code 1895 (vol. 2, p. 982; vol. 3, p. 93) is *ex officio* a justice of the peace, must be regarded as satisfying the requirement of the provisions of this section that the affidavit be made before a magistrate, where the governor of Georgia has based his requisition upon such affidavit, and a warrant of arrest has been issued thereon by the governor of the state upon whom the demand for arrest and extradition was made. *Compton v. Alabama* (1909) 214 U. S. 1, 29 S. Ct. 605, 53 U. S. (L. ed.) 885, 16 Ann. Cas. 1098, *affirming* (1907) 152 Ala. 68, 44 So. 685.

The following persons have been held to be magistrates within the meaning of the federal statute: an assistant police magistrate of a city, *Kurtz v. State*, (1886) 22 Fla. 36, 1 Am. St. Rep. 173; a county judge, *Ex p. Martin*, (Tex. Crim. 1901) 65 S. W. 910; the clerk of a municipal court, *In re Keller*, (D. C. Minn. 1888) 36 Fed. 681; and a notary public clothed with power as a civil magistrate, *Compton v. Alabama*, (1909) 214 U. S. 1, 29 S. Ct. 605, 53 U. S. (L. ed.) 885, 16 Ann. Cas. 1098, *affirming* (1907) 152 Ala. 68, 44 So. 685. See also *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260.

Record of conviction in lieu of affidavit.—Where a charge of crime made against a person in affidavits filed before a magistrate or a court has culminated in a conviction, the record of such conviction is sufficient evidence in proceedings for his extradition from another state, and the question as to the sufficiency of the affidavits becomes immaterial. *Hughes v. Pfanz*, (C. C. A. 1905) 138 Fed. 980, 71 C. C. A. 234.

Effect of clerical error.—An evident clerical error in the affidavit of the clerk of the court that an indictment was returned on a certain date does not preclude a governor from determining the true date. *State v. Clough*, (1902) 71 N. H. 594, 53 Atl. 1086, *affirmed* (1905) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515.

A verified complaint is sufficient as an affidavit required by this section. *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064; *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260; *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077. See also *People v. Stockwell*, (1904)

135 Mich. 341, 97 N. W. 765; *In re Hooper*, (1881) 52 Wis. 699, 58 N. W. 741; *State v. Curtis*, (1910) 111 Minn. 240, 126 N. W. 719.

Under 2 Ballinger's Ann. Codes & Stat. of Washington, sec. 7017, declaring that when any person shall be found within the state charged with an offense committed in another state, any court or magistrate may on complaint issue a warrant for his arrest, etc., the complaint on which the warrant is issued must show that accused has been legally charged with crime in the demanding state. *State v. White*, (1905) 40 Wash. 560, 82 Pac. 907, 2 L. R. A. (N. S.) 563.

But a complaint is not necessarily an affidavit, nor are they in legal practice or contemplation understood as convertible terms. *State v. Richardson*, (1885) 34 Minn. 115, 24 N. W. 354.

Nor can the verification of an information be regarded as an affidavit such as is required by law. *In re Hart*, (C. C. A. 4th Cir. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801.

Jurisdiction to determine sufficiency of affidavit.—The sufficiency of an affidavit as a pleading will not be inquired into in the state in which the person is found. *State v. Goss*, (1896) 66 Minn. 291, 68 N. W. 1089. See also *State v. Patterson*, (Mo. 1892) 20 S. W. 9.

A requisition for the return of a fugitive from justice cannot be denied when the copy of the affidavit attached to the requisition is held sufficient by the court of the state where the offense was committed, although it would not be held good by the court of the state where the accused has taken refuge. *Webb v. York*, (C. C. A. 8th Cir. 1897) 79 Fed. 616, 49 U. S. App. 163, 25 C. C. A. 133, *citing Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Pearce v. Texas*, (1894) 155 U. S. 311, 15 S. Ct. 116, 39 U. S. (L. ed.) 164.

Courts are not authorized to discharge a prisoner because of formal defects in the affidavit charging the offense. The sufficiency of the charge as a matter of technical pleading is to be tried and determined in the state from which the fugitive has fled. *Ex p. Spears*, (1891) 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341.

But in *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077, it was said that the court of the state on which the demand is made may look into the requisition papers in order to determine whether or not the affidavit contains an offense cognizable and punishable in the demanding state.

Burden of proof.—In *Tiberg v. Warren*, (C. C. A. 9th Cir. 1911) 192 Fed. 458, 112 C. C. A. 596, it was held that if the person whose extradition is sought claims that the affidavit, though positive in form,

was made on hearsay, the burden is on him to establish that fact.

VIII. "CHARGED" WITH CRIME

What constitutes "charging" with crime.—A fugitive from justice is "charged" with a crime, within the extradition law, only when he is charged lawfully by a person who has knowledge of its commission, or is possessed of information, which he states under oath, leading a reasonable and fair mind to infer its commission. *People v. City Prison*, (1908) 60 Misc. 525, 112 N. Y. S. 492.

It is only necessary to inquire whether a crime has been charged under the statute of the demanding state as construed by the courts of that state. *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

A requisition, being accompanied by a copy of an affidavit charging the accused with the commission of a certain act, and by the certificate of the governor of that state that such act constitutes a crime under the laws of that state, makes at least a *prima facie* showing that the accused is charged with a crime in the state from which he fled, and authorizes his arrest. *Tullis v. Fleming*, (1879) 69 Ind. 15. See also *Drinkall v. Spiegel*, (1896) 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486.

When a warrant recites that the person accused stands charged with the commission of acts which constitute a crime in the state of refuge, it will be presumed, in the absence of proof to the contrary, that the laws of the demanding state are the same, and that crime known to the laws of the demanding state is charged. *In re Hooper*, (1881) 52 Wis. 699, 58 N. W. 741.

A fugitive having been properly charged with a crime under the laws of the demanding state, it is not necessary to go into the question whether such crime is a crime under the laws of the state to which he has fled. *Johnston v. Riley*, (1853) 13 Ga. 97; *Matter of Hayward*, (1848) 1 Am. L. J. (N. S.) 271.

A finding on extradition proceedings that an indictment upon which they are based does not charge a crime will not preclude a subsequent trial on the merits in the state where the indictment was returned after the accused has been found in that state and arrested. *Benson v. Palmer*, (1908) 31 App. Cas. (D. C.) 561.

In extradition proceedings, allegations that accused in a specified county and state on a day named obtained a specified sum of money from one named person as agent of another by false pretenses by drawing and delivering to such person a check for that amount on a bank at a specified place, and procured such person as such agent to cash the check by falsely representing that he was financially responsible, and had funds in or credit with the bank, and that the check would be honored, and that such person was de-

ceived thereby, was held sufficiently to charge the offense of obtaining money on false pretenses. *Taylor v. Wise*, (1a. 1910) 126 N. W. 1126.

Where an Ohio statute provided that any person who obtained of another anything of value by any false pretense, with intent to defraud, shall be guilty of an offense which, if the value of the property be thirty-five dollars or more, is punishable by imprisonment, an affidavit charging that accused, on a particular day, in M. county, Ohio, unlawfully and falsely pretended to a certain watch company, with intent to defraud it, that he was the owner of a dry goods store in Y., Ohio, which statement was false and known so to be by accused, and by means of such false statement accused obtained from the company jewelry worth \$400, was held sufficiently to state an offense, under the Ohio laws, to sustain extradition proceedings. *In re Strauss*, (C. C. A. 1903) 126 Fed. 327, 63 C. C. A. 99.

Legally well founded.—The statute does not confer upon the authorities of the state in which the person may be found the power to try and determine whether the charge may have been legally well founded or not; that is left to be determined by the authorities of the state having jurisdiction of the crime. *People v. Byrnes*, (1884) 33 Hun (N. Y.) 98.

Question of law.—It is a question of law whether the person extradited was substantially charged with a crime against the laws of the state demanding his surrender. *Munsey v. Clough*, (1904) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515, *affirming* (1902) 71 N. H. 594, 53 Atl. 1086; *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99; *Depoilly v. Palmer*, (1906) 28 App. Cas. (D. C.) 324; *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045, 117 A. S. R. 817; *In re Waterman*, (1907) 29 Nev. 288, 89 Pac. 291, 13 Ann. Cas. 926, 11 L. R. A. (N. S.) 424.

Before the governor of a state, of whom a demand has been made for the surrender of a supposed fugitive from justice, can lawfully comply with such demand, it must appear that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, and as this is a question of law it is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *Com. v. Philadelphia County Prison*, (1908) 220 Pa. St. 401, 69 Atl. 918, 21 L. R. A. (N. S.) 939, *affirming* (1907) 33 Pa. Super. Ct. 594.

Prosecution must have commenced.—Under the state statute the governor has no authority to surrender a fugitive, unless he has been "charged" with crime

in the state from which he fled. It was not intended that a person might be arrested upon an affidavit or information charging him with the commission of a crime in another state, when no prosecution had been commenced there. *Ex p. White*, (1875) 49 Cal. 433.

It was said in *State v. Hufford*, (1869) 28 Ia. 391, that under a state statute, being in aid of the constitutional and statutory requirements of the United States, a charge of crime against the person to be arrested and delivered up, made in the state where the offense was committed, is contemplated. The charge must be made to some court, magistrate, or officer, in the form of an indictment, information, or other accusation, known to the law of the state in which the offense was committed. See also *Smith v. State*, (1887) 21 Neb. 552, 32 N. W. 594.

There is nothing in the statute which requires that a warrant shall be issued for the fugitive upon the charge against him before his return can be demanded from the state to which he may have fled. It is the indictment or affidavit, and not the issuing of a warrant, which constitutes the charge against a fugitive upon which his return can be required. *Tullis v. Fleming*, (1879) 69 Ind. 15.

The finding of a bill of indictment establishes the fact that the act charged is an offense against the laws of the state. *State v. Anderson*, (1883) 1 Hill L. (S. C.) 327.

An indictment must be taken as *prima facie* evidence that the offense charged is a crime under the laws of the state. *In re Fetter*, (1852) 23 N. J. L. 311, 57 Am. Dec. 382.

Complaint before committing magistrate.—A person against whom a complaint for a felony has been filed before a committing magistrate, who can only charge or hold for trial before another tribunal, is "charged" with the crime within the meaning of U. S. Const., art. 4, sec. 2, subd. 2, and of R. S. sec. 5278. *Matter of Strauss*, (1905) 197 U. S. 324, 25 S. Ct. 535, 49 U. S. (L. ed.) 774.

Person convicted and sentenced.—In *Hughes v. Pfanz*, (C. C. A. 1905) 138 Fed. 980, 71 C. C. A. 234, it appeared that the appellant had been convicted of a crime in Indiana and sentenced under the indeterminate sentence law of that state and had escaped from the state before his sentence expired. It was claimed that he was not "charged with crime" within section 5278. The court said: "The term 'charged with crime,' as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he

could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment indicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice. The relator was convicted of the crime of larceny in Indiana, and sentenced, and the term of sentence has not yet expired. That charge of larceny continues to be a charge against him until the sentence has been performed, and he therefore stands 'charged with crime,' within the meaning of that term as used in the Federal Constitution."

Place of commission.—An affidavit for a requisition, made by the governor of Colorado, alleged that accused obtained from the prosecutor two title deeds purporting to convey lands in Kansas; that she promised to take the deeds to the recorder in the county where the lands described in the deeds were situated, and there record the same, for which purpose the deeds were delivered to her; that she did not record them, but converted them to her own use, to wit, that she left Colorado within a few days after obtaining the deeds for the state of Kansas and there obtained other conveyances to the property and transferred the title to other persons, etc. It was held that the offense stated in the affidavit was committed in Kansas, and was not within the jurisdiction of the courts of Colorado, and hence the affidavit was insufficient to sustain the requisition. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 59, 95 S. W. 1077.

Presumptions.—It is presumed that the acts charged in an indictment found in a sister state, under which the extradition of fugitives from justice is sought, are sufficient to constitute a crime under the laws of that state. *In re Remshaw*, (1904) 18 S. D. 32, 99 N. W. 83, 112 A. S. R. 778.

Effect of proper charge of crime.—Where a proper charge of crime has been presented to the court, the court must decline to investigate the guilt or innocence of the prisoner. "It would be otherwise were the arrest made upon preliminary process, and before indictment. In that event investigation would be had, at least, to disclose if there be a prosecution in good faith, and if there be probable cause to suspect the guilt of the party accused." *In re Roberts*, (1885)

24 Fed. 132; *U. S. v. Greene*, (1900) 100 Fed. 941.

"When the executive of the state in which the alleged offender is found is furnished with proof that he is so charged, the demand of the state from the jurisdiction of whose tribunals he has absented himself should be complied with, and the courts will not go behind the 'indictment' or 'affidavit,' if regular in form, and specifically charging the commission of the offense within the jurisdiction of the demanding state, to try the question whether a crime was in fact committed, though identity will always be investigated, and it is proper to inquire whether the prisoner was in fact within the demanding state when the alleged crime was committed." *In re White*, (C. C. A. 1893) 55 Fed. 54, 14 U. S. App. 87, 5 C. C. A. 29.

IX. TREASON, FELONY OR OTHER CRIME

The words "treason, felony, or other crime," embrace any act forbidden and made punishable by the laws of the state making the demand, whether by common law or by statute. *In re Hooper*, (1881) 52 Wis. 699, 58 N. W. 741; *State v. Stewart*, (1884) 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; *Kentucky v. Dennison*, (1860) 24 How. 66, 16 U. S. (L. ed.) 717; *Taylor v. Taintor*, (1872) 16 Wall. 366, 21 U. S. (L. ed.) 287; *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Lascelles v. Georgia*, (1893) 148 U. S. 537, 13 S. Ct. 687, 37 U. S. (L. ed.) 549; *Matter of Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8,162; *In re Brown*, (1873) 112 Mass. 409, 17 Am. Rep. 114; *Morton v. Skinner*, (1874) 48 Ind. 123; *In re Voorhees*, (1867) 32 N. J. L. 141; *In re Clark*, (1832) 9 Wend. (N. Y.) 212; *Leary's Case*, (1879) 6 Abb. N. Cas. (N. Y.) 43; *People v. Brady*, (1874) 56 N. Y. 182; *People v. Donohue*, (1881) 84 N. Y. 438; *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125.

The words embrace every act forbidden and made punishable by the law of the demanding state, and apply as well when the offense charged is a mild misdemeanor under the law of the demanding state, as where it is a grave felony under the law of all the states. *State v. Hudson*, (1893) 2 Ohio Dec. 41, 2 Ohio N. P. 1; *Com. v. Johnston*, (1892) 12 Pa. Co. Ct. 263.

The word "crime," as used in Const. U. S., art. 4, sec. 2, requiring that a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, on demand of the executive authority of the state from which he fled, shall be delivered up to be removed to the state having jurisdiction of the crime, embraces not only misdemeanors, but treason and felony as well, being sufficiently broad to include

every possible crime committed within the border of the United States. *Ross v. Croft*, (1911) 84 Conn. 370, 80 Atl. 90, Ann. Cas. 1912C 1295.

But in *In re Hughes*, (1867) 61 N. C. 57, the court said that the word "crime" embraces all offenses against the public of an aggravated or infamous character as distinguished from "misdemeanors." See *In re Greenough*, (1858) 31 Vt. 279.

The crime is any crime created by statute, in the state in which the offense is alleged to have been committed, since the adoption of the Constitution of the United States, and is not restricted to such an act as is a crime at common law. *Matter of Hughes*, (1867) 61 N. C. 57.

Where a defendant, after conviction in a sister state, fled from the justice of that state, the mere fact that in the judgment of conviction there was imposed a pecuniary fine and sentence to jail was held not to show that he was not guilty of a felony within Const. U. S., art. 4, sec. 2, and the federal statutes relating to extradition, there being nothing to show that under the law of the sister state accused might not have been imprisoned in the penitentiary. *Ex p. Bergman*, (1910) 60 Tex. Crim. 8, 130 S. W. 174.

X. CERTIFIED AS AUTHENTIC

"Certified as authentic."—The requisition requires the production by the governor demanding a fugitive from justice of a copy of the indictment found or affidavit made before a magistrate of his state or territory, charging the person demanded with having committed a crime, "certified as authentic" by him, the demanding governor. What is it that is required to be certified as authentic? It is the indictment or affidavit made before the magistrate. This is really all the certificate that is required of the demanding governor, and it is not essential that he go farther and certify to the official character of the grand jury or of the officer certifying to the copy of indictment, or the officer before whom the affidavit is subscribed and sworn to, or to the official character of the proper custodian of such a document. It is sufficient that the indictment or affidavit is certified as authentic. *Tiberg v. Warren*, (C. C. A. 6th Cir. 1911) 192 Fed. 458, 112 C. C. A. 596.

Extradition proceedings are sufficiently authenticated where the record of the prosecution is certified by the justice before whom it is pending, the county clerk certifies to the justice's official character, and the attorney-general certifies that the application for requisition is in due form under the laws of that state, while the governor certifies to the authenticity of the records and that by such papers and records the accused stands charged with a crime. *Taylor v. Wise*, (Ia. 1910) 126 N. W. 1126.

The question of the authenticity of the complaint is for the governor's own determination, and his certificate to the fact alone is required. *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064.

Where the warrant recited that it was issued upon the requisition of a state executive, and that a copy of the indictment of the accused accompanied such requisition, and that the executive of the state asking for extradition had certified that such copy was "in due form," it was held that the expression "certified to be in due form" was virtually the same as the expression in this section "certified as authentic," and that, therefore, the warrant was sufficient. *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *In re Foye*, (1899) 21 Wash. 250, 57 Pac. 825; *In re Baker*, (1899) 21 Wash. 259, 57 Pac. 827; *In re Sylvester*, (1899) 21 Wash. 363, 57 Pac. 829.

Where the requisition certified that the papers were correct copies, and where one of the papers contained a criminal charge, which was indorsed "an indictment," etc., and was signed by a foreman of the grand jury as a "true bill," it was held that the requirements of this section were satisfied. *State v. Justus*, (1901) 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325.

The objection to a surrender that the affidavit annexed to the requisition alleging the prisoner to have been a fugitive from justice was inadequately authenticated, where the affidavit is not the only evidence before the governor of such fact, and it being the presumption that the governor informed himself of the law in the premises, is not sufficient to authorize the party's release under habeas corpus. *Katyuga v. Cosgrove*, (1901) 67 N. J. L. 213, 50 Atl. 679.

Where a requisition for surrender from one state to another stated that "it appears by the annexed papers, which I certify to be authentic and duly authenticated, that D. stands charged with the crime of murder in the first degree;" and there was annexed thereto a paper indorsed as a true bill and claiming to be an indictment wherein the said D. was charged with being an accessory before the act, it was held that, notwithstanding it was not stated whether such paper was an original indictment or a copy, the requisition was good, the authentication being sufficient. *Ex p. Dickson*, (1902) 4 Indian Ter. 481, 69 S. W. 943.

The law does not require that the governor should certify that the papers are genuine; it is sufficient if he certifies that they are duly authenticated. *Hackney v. Welsh*, (1886) 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

Papers are sufficiently authenticated by affidavit and by the signature of the prosecuting attorney. *Hackney v. Welsh*, (1886) 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

"Duly authenticated according to law."

—When the copy of the indictment annexed to the requisition purports to have been found by a grand jury of the county, and to be authenticated by the attestation of the clerk of that court under the seal thereof, a requisition stating that it is "duly authenticated according to law" is a compliance with the statute. *Ex p. Sheldon*, (1878) 34 Ohio St. 319.

"Duly certified as authentic."—A warrant sufficiently follows the statute which states that the demand was "accompanied by a copy of said affidavit, duly certified as authentic." The statement that it was "duly certified as authentic" must mean that it was certified according to law. *Ex p. Stanley*, (1888) 25 Tex. App. 372, 8 S. W. 645, 8 A. S. R. 440.

The purpose of requiring a certificate of authentication of the affidavit charging a crime, attached to a requisition for extradition of a fugitive from justice, is to prevent the governor of the state upon whom the demand is made from being imposed upon by spurious charges of crime, and to advise him of the genuineness of the copy of the indictment or affidavit. *State v. Curtis*, (1910) 111 Minn. 240, 126 N. W. 719.

Form.—The certificate of authentication need not be in any particular form. It is sufficient if it shows that a copy of an indictment or affidavit annexed to the requisition is authentic. A certificate was held to be sufficient which was in these words: "It appears from the annexed papers, duly authenticated according to the laws of this state." *State v. Curtis*, (1910) 111 Minn. 240, 126 N. W. 719.

There is nothing in the statute specifying how the governor is to be satisfied that the complaints on which he acts are authentic. That is a question for his own determination. His certificate to the fact alone is required. If the proceedings are regular in form, it is for the person attacking them to show that he is not a fugitive from justice. *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064.

In *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260, the certification was as follows: "It satisfactorily appears, by the annexed and accompanying complaint, in form of an affidavit, filed in and issued out of the justice court of Stockton township, county of San Joaquin, state of California, and warrant of arrest issued out of said court, also affidavits of George F. McNoble, Walter F. Sibley, Joseph D. Simpson, and Hayward Reed (which I certify are authentic and duly authenticated in accordance with the laws of the state of California), that in the due and regular course of judicial proceedings under the laws of this state, J. H. Grande stands charged with the crime of forgery." Objection was made that the certification related only to the affidavits of McNoble, Sibley, Simpson, and Reed. The court held

that the only reasonable construction of the language used was that the governor certified that all of the documents enumerated by him and upon which he based his demand were authentic, and that his certificate was therefore sufficient.

Judge of authenticity.—The governor of the state issuing the requisition for the fugitive is the only proper judge of the authenticity of the affidavit, and where the requisition recites that the affidavit is duly authenticated according to the law of that state, it is sufficient. *Matter of Manchester*, (1885) 5 Cal. 237; *Kurtz v. State*, (1886) 22 Fla. 36, 1 Am. St. Rep. 173.

No indictment annexed.—Where the requisition contains a mere recital that a duly authenticated indictment is annexed, but there is no indictment annexed, such recital is of no effect. *Ex p. Hart*, (C. C. A. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801.

The absence of the state seal from the executive requisition will not invalidate the same, provided that otherwise it is correct. *In re Baker*, (1899) 21 Wash. 259, 57 Pac. 827, citing *Hibler v. State*, (1875) 43 Tex. 197.

By secretary of state.—This statute is summary and must be strictly complied with, otherwise an executive warrant issued under it would be absolutely void. An affidavit authenticated by the secretary of state is not authenticated in accordance with this section, which prescribes the performance of that duty by the governor or chief magistrate. *Soloman's Case*, (1866) 1 Abb. Pr. N. S. (N. Y.) 347.

Presumptions.—The presumption is that one authenticating an indictment, made a part of requisition papers, as governor of the demanding state, was so acting at the time. *Kemper v. Metzger*, (1907) 169 Ind. 112, 81 N. E. 663.

Where a governor's requisition is issued in extradition proceedings, it will be presumed on habeas corpus in favor of the action of the governor that his requisition was attached to the papers and affidavits on which it was based, and that he stated therein that the annexed papers were duly authenticated in accordance with the laws of the demanding state. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

XI. PROCEEDINGS BEFORE GOVERNOR

Right to hearing before governor.—The person demanded in interstate extradition proceedings has no right to a hearing before the governor on the question whether he has been substantially charged with a crime and whether he is a fugitive from justice. *Munsey v. Clough*, (1905) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515; *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92; *Farrrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502, 112 A. S. R. 98, 3 Ann. Cas. 874, 70 L. R. A. 686.

Sufficiency of requisition papers.—An extradition requisition reciting that the accused was charged by indictment with a specified crime against the laws of the state, and had become a fugitive from the justice of that state, accompanied by a certified copy of the indictment, makes a *prima facie* case against the accused as an alleged fugitive from justice, and, in the absence of proof to the contrary, authorizes the executive of the surrendering state to issue his warrant for the arrest and delivery of the alleged criminal to the agent of the demanding state. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92. See also *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 90, Ann. Cas. 1912C 1295.

Scope of governor's inquiry.—When requisition is made upon a governor he must determine, first, whether the person demanded is substantially charged with a crime against the laws of the state from whose justice it is alleged he has fled, by an indictment or affidavit properly certified; and, second, whether he is a fugitive from justice from the state demanding him. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045, 117 A. S. R. 817. See also *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 90, Ann. Cas. 1912C 1295; *Harris v. Magee*, (1911) 150 Ia. 144, 129 N. W. 742.

Discretion of executive as to surrender.—Whether the warrant of arrest shall be issued or not is an executive consideration, and the duty of the governor is absolute whenever the requisition from the demanding state is presented in due form, with the necessary accompanying papers as required by law, to the governor of the state where the accused has taken refuge. The latter is under obligation to issue a warrant for the surrender of the person accused, if he be a fugitive from justice. If the requisition is in proper form he has no authority to determine whether the charge is true. The constitutional provision for extradition is in the nature of a treaty between the states to which the executive of each is bound to give effect. *In re Opinion of Justices*, (1909) 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799; *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125; *Ex p. Denning*, (1907) 50 Tex. Crim. 629, 100 S. W. 401; *Coleman v. State*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

The surrender of a fugitive by one state to another does not depend on comity. The obligation to make such surrender is imposed upon all states by the supreme law of the land. The duty to deliver up is complete even though the officers of a state have power to refuse to do so. *Com. v. Johnston*, (1892) 12 Pa. Co. Ct. 263.

When the executive authority of the state whose laws have been thus violated makes such a demand upon the executive of the state in which the alleged fugitive

is found as is indicated by the above section, producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate charging the person demanded with a crime against the laws of the demanding state, it becomes, under the Constitution and laws of the United States, the duty of the executive of the state where the fugitive is found to cause him to be arrested, surrendered, and delivered to the appointed agent of the demanding state, to be taken to that state. *Ryan v. Rogers*, (1913) 21 Wyo. 311, 132 Pac. 95; *Ex p. Law*, (1911) 2 Ala. App. 257, 56 So. 79.

But in *U. S. v. Pope*, (1878) 24 Int. Rev. Rec. 29, 27 Fed. Cas. No. 16,069, it was held that the executive authority, whether of the state or nation, has an ultimate discretion whether to surrender the supposed criminal or not, and surrender is often refused, "though the papers are in due form and unimpeached, if there is good reason to believe that some ulterior object or sinister design is concealed under the regular forms." *U. S. v. Pope*, (1878) 24 Int. Rev. Rec. 29, 27 Fed. Cas. No. 16,069.

So it has been held that the word "duty" implies the moral obligation of a state to perform the compact in the Constitution when Congress should have indicated the manner in which such duty was to be performed; but Congress cannot, by any act, coerce an officer of a state. The performance of its duty is left to its own discretion, and if it refuses such performance it cannot be compelled. *Kentucky v. Dennison*, (1860) 24 How. 66, 16 U. S. (L. ed.) 717; *Taylor v. Taintor*, (1872) 16 Wall. 366, 21 U. S. (L. ed.) 287; *Ex p. Manchester*, (1855) 5 Cal. 237; *State v. Toole*, (1897) 69 Minn. 104, 72 N. W. 53, 65 A. S. R. 553, 38 L. R. A. 224. See also *Work v. Corrington*, (187) 34 Ohio St. 64, 32 Am. Rep. 345.

Executive must determine fact of flight.—Upon the executive of the state in which the accused is found, rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding state. He does not fall in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding state. *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *Cook v. Hart*, (1892) 146 U. S. 183, 13 S. Ct. 40, 36 U. S. (L. ed.) 934; *Katyuga v. Cosgrove*, (1901) 67 N. J. L. 213, 50 Atl. 679.

No special evidence required by the Act.—The Act, however, does not prescribe any mode by which the fact that he is a fugitive from justice shall be authenti-

cated. *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Ex p. Swearingen*, (1880) 13 S. C. 74.

Question of fact.—The question whether the person demanded is a fugitive from justice is a question of fact which the governor upon whom the demand is made must decide upon such evidence as he may deem satisfactory. If there be evidence *pro* and *con* the courts might not be justified in reviewing the decision of the governor, but when the court has before it uncontradicted testimony of the relator and the stipulation of counsel as to what the facts are, it has the right to say whether a case is made out within the federal statute justifying the action of the governor. *Hyatt v. New York*, (1903) 188 U. S. 601, 23 S. Ct. 458, 47 U. S. (L. ed.) 657; *In re Strauss*, (C. C. A. 2d Cir. 1903) 126 Fed. 327, 63 C. C. A. 99.

Question cannot be raised in demanding state.—Where the accused is personally within the jurisdiction of the demanding state, and there applies to the court for his discharge on habeas corpus, he cannot raise the question as to whether or not he has been, as a matter of fact, a refugee from the justice of that state, within the meaning of the Federal Constitution and the Act of Congress authorizing interstate extradition. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897, 118 A. S. R. 214, 12 L. R. A. (N. S.) 227; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

Evidence as to flight from justice.—Before the executive of one state is authorized to issue his warrant to cause to be arrested and secured a person charged in another state with crime, it should be shown by evidence making a *prima facie* case that such person has fled from the demanding state. This should be shown by competent evidence, as the fact of fleeing lies at the foundation of the right to issue a warrant of extradition. The certificate of the demanding governor is no evidence of the fact. *In re Jackson*, (1878) 2 Flipp. 183, 13 Fed. Cas. No. 7,125.

If the determination of the question whether the accused is a "fugitive from justice" by the executive of the state where he is found is subject to judicial review, upon habeas corpus, the accused, in custody, under his warrant—which recites the demand of the executive of the demanding state, accompanied by an authentic indictment charging him, substantially in the language of the statutes of such state, with a specific crime committed within the limits thereof—should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required. *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250.

An indictment alone or the fact that a

person is charged with having committed a crime in the demanding state, constitutes, if any at all, very remote evidence of flight or of the fact that the accused is a fugitive from justice. "A person may be a principal in the commission of a crime and not be present at the scene thereof at the time of its commission. As a concrete example, one might plan the crime of murder in California, to be committed in the state of New York by his confederates, he remaining and being in the former state at the time of its commission. While he would be a principal in the commission of said crime and could be indicted in New York for it, and the courts of that state have the power or legal right to try and punish him therefor, if ever he came within their jurisdiction, still he would not be a fugitive from justice under the federal constitutional provision and laws establishing the authority for interstate extradition." *Ex p. Shoemaker*, (1914) 25 Cal. App. 551, 144 Pac. 985.

Independent proof, apart from the requisition papers, that the accused was a fugitive from justice, need not be demanded by the governor of the surrendering state before issuing his warrant of arrest in extradition proceedings. *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148.

The statute does not provide for the particular kind of evidence to be produced before the governor, nor how it shall be authenticated, but it must at least be evidence that is satisfactory to his mind. *Munsey v. Clough*, (1905) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515, *affirming* (1902) 71 N. H. 594, 53 Atl. 1086; *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502, 112 A. S. R. 98, 3 Ann. Cas. 874, 70 L. R. A. 686.

Contradictory evidence on the question of the presence or absence of the accused in the state at the time of the commission of the offense will not require his discharge on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings. *Munsey v. Clough*, (1905) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515.

Where there was specific evidence that the petitioner, a resident of New York, participated there in a conspiracy to bribe members of the city council of Pittsburg to select certain banks in Pittsburg, of one of which petitioner was president, as city depositories, and there was substantial evidence from which a jury would be justified in drawing an inference that petitioner was in Pittsburg on a day when some act or acts in furtherance of the conspiracy were performed, it was held that there was sufficient proof that he was a fugitive from justice to justify his extradition to Pennsylvania. *Ex p. Hoffstot*, (1910) 180 Fed. 240, *affirmed* 218 U. S. 665, 31 S. Ct. 222, 54 U. S. (L. ed.) 1201.

In *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450, the appellant was charged with keeping "a gambling table for gambling" and with keeping and managing "a house for gambling." It was held that he did not overthrow the *prima facie* case of the state by testimony that he had not been in the state on the date named, but had been there "shortly before" and frequently during the summer without showing the exact dates when he was there.

Affidavit of prosecuting attorney that the accused was a fugitive from justice, etc., sufficient evidence of fact. *Ex p. Sheldon*, (1878) 34 Ohio St. 319.

False affidavit as to being fugitive.—Under this section, a person charged must be a fugitive from the state in which the crime was committed, before the executive authority can be called into action; and, where the affidavit as to his being a fugitive, upon which he has been surrendered, is false, he will be set free under a habeas corpus. *Tennessee v. Jackson*, (1888) 33 Fed. 258.

Warrant is prima facie evidence as to flight from justice.—The warrant of the executive, in rendition between states, is not conclusive, although it is *prima facie* evidence upon the question as to whether the accused is a "fugitive from justice;" and at any time before the accused is given up to the authorities of the state demanding him, that question may be considered under a habeas corpus. *Hyatt v. New York*, (1903) 188 U. S. 691, 23 S. Ct. 456, 47 U. S. (L. ed.) 657; *In re Cook*, (1892) 49 Fed. 833; *Bassing v. Cady*, (1908) 208 U. S. 386, 28 S. Ct. 392, 52 U. S. (L. ed.) 540; *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92; *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 452; *State v. Curtis*, (1910) 111 Minn. 240, 126 N. W. 719; *Ex p. Thompson*, (1915) 85 N. J. Eq. 221, 96 Atl. 102.

Where the governor, in his warrant, states or certifies that the party is a fugitive from justice, a *prima facie* case arises which must be overthrown by the petitioner when he makes that issue before a court on a habeas corpus. *In re Keller*, (1888) 36 Fed. 681, *following* *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *Eaton v. West Virginia*, (C. C. A. 1898) 91 Fed. 760, 61 U. S. App. 667, 34 C. C. A. 68; *State v. Justus*, (1901) 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325.

In *Katyuga v. Cosgrove*, (1901) 67 N. J. L. 213, 50 Atl. 679, the court said that the issuance of a warrant, whether it contains a recital of an express finding that the accused is a fugitive from justice or not, is sufficient evidence that the executive so found.

Race prejudice as cause for refusing extradition.—The mere suggestion that the

alleged fugitive from the justice of another state, because of his race and color, will not receive a fair and impartial trial in the court of the demanding state, and will not be adequately protected against violence while in the custody of that state, does not require the executive of the state in which he may be found to refuse to surrender him on demand made in conformity with the Federal Constitution and laws, nor furnish a ground for his release on habeas corpus. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92.

XII. WARRANT OF ARREST

Steps to secure arrest.—"As to what steps the governor shall take to secure the arrest of the person demanded, and how he shall satisfy himself of the identity of the person seized, the Act of Congress has not determined but has left it for the states to provide such reasonable method as will best secure the discharge of the obligation imposed by the Constitution of the United States." *Robinson v. Flanders*, (1867) 29 Ind. 10.

Conditions precedent.—In order to justify an arrest and detention of an alleged fugitive from justice there must be a charge of a crime against the prisoner in the state where the crime is alleged to have been committed; there must, secondly, be a demand by the governor of that state for the arrest and detention; thirdly, the evidence on which the arrest is based must be an indictment found in the state from which the prisoner had fled, or an affidavit made and certified by the governor of that state; and, fourthly, the prisoner should have been in the state where the crime was committed, and have fled from it. *Ex p. McKean*, (1878) 3 Hughes 23, 16 Fed. Cas. No. 8,848.

Three things are necessary in order to authorize the executive of one state to order the return of a fugitive from justice to the state in which the crime was committed: first, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled; second, the demand must be accompanied by a copy of the indictment, or an affidavit made before a magistrate, charging the fugitive with having committed a crime in the demanding state; and, third, a copy of the indictment or affidavit must be certified to by the executive of the demanding state. *Thorp v. Metzger*, (1913) 77 Wash. 62, 137 Pac. 330.

It is only necessary, as a condition precedent to the issuing of the governor's warrant, to establish two propositions: first, that the defendant was substantially charged with crime against the laws of another state, and second, that he was a fugitive from the justice of that state. *In re Strauss*, (1903) 126 Fed. 327, 63 C. A. 99.

When the executive is not furnished with a copy of either indictment or affidavit, made as required by the statute, a warrant of removal is void. *Ex p. Hart*, (C. C. A. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801.

Form and sufficiency.—*In general.*—The executive warrant need not set forth the facts necessary to justify the detention with the specific certainty of a criminal pleading. "If it appears substantially from the body that the right to make the arrest is justified upon legal grounds, it is sufficient to authorize action of the officer to whom it is delivered, and to protect him in its execution." *State v. Justus*, (1901) 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325.

It is not essential that the warrant should contain a formal statement of all the facts upon which it is issued. If an examination of the record evidence presented to the governor legally authorizes the finding of the necessary facts, it will be presumed, in the absence of evidence to the contrary, that he made such findings. *State v. Clough*, (1902) 71 N. H. 594, 53 Atl. 1086.

A governor's warrant empowering a sheriff to receive defendant from the authorities of another state and convey him hither to be dealt with according to law is sufficient to authorize defendant's production in the court of trial. *People v. Stockwell*, (1904) 135 Mich. 341, 97 N. W. 765.

Addressed to sheriff.—The fact that the warrant is addressed to the sheriff of the county, and not to the agent appointed by the demanding state, affords no reason for the discharge of the accused. *State v. Clough*, (1902) 71 N. H. 594, 53 Atl. 1086.

Seal of state.—When the state statute requires the governor's warrant to be under the great seal of the state, a warrant issued upon which no distinct requisite of the seal can be seen on the impression is void. *Vallad v. Sheriff*, (1828) 2 Mo. 26.

Fugitive from justice.—It is not necessary that the warrant should contain the express statement that the governor has found that the accused is a fugitive from justice. The fact of the issuing of the warrant upon demand made upon that ground is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary. *Denison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045, 117 A. S. R. 817.

Though there is no direct statement in the warrant that the accused had fled from the demanding state or from the justice of that state, and had taken refuge in the asylum state, it is sufficient when it states facts which clearly and unmistakably show that he was a fugitive from justice within

the meaning of the Constitution and statute. *Ex p. Stanley*, (1888) 25 Tex. App. 372, 8 S. W. 645, 8 A. S. R. 440.

Recital of indictment or affidavit.—The warrant must bear upon its face the evidence that it was duly issued, and, unless it recites or sets forth an indictment or affidavit upon which it is founded, it is illegal and void. *In re Doo Woon*, (1883) 18 Fed. 898 [citing *Ex p. Smith*, (1842) 3 McLean 121, 22 Fed. Cas. No. 12,968; *Ex p. Thornton*, (1853) 9 Tex. 635].

An executive warrant is sufficient which recites, but does not set forth in full, the affidavit upon which it is issued. Where the papers upon which the warrant of extradition is issued are withheld by the executive, the warrant itself can be looked to for the evidence that the essential conditions of its issue have been complied with. *Ex p. Stanley*, (1888) 25 Tex. App. 372, 8 S. W. 645, 8 A. S. R. 440; *People v. Donohue*, (1881) 84 N. Y. 438.

It is not necessary that the executive warrant should be accompanied by certified copies of the affidavit or indictment, or that such affidavit or indictment be set out in the warrant. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

The executive warrant need not recite that the affidavit or indictment from the demanding state was presented to the governor of the asylum state by any legal authority from such demanding state. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

The warrant is not insufficient because instead of reciting that it has issued upon the production of the copy of an indictment or affidavit, as is required by the Act of Congress, it merely recites that it has issued "upon the production of the requisite evidence to justify the same, and which is on file in the office of the Secretary of State." *State v. Flournoy*, (1915) 136 La. 852, 87 So. 929.

It is not necessary under this section, in interstate proceedings, that the executive mandate of the state surrendering the accused should recite that the executive of the demanding state either produced, or caused to be produced, a copy of an indictment found or an affidavit made before a state magistrate showing that the person demanded is charged with having committed the alleged crime, nor that a copy of such indictment or affidavit was certified as authentic by the governor of the demanding state. *Ex p. Moscato*, (1895), 44 S. C. 335, 22 S. E. 308.

The executive warrant need not show that the crime charged in the indictment or affidavit is a crime by the law of the demanding state. *Ex p. Stanley*, (1888) 25 Tex. App. 372, 8 S. W. 645, 8 A. S. R. 440.

In *Ex p. Thomas*, (1908) 53 Tex. Crim. 37, 108 S. W. 663, it was held that in view of the Code Crim. Pro. of Texas 1895, art. 254, subd. 2, which provides that a

warrant of arrest "must state that the person is accused of some offense against the laws of the state, naming the offense," an executive warrant in extradition proceedings which fails to name the offense alleged to have been committed in the foreign state, and is neither accompanied by an indictment nor a complaint disclosing the nature of the offense, is fatally defective.

Where a certified copy of an original information on which extradition proceedings in the demanding state were based was attached to the requisition and charged the petitioner with having separated himself from his wife and minor child, they being destitute and depending wholly upon their earnings for adequate support, contrary to the statute, etc., and throughout the papers such offense was designated as "desertion" and was made a misdemeanor by Pa. Act March 13, 1903 (P. L. 26), a warrant for the arrest and return of petitioner to answer for the crime of "desertion" was not objectionable as failing to set out an offense known to the laws of the demanding state. *Ex p. Hose*, (1911) 34 Nev. 87, 116 Pac. 417.

Where extradition papers showed that the alleged fugitive from justice was charged by affidavit, a recital in the warrant of the governor of the state on which the demand was made that the fugitive was charged by indictment was held to be a mere immaterial clerical error. *Ex p. Coleman*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

Recitals conclusive.—The recitals, in a warrant of rendition, that the demand was accompanied by a complaint and information, affidavits, and warrant of arrest, are conclusive on a writ of habeas corpus, when not disputed. *Ex p. Lewis*, (1889) 79 Cal. 95, 21 Pac. 553.

Effect of warrant as prima facie evidence of legal prerequisites.—The warrant of the governor, authorizing the extradition of a person charged with an offense in another state, is *prima facie* evidence that all the essential prerequisites have been observed. *Ross v. Croft*, (1911) 84 Conn. 370, 80 Atl. 90, Ann. Cas. 1912C 1295; *Kemper v. Metzger*, (1907) 169 Ind. 112, 81 N. E. 663; *People v. Police Com'r*, (1905) 100 App. Div. 483, 91 N. Y. S. 760; *Ex p. Bergman*, (1910) 60 Tex. Crim. 8, 130 S. W. 174; *In re Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

On habeas corpus to review the issuance of an extradition warrant by the governor of a state, the accused is concluded by the *prima facie* case made out by the papers upon which the governor acted, where such accused, upon the hearing in the habeas corpus proceedings, waives the right to introduce further evidence. *Munsey v. Clough*, (1904) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515.

"A warrant of extradition of the governor of a state, issued upon the requisition of the governor of another state, accompanied by a copy of an indictment, is *prima facie* evidence, at least, that the accused had been indicted and was a fugitive from justice; and, when the court in which the indictment was found has jurisdiction of the offense, is sufficient to make it the duty of the courts of the United States to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the detention of the prisoner, in the state in which he was indicted, to be inquired into and determined, in the first instance, by the courts of the state, which are empowered and obligated, equally with the courts of the United States, to recognize and uphold the supremacy of the Constitution and laws of the United States." Whitten v. Tomlinson, (1895) 160 U. S. 231, 16 S. Ct. 297, 40 U. S. (L. ed.) 406.

When a warrant of arrest is valid on its face, it is *prima facie* evidence that an indictment was found or affidavit made in the state making the requisition. Nichols v. Cornelius, (1856) 7 Ind. 611; Robinson v. Flanders, (1867) 29 Ind. 10.

The warrant of the governor is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the state from which he fled. Davis's Case, (1877) 122 Mass. 324.

An executive warrant is *prima facie* evidence that all necessary prerequisites have been complied with—as, that there was an affidavit or indictment emanating from the authorities of the demanding state charging the accused with crime against the laws of that state. *Ex p. Devine*, (1897) 74 Miss. 715, 22 So. 3.

The recitals in the warrant of the executive as to matters necessary to confer authority under the Constitution and Acts of Congress are to be taken as *prima facie* true, upon a return to a writ of habeas corpus. But when the affidavit appears by the return or otherwise, it is competent for the court to examine it and determine whether a crime has been legally charged. As to so examining an indictment, *quære*. *People v. Pinkerton*, (1879) 77 N. Y. 245. See also *Matter of Scraf-ford*, (1891) 59 Hun (N. Y.) 320.

Reviewability after surrender of prisoner.—The warrant of the chief executive of the state surrendering an accused person, whether issued lawfully or unlawfully, has accomplished its purpose and become *functus officio* as soon as the accused is delivered into the jurisdiction of the demanding state, and the regularity of its issuance thereupon ceases to be a question for the judicial inquiry on application by the prisoner for his discharge, where he is at the time held under due and

legal process issued out of a court of competent criminal jurisdiction of the demanding state. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897, 118 A. S. R. 211, 12 L. R. A. (N. S.) 227; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

Revocation of warrant.—The state governor may, in case a warrant has been improperly issued, revoke the same, whether it has been issued by himself or by his predecessor, and even though the fugitive has been arrested and handed over to the authorities of the demanding state. *Work v. Corrington*, (1877) 34 Ohio St. 64, 32 Am. Rep. 345; *State v. Toole*, (1897) 69 Minn. 104, 72 N. W. 53, 65 A. S. R. 553, 38 L. R. A. 224, where, however, it was held that the warrant could be revoked only prior to the removal of the fugitive. See also *Gaffigan v. Merrick*, reported in *Spear on Extradition* (3d ed.) 440, 713; *Knowlton's Case*, (Colo. 1883) 5 Crim. L. Mag. 250; *Carroll's Case*, Chicago Leg. N., Sept. 28, 1878.

Second warrant.—The state governor may issue a second warrant for the extradition of the fugitive. *In re Hughes*, (1867) 61 N. C. 57; *Kurtz v. State*, (1886) 22 Fla. 36, 1 A. S. R. 173; *Com. v. Hall*, (1857) 9 Gray (Mass.) 262, 69 Am. Dec. 285; *Ex p. Hobbs*, (1893) 32 Tex. Crim. 312, 22 S. W. 1035, 40 A. S. R. 782, holding that such second warrant may be issued without another requisition by the executive of the demanding state.

Prior discharge not bar to application.—Where the same charge has been already heard in another state, but the matter was not adequately considered or investigated, the discharge of the accused will not be a bar to the renewal of the application. *Muller's Case*, (1863) 5 Phila. (Pa.) 289, 17 Fed. Cas. No. 9,913.

The fact that the prisoner has been once delivered up, and was allowed to leave the state to which he was sent upon entering into a recognizance for his appearance, does not deprive the governor of the asylum state of power to order his arrest a second time, either on the ground that his power, having been once executed, had spent its force, or on the ground that a forfeiture of the recognizance was an atonement for the offense. It may be that had the prisoner been discharged for want of prosecution, it would be in the discretion of the governor to refuse to order a second arrest. *In re Hughes*, (1867) 61 N. C. 57.

Rearrest after discharge on habeas corpus.—A person who has been arrested in extradition proceedings and discharged on habeas corpus is not thereby necessarily protected from being again arrested for the same offense. *In re White*, (C. C. Minn. 1891) 45 Fed. Dec. 237; *Kurtz v. State*,

(1886) 22 Fla. 36, 1 A. S. R. 173; *Ex p. Seitz*, (1899) 8 Quebec Q. B. 392; *In re Harsha*, (1906) 11 Ont. L. Rep. 457, 6 Ann. Cas. 496.

Arrest before requisition.—The constitutional provision relating to interstate rendition does not contain a grant of power, but is the regulation of a previously existing right. It makes obligatory upon every state the performance of an act which previously was of doubtful obligation. There exists the power in every state of arresting and detaining a fugitive wherever he may be found, preparatory to a demand and surrender; there need be no delay until the demand for his surrender has been actually made. *Matter of Fetter*, (1852) 23 N. J. L. 311, 57 Am. Dec. 382.

A person charged with felony in another state may, upon a principle of comity, through the agency of the judicial tribunals of the state of refuge, be detained for a reasonable period for the purpose of affording time for an application to the governor of the state where the felony is charged to have been committed to make the demand. *State v. Howell*, (1821) R. M. Charlt. (Ga.) 120; *State v. Loper*, (1842) Ga. Dec. pt. 2, 33; *Rea v. Smith*, (1856) 2 Handy (Ohio) 193; *State v. Buzine*, 4 Har. (Del.) 572; *Morrell v. Quarles*, (1860) 35 Ala. 544; *Matter of Fetter*, (1852) 23 N. J. L. 311, 57 Am. Dec. 382; *Ex p. Romanes*, 1 Utah 23. See *Simmons v. Com.*, (1813) 5 Bin. (Pa.) 617.

XIII. BAIL

Bail.—A person arrested under a warrant of extradition cannot be allowed bail. *Matter of Goodhue*, (1815) 1 Wheel. Crim. (N. Y.) 427; *Ex p. Erwin*, (1879) 7 Tex. App. 288.

XIV. REVIEW

1. By Federal Court

Review of act of governor by federal court.—"The claim that the act of the governor of a state in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him when he acted, cannot be assented to. The act of the governor can be reviewed, and, if he has not followed the directions and observed the conditions of the Constitution and laws of the United States, pertinent to such matters, can be set aside as void." *Ex p. Hart*, (C. C. A. 1894) 63 Fed. 249, 25 U. S. App. 22, 11 C. C. A. 165, 28 L. R. A. 801. See also *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *Ex p. Morgan*, (W. D. Ark. 1883) 20 Fed. 298; *In re Roberts*, (S. D. Ga. 1885) 24 Fed. 132; *Ex p. Brown*, (N. D. N. Y. 1886) 28 Fed. 653.

The federal court will not on a habeas corpus discharge a prisoner charged with a violation of the criminal laws of one

state and apprehended in another, where it appears by the recitals contained in the warrant by virtue of which he is arrested, and the record of the extradition proceedings, that no right, privilege, or immunity secured to him by the Constitution and laws of the United States will be violated by remanding him to the custody of the agent of the state demanding him; and when the executive of the state wherein the accused is found is satisfied of the integrity of the proceedings to secure his surrender, the federal courts will seek to uphold its proceedings carried on in apparent good faith, rather than seek to find excuses to discharge the accused. *Ex p. Dawson*, (C. C. A. 1897) 83 Fed. 306, 49 U. S. App. 674, 28 C. C. A. 354.

On habeas corpus, a federal court may look into the proceedings which took place before the committing magistrate, for the purpose of determining whether the requirements of the law of Congress have been observed. *Ex p. McKean*, (1878) 3 Hughes 23, 16 Fed. Cas. No. 8,848.

But the power of the federal courts to interfere in interstate extradition proceedings should only be exercised in cases of urgency, where the error is plain and the necessity for federal intervention obvious. *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

Accused is under federal authority.—Where a party is apprehended under a warrant in interstate extradition matters, he "is in custody under or by color of the authority of the United States," and therefore the federal courts have jurisdiction upon a writ of habeas corpus. *In re Doo Woon*, (1883) 18 Fed. 898; *In re Robb*, (1884) 19 Fed. 26.

After prisoner reaches demanding state.—In interstate extradition, the prisoner is only held under the extradition process until such time as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state, and it necessarily follows that there is no longer a federal question involved in his detention. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897, 118 A. S. R. 214, 12 L. R. A. (N. S.) 227; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

Right to appeal to United States Supreme Court.—Habeas corpus proceedings on behalf of a person whose interstate extradition is sought pursuant to the Federal Constitution and laws, and who contends that his detention in custody is unlawful because the indictment, which is its only excuse, is not a charge of crime within the meaning of U. S. Const., art. 4, sec. 2, par. 2, regulating extradition, involve the construction of the Constitution of the United States, within the meaning of the Act of March 3, 1891, 26 Stat. L. 826 ch. 517, sec. 5

(now Judicial Code, sec. 238, see title JUDICIARY), governing direct appeals to the Supreme Court. *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 1113, *affirming* (1907) 155 Fed. 663.

2. By State Courts

Review by state court.—The finding of the governor that the person demanded in an extradition requisition should be surrendered is not necessarily final, but may be pronounced by the courts insufficient to support arrest on conclusive proof that the person demanded was not within the demanding state at the time the crime was alleged to have been committed, and that there was no sufficient evidence to the contrary before the governor. *Robb v. Connolly*, (1834) 111 U. S. 624, 4 S. Ct. 544, 28 U. S. (L. ed.) 542; *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502, 112 A. S. R. 98, 3 Ann. Cas. 874, 70 L. R. A. 686; *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

A state court, as a co-ordinate branch of the government, has power to review and control the action of the governor under a writ of habeas corpus, but in regard to any matter within the discretion of the governor the court has no right to interfere. *In re Hughes*, (1867) 61 N. C. 57.

Question of fact.—The courts will not review the decision of the governor in extradition proceedings upon a question of fact made before him, which the law makes it his duty to decide, and upon which there is evidence *pro* and *con* before the governor. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045, 117 A. S. R. 817.

Provisions of law complied with.—Upon petition for release upon habeas corpus, if the return sets forth that the party is a fugitive from justice, that he is demanded as such and is arrested and committed for the purpose of being surrendered, the only inquiry that can be made is whether the provisions of the Act of Congress have been complied with. *State v. Buzine*, 4 Har. (Del.) 572; *State v. O'Connor*, (1888) 38 Minn. 243, 36 N. W. 462.

Cannot examine evidence.—On habeas corpus the court cannot examine the evidence taken in a magistrate's court in the demanding state, and review the decision of the magistrate that a crime had been committed and there was probable cause for believing that the accused committed it. *In re Van Sciever*, (1894) 42 Neb. 772, 60 N. W. 1037, 47 A. S. R. 730. See also *infra*, this note, *Scope of Review*.

Indictment charges an offense.—Upon habeas corpus the court may look into the indictment to ascertain whether it charges an offense against the laws of the state demanding the surrender of the accused person, but not to examine its suffi-

ciency as a criminal pleading in other respects. *State v. O'Connor*, (1888) 38 Minn. 243, 36 N. W. 462. See also *infra*, this note, *Scope of Review*.

The guilt or innocence of the accused cannot be inquired into on habeas corpus. *Ex p. Devine*, (1897) 74 Miss. 715, 22 So. 3. See also *infra*, this note, *Scope of Review*.

No copy of affidavit or indictment.—The relator, on a writ of habeas corpus, should be permitted to show by any competent evidence that the executive warrant was not based upon a copy of an affidavit or indictment for crime, certified to be authentic by the governor of the demanding state. *Ex p. Devine*, (1897) 74 Miss. 715, 22 So. 3.

3. Scope of Review

Warrant as charging crime.—Upon the hearing the court will go behind the warrant of the governor and inquire whether on the face of the papers the prisoner has been charged with a crime in the demanding state. *Ex p. Smith*, (1842) 3 McLean 121, 22 Fed. Cas. No. 12,968; *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544; *In re Doo Woon*, (D. C. Ore. 1883) 18 Fed. 898; *Ex p. Morgan*, (N. D. Ark. 1883) 20 Fed. 298; *Knowlton's Case*, (Colo. 1883) 5 Crim. L. Mag. 250; *Baranger v. Baum*, (1898) 103 Ga. 465, 30 S. E. 524, 68 A. S. R. 113; *Ex p. Devine*, (1897) 74 Miss. 715, 22 So. 3; *People v. Conlin*, (1895) 15 Misc. 303, 36 N. Y. S. 888; *People v. Brady*, (1874) 56 N. Y. 182; *People v. Pinkerton*, (1879) 77 N. Y. 245; *In re Tod*, (1900) 12 S. D. 386, 81 N. W. 637, 76 A. S. R. 616, 47 L. R. A. 566; *In re Greenough*, (1858) 31 Vt. 279; *Armstrong v. Van De Vanter*, (1899) 21 Wash. 682, 59 Pac. 510.

But the warrant of the governor reciting that the prisoner is charged with a crime is *prima facie* evidence of such fact. *In re Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8,162; *Ex p. Lewis*, (1889) 79 Cal. 95, 21 Pac. 553; *Ex p. Devine*, (1897) 74 Miss. 715, 22 So. 3; *People v. Donohue*, (1881) 84 N. Y. 438; *Ex p. Stanley*, (1888) 25 Tex. App. 372, 8 S. W. 645, 8 A. S. R. 440; *Ex p. White*, (1898) 39 Tex. Crim. 497, 46 S. W. 639; *In re Hooper*, (1881) 52 Wis. 699, 58 N. W. 741.

A fortiori the copy of the indictment or affidavit certified by the demanding state is conclusive of the fact that the prisoner is charged with a crime. *Matter of Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8,162; *State v. Buzine*, (1846) 4 Har. (Del.) 572; *Robinson v. Flanders*, (1867) 29 Ind. 10; *Kingsbury's Case*, (1870) 106 Mass. 223; *In re Van Sciever*, (1894) 42 Neb. 772, 60 N. W. 1037, 47 A. S. R. 730; *State v. Clough*, (1902) 71 N. H. 594, 53 Atl. 1086; *In re Clark*, (1832) 9 Wend. (N. Y.) 212; *People v.*

Byrnes, (1884) 33 Hun (N. Y.) 98; *Ex p. Swearingen*, (1880) 13 S. C. 74; *Hibler v. State*, (1875) 43 Tex. 197; *In re Greenough*, (1858) 31 Vt. 279.

Guilt or innocence of prisoner.—The question of the guilt or innocence of the prisoner or other matter of defense will not be inquired into. *In re White*, (C. C. A. 2d Cir. 1893) 55 Fed. 54, 14 U. S. App. 87, 5 C. C. A. 29; *In re Bloch*, (N. D. Ark. 1898) 87 Fed. 981; *Ex p. State*, (1883) 73 Ala. 503, 49 Am. Rep. 63; *Barranger v. Baum*, (1898) 103 Ga. 465, 30 S. E. 524, 68 A. S. R. 113; *Robinson v. Flanders*, (1867) 29 Ind. 10; *Ex p. Devine*, (1897) 74 Miss. 715, 22 So. 3; *In re Van Sciever*, (1894) 42 Neb. 772, 60 N. W. 1037, 47 A. S. R. 730; *In re Clark*, (1832) 9 Wend. (N. Y.) 212; *People v. Byrnes*, (1884) 33 Hun (N. Y.) 98; *People v. Brady*, (1874) 56 N. Y. 182; *People v. Donohue*, (1881) 84 N. Y. 438; *Wilcox v. Nolze*, (1878) 34 Ohio St. 520; *Ex p. Swearingen*, (1880) 13 S. C. 74; *In re Greenough*, (1858) 31 Vt. 279. See, however, *Ex p. Slauson*, (E. D. Va. 1896) 73 Fed. 666.

Prisoner as fugitive from justice.—The court may also inquire into the question whether the prisoner was in fact a fugitive from justice, which involves the necessity for his actual presence in the demanding state. *Ex p. Smith*, (1842) 3 McLean 121, 22 Fed. Caa. No. 12,968; *Cook v. Hart*, (1892) 146 U. S. 183, 13 S. Ct. 40, 36 U. S. (L. ed.) 934; *Hyatt v. New York*, (1903) 188 U. S. 691, 23 S. Ct. 456, 47 U. S. (L. ed.) 657; *Tennessee v. Jackson*, (E. D. Tenn. 1888) 36 Fed. 258, 1 L. R. A. 370; *In re Cook*, (E. D. Wis. 1892) 49 Fed. 833; *In re White*, (C. C. A. 2d Cir. 1893) 55 Fed. 54, 14 U. S. App. 87, 5 C. C. A. 29; *Hartman v. Aveline*, (1878) 63 Ind. 344, 30 Am. Rep. 217; *Jones v. Leonard*, (1878) 50 Ia. 106, 32 Am. Rep. 116; *State v. Clough*, (1902) 71 N. H. 594, 53 Atl. 1086, (1903) 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946; *People v. Conlin*, (1895) 15 Misc. 303, 36 N. Y. S. 888; *Wilcox v. Nolze*, (1878) 34 Ohio St. 520; *Com. v. Trach*, (1887) 3 Pa. Co. Ct. 65; *In re Tod*, (1900) 12 S. D. 386, 81 N. W. 637, 76 A. S. R. 616, 47 L. R. A. 566; *Hibler v. State*, (1875) 43 Tex. 197. See, however, *People v. Pinkerton*, (1879) 17 Hun (N. Y.) 199.

Technical sufficiency of indictment.—The court will not inquire into the technical sufficiency of the indictment or affidavit. *Ex p. Reggel*, (1885) 114 U. S. 642, 5 S. Ct. 1148, 29 U. S. (L. ed.) 250; *Pearce v. Texas*, (1894) 155 U. S. 311, 15 S. Ct. 116, 39 U. S. (L. ed.) 164; *Munsey v. Clough*, (1905) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515; *In re Roberts*, (S. D. Ga. 1885) 24 Fed. 132; *In re Keller*, (D. C. Minn. 1888) 36 Fed. 681; *Ex p. Hart*, (C. C. Md. 1894) 59 Fed. 894; *Webb v. York*, (C. C. A. 8th Cir. 1897) 79 Fed. 616, 49 U. S. App. 163, 25 C. C. A.

133; *In re Burke*, (1879) 19 Alb. L. J. 509, 4 Fed. Cas. No. 2,158; *Ex p. Manchester*, (1855) 5 Cal. 237; *Barranger v. Baum*, (1897) 103 Ga. 465, 30 S. E. 524, 68 A. S. R. 113; *Davis' Case*, (1877) 122 Mass. 324; *In re Van Sciever*, (1894) 42 Neb. 772, 60 N. W. 1037, 47 A. S. R. 730; *State v. Clough*, (1902) 71 N. H. 594, 53 Atl. 1086; *People v. Police Com'r.* (1905) 100 App. Div. 483, 91 N. Y. S. 760. But see *People v. Brady*, (1874) 56 N. Y. 182; *Ex p. Sheldon*, (1878) 34 Ohio St. 319; *Wilcox v. Nolze*, (1878) 34 Ohio St. 520; *In re Renshaw*, (1904) 18 S. D. 32, 99 N. W. 83, 112 A. S. R. 778; *In re Baker*, (1899) 21 Wash. 259, 57 Pac. 827.

Identity—When inquired into.—The question of the identity of the party arrested with the party described as the alleged fugitive in the mandate of the governor in extradition proceedings is always open to inquiry on habeas corpus. *In re Chung Kin Tow*, (D. C. Mass. 1914) 218 Fed. 185; *In re Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8,162; *In re White*, (C. C. A. 2d Cir. 1893) 55 Fed. 54, 14 U. S. App. 87, 5 C. C. A. 29; *People v. Byrnes*, (1884) 33 Hun (N. Y.) 98.

The question of the identity of the person accused cannot be inquired into on habeas corpus when his identity is expressly alleged in the return. *Robinson v. Flanders*, (1867) 29 Ind. 10. See *People v. Pinkerton*, (1879) 77 N. Y. 245.

Nor can the question of the identity of the person accused be inquired into on habeas corpus where there is no allegation in the pleadings that he is not such person. *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260; *Gillis v. Leeklev*, (1905) 38 Wash. 156, 80 Pac. 300.

So, an admission of identity of the person named in the complaint is sufficient. *In re Charleston*, (D. C. Minn. 1888) 34 Fed. 531.

The question of identity cannot be raised by demurred to the sheriff's answer to a writ of habeas corpus which sets forth that he holds the fugitive in obedience to the warrant of the demanding state. As the demurrer necessarily admits the facts recited in the answer, it cannot attack their sufficiency. *In re Bloch*, (W. D. Ark. 1898) 87 Fed. 981.

Where the return to a habeas corpus expressly alleges that the person in custody is the person named in the warrant, it is not available for the prisoner to raise the question of identity by way of exceptions to the return before the circuit judge. *Robinson v. Flanders*, (1867). But see *State v. Bates*, (1907) 29 Ind. 10, 101 Minn. 303, 112 N. W. 260, holding that by traverse to a writ of habeas corpus a fugitive might raise the question of his identity. See also *People v. Byrnes*, (1884) 33 Hun 98.

A state statute requiring the officer making the arrest to take the prisoner before the nearest judge for identification

is clearly within the constitutional power and duty of the legislature. *Robinson v. Flanders*, (1867) 29 Ind. 10.

Burden of proof.—The burden of proving the identity of a person who has been arrested for extradition, as a fugitive from justice, rests on those seeking his deportation where, in habeas corpus proceedings, the alleged fugitive denies that he is the person against whom the warrant was issued. *Barnes v. Nelson*, (1909) 23 S. D. 181, 121 N. W. 89, 20 Ann. Cas. 544; *People v. Byrnes*, (1884) 33 Hun 98, 2 N. Y. Crim. 398; *People v. Conlin*, (1895) 15 Misc. 303, 36 N. Y. S. 888.

In the following cases it appears that the party seeking extradition assumed the burden of proving the identity of the alleged fugitive. *In re Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8, 162; *In re McPhun*, (S. D. N. Y. 1887) 30 Fed. 57.

The positive identification of an alleged fugitive by the officer of the demanding state has been held to be sufficient notwithstanding the denial of the prisoner. *Harris v. State*, (1906) 148 Ala. 659 mem., 41 So. 416. See also *In re Hamilton*, (1867) 1 Ben. 455; 11 Fed. Cas. No. 5,976.

Motives of governor.—The motives which prompt the chief executive of a state to issue his warrant for the rendition of a prisoner are not proper subjects of judicial inquiry. Such inquiry would be opposed to public policy and the freedom of action of the executive department of government. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897, 118 A. S. R. 214, 12 L. R. A. (N. S.) 227; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

Motive of prosecution.—In *Com. v. Philadelphia County Prison*, (1908) 220 Pa. St. 401, 69 Atl. 916, affirming (1907) 33 Pa. Super. Ct. 594, the court said: "Assuming that the demanding state has complied with the requirements of the Federal Constitution and the Act of Congress in making the requisition for the accused, it would be equally an unconstitutional exercise of power for the court of the asylum state to inquire into the motives of the prosecution, instituted in conformity with the laws of the demanding state, and release the offender and thereby prevent his extradition for trial in the latter state. The only possible effect of permitting the motives of the private prosecutor to be shown on a habeas corpus extradition proceeding would be to show the guilt or innocence of the accused. If a person is guilty of an offense against the laws of a state, it is no defense for him to allege that the prosecution was inspired by improper motives. It very frequently happens that criminals are brought to punishment only by persons who have motives other than the vindication of the violated law; but it has never been held that such reason was sufficient

to invalidate a conviction for a criminal offense. Good faith and courtesy require a state to honor the demand of a sister state for the return of a fugitive from justice."

4. Review of Courts of Demanding State

Rule stated.—The action and conduct of the chief executive of the state in which the accused was found in issuing the executive warrant, and of the executive and ministerial officers acting in aid of his warrant, is a matter for the consideration of the courts of his state, subject to the federal courts in so far as the federal question is involved, and is not a question open to examination or consideration by the courts of a foreign state. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897, 118 A. S. R. 214, 12 L. R. A. (N. S.) 227; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

5. Production of Papers

Compelling production.—A party having the custody of an alleged fugitive from justice cannot be obliged, on a hearing upon habeas corpus, to produce the papers accompanying the requisition of the governor of the demanding state. *In re Sylvester*, (1899) 21 Wash. 268, 57 Pac. 829, citing *Matter of Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8,162; *Leary's Case*, (1879) 6 Abb. N. Cas. (N. Y.) 44.

XV. SUBSEQUENT PROCEEDINGS IN DEMANDING STATE

How party brought into state not inquired into.—When a person is properly charged with a crime, the courts will not inquire into the circumstances under which he is brought into the state and within the jurisdiction of the court. *In re Miller*, (W. D. Pa. 1885) 23 Fed. 32; *Hall v. Patterson*, (C. C. N. J. 1891) 45 Fed. 352; *People v. Pratt*, (1889) 78 Cal. 345, 20 Pac. 731; *State v. Kealy*, (1893) 89 Ia. 94, 56 N. W. 283; *State v. Ross*, (1866) 21 Ia. 487; *State v. Patterson*, (1893) 116 Mo. 605, 22 S. W. 696; *Mahon v. Justice*, (1888) 127 U. S. 700, 8 S. Ct. 1204, 32 U. S. (L. ed.) 283; *Cook v. Hart*, (1892) 146 U. S. 183, 13 S. Ct. 40, 36 U. S. (L. ed.) 934; *State v. Smith*, (1829) 1 Bailey L. (S. C.) 283, 19 Am. Dec. 679; *Matter of Noyes*, (1878) 17 Alb. L. J. 407; *Ex p. Barker*, (1888) 87 Ala. 4, 6 So. 7, 13 A. S. R. 17; *U. S. v. Johnson*, (1878) 1 N. J. L. J. 162, 26 Fed. Cas. No. 15,487; *In re Miles*, (1875) 52 Vt. 609; *Kingen v. Kelley*, (1891) 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177. But see *contra*, *In re Robinson*, (1890) 29 Neb. 135, 45 N. W. 267, 26 A. S. R. 378, 8 L. R. A. 398; *Com. v. Shaw*, (Pa. 1885) 6 Crim. L. Mag. 245; *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897, 118 A. S. R.

214, 12 L. R. A. (N. S.) 227; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

Some cases contain expressions indicating that the right to retain jurisdiction of a prisoner might be questionable if the state from which he had been taken should demand his return. *Ex p. Barker*, (1888) 87 Ala. 4, 6 So. 7, 13 A. S. R. 17; *Dow's Case*, (1851) 18 Pa. St. 37.

Arranging and carrying out the arrest and deportation of the accused so as to leave him no opportunity to prove before the governor of the surrendering state that he was not a fugitive from justice, or to appeal to some court of that state to prevent his illegal deportation, does not violate the provisions of U. S. Const., art. 4, sec. 2, or R. S. sec. 5278, relating to extradition proceedings. *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148, 7 Ann. Cas. No. 1,047.

Illegality in the mode of arrest in the state to which a fugitive has fled is not ground for his discharge, on habeas corpus, unless demanded by the executive of the state in which he was found. *Dow's Case*, (1851) 18 Pa. St. 37.

In *Norton's Case*, (1884) 31 Alb. L. J. 66, the court in Pennsylvania released on habeas corpus a person held on the charge of a crime, when it appeared that he had been decoyed from Canada into the state of New York, and from there forcibly abducted, and that the governor of New York had requested the governor of Pennsylvania, if consistent with his "ideas of justice and of executive power," to "cause the release" of the person kidnapped.

Kidnapping conspiracy and unlawful force.—The jurisdiction of a criminal proceeding will not be defeated by the fact that the defendant was brought from a foreign jurisdiction by kidnapping, unlawful force, or the like. *Elmore v. State*, (1885) 45 Ark. 243; *State v. Ross*, (1866) 21 Ia. 467; *State v. Day*, (1882) 58 Ia. 678, 12 N. W. 733; *People v. Rowe*, (1858) 4 Park. Crim. (N. Y.) 253; *State v. Smith*, (1829) 1 Bailey L. (S. C.) 283, 19 Am. Dec. 679; *Brooklin v. State*, (1888) 26 Tex. App. 121, 9 S. W. 735; *State v. Brewster*, (1835) 7 Vt. 118; *Baker v. State*, (1894) 88 Wis. 140, 59 N. W. 570; *Kingen v. Kelley*, (1891) 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177. And see *Ker v. Illinois*, (1886) 119 U. S. 436, 7 S. Ct. 225, 30 U. S. (L. ed.) 421; *Mahon v. Justice*, (1888) 127 U. S. 700, 8 S. Ct. 1204, 32 U. S. (L. ed.) 283; *Cook v. Hart*, (1892) 146 U. S. 183, 13 S. Ct. 40, 36 U. S. (L. ed.) 934; *In re Johnson*, (1897) 167 U. S. 120, 17 S. Ct. 735, 42 U. S. (L. ed.) 103; *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148, 7 Ann. Cas. 1047.

Trial for different offense.—A fugitive from justice who has been surrendered by

one state of the Union to another state thereof upon requisition, charging him with a commission of a specific crime, has, under the Constitution and laws of the United States, no right, privilege, or immunity to be exempt from indictment and trial in the state to which he is returned, for any offense other than, or different from, that designated and described in the requisition proceedings, without first having an opportunity to return to the state whence he was extradited. *Lascelles v. Georgia*, (1893) 148 U. S. 537, 13 S. Ct. 687, 37 U. S. (L. ed.) 549; *Matter of Noyes*, (1878) 17 Alb. L. J. 407; *Knox v. State*, (1905) 164 Ind. 226, 73 N. E. 255, 108 A. S. R. 291, 3 Ann. Cas. 539; *Taylor v. Com.*, (1906) 29 Ky. L. Rep. 714, 96 S. W. 440; *Rutledge v. Krauss*, (1906) 73 N. J. L. 397, 63 Atl. 988; *Ham v. State*, (1878) 4 Tex. App. 645; *State v. Stewart*, (1884) 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; *People v. Cross*, (1892) 135 N. Y. 536, 32 N. E. 246, 31 A. S. R. 850; *Com. v. Wright*, (1893) 158 Mass. 149, 33 N. E. 82, 35 A. S. R. 475, 19 L. R. A. 206; *In re Miles*, (1875) 52 Vt. 609; *Carr v. State*, (1893) 104 Ala. 43, 16 So. 155; *Williams v. Weber*, (1891) 1 Colo. App. 191, 28 Pac. 21; *In re Flack*, (1913) 88 Kan. 616, 129 Pac. 541, Ann. Cas. 1914B 789, 47 L. R. A. (N. S.) 807; *Com. v. Wright*, (1893) 158 Mass. 149, 33 N. E. 82, 35 A. S. R. 475, 19 L. R. A. 206; *State v. Patterson*, (1893) 116 Mo. 505, 22 S. W. 696; *State v. Walker*, (1894) 119 Mo. 467, 24 S. W. 1011; *State v. Glover*, (1893) 112 N. C. 896, 17 S. E. 525; *In re Brophy*, (1895) 4 Ohio Dec. 391, 2 Ohio N. P. 230; *Com. v. Johnston*, (1892) 2 Pa. Dist. 673; *Harland v. Territory*, (1887) 3 Wash. Ter. 131, 13 Pac. 453. The contrary, however, was held in *In re Fitton*, (1891) 45 Fed. 471; *U. S. v. Johnson*, (1878) 1 N. J. L. J. 162, 26 Fed. Cas. No. 15,487; *State v. Hall*, (1888) 40 Kan. 338, 19 Pac. 918, 10 A. S. R. 200; *Matter of Cannon*, (1882) 47 Mich. 481, 11 N. W. 280; *State v. Leidigh*, (1896) 47 Neb. 126, 66 N. W. 308; *Ex p. McKnight*, (1891) 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128.

A trial upon extradition is not objectionable because the indictment charged the commission of a general offense whereas the warrant upon which the rendition was obtained charged a distinct act connected with the general offense and pleaded in the indictment as one of the steps or stages in the offense laid. *State v. Meade*, (1896) 56 Kan. 690, 44 Pac. 619.

Assuming without admitting that a fugitive extradited for one offense cannot be tried for another, the rule would not apply where the offenses arise out of the same transaction or occurrence, though they are different in form and incidents. *Musgrave v. State*, (1892) 133 Ind. 297, 32 N. E. 885; *Waterman v. State*, (1888) 116 Ind. 51, 18 N. E. 63.

Where an accused person, against whom a warrant has been issued for an offense alleged to have been committed in another state, voluntarily submits to arrest and waives extradition, he may be tried for any offense other than the one on which the original warrant was issued. *State v. McNaspy*, (1897) 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 753.

The governor of one state having refused a warrant because the affidavit for the requisition charging larceny was made before a notary public, and not before a magistrate as required by this section, and the party, upon being informed that this was merely a formal and correctable defect, having waived such defect in writing and consented to go immediately, on the condition, however, that he should be tried only for larceny, it was held that, not having been told of the governor's refusal, he could not be held on a charge afterward preferred against him of forgery, until he had an opportunity of returning to the state from which he was taken. *In re Fitton*, (1891) 45 Fed. 471.

Civil process.—Whether a fugitive from justice who has been surrendered, tried, and acquitted of the special charge against him can be at once rearrested and proceeded against in a civil action, has been a somewhat doubtful question. In the following cases it was held that he can be: *Reid v. Ham*, (1893) 54 Minn. 305, 56 N. W. 35, 40 A. S. R. 333, 21 L. R. A. 232; *Rutledge v. Cross*, (1906) 73 N. J. L. 397, 63 Atl. 988; *Williams v. Bacon*, (1834) 10 Wend. (N. Y.) 636; *Browning v. Abrams*, (1876) 51 How. Pr. (N. Y.) 172. While in the following cases it was held that he cannot be: *Compton v. Wilder*, (1883) 40 Ohio St. 130; *Moletor v. Sinnen*, (1890) 76 Wis. 308, 44 N. W. 1099, 20 A. S. R. 71, 7 L. R. A. 817.

In *State v. Boynton*, (1909) 140 Wis. 89, 121 N. W. 887, 17 Ann. Cas. 618, following *Moletor v. Sinnen*, (1890) 76 Wis. 308, 44 N. W. 1099, 20 A. S. R. 71, 7 L. R. A. 817, it was held that one who was brought into the state by extradition proceedings on a criminal charge was not subject to arrest for contempt until he had had an opportunity to return to the state from which he was extradited, though at the time he absconded he was a resident of Wisconsin and had not since acquired a residence elsewhere, and though the court had prior to his departure from Wisconsin obtained jurisdiction of the subject-matter of the suit in which the judgment was rendered and of his person.

If, however, the accused is brought within the jurisdiction "in bad faith, for the purpose of a civil arrest," he cannot be arrested on a civil process by any person who was a party to the extradition proceedings. *Browning v. Abrams*, (1876) 51 How. Pr. (N. Y.) 172; *Williams v. Bacon*, (1834) 10 Wend. (N. Y.) 636; *Underwood v. Fetter*, 6 N. Y. Leg. Obs. 66.

And where this was the reason for the institution of the extradition proceedings, the party accused will not be given up. *Ex p. Slauson*, (1896) 73 Fed. 666.

Where the defendant, who was a *bona fide* resident of another state, was brought into Iowa by extradition proceedings to answer a criminal complaint, and, after giving bail, voluntarily returned for trial, and was acquitted, and intended to return to his home on the first train leaving the place where his trial was had, it was held that he was privileged from the service of civil process before he could so depart. *Murray v. Wilcox*, (1904) 122 Ia. 188, 97 N. W. 1087, 101 A. S. R. 263, 64 L. R. A. 534.

Where a person was arrested in another state, where he was residing with the relator's wife, and was returned to Michigan upon a requisition, for nonsupport of his own wife, it was held that he was privileged from arrest upon relator's civil suit for alienation of relator's wife's affections, made upon the day that the criminal action was dismissed, and before he had an opportunity to leave the state. *Weale v. Clinton Circuit Judge*, (1909) 158 Mich. 563, 123 N. W. 31, 16 Detroit Leg. N. 709.

Questions raised on habeas corpus.—On habeas corpus proceedings instituted by one arrested on requisition, evidence as to the guilt or innocence of the accused is inadmissible, being a question solely for the demanding state. *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 113, *affirming* (1907); 155 Fed. 663; *Depoilly v. Palmer*, (1906) 28 App. Cas. (D. C.) 324; *Taylor v. Wise*, (Ia. 1910) 126 N. W. 1126; *Ex p. Denning*, (1907) 50 Tex. Crim. 629, 100 S. W. 401. See also the title HABEAS CORPUS.

After conviction.—Where the accused has been tried and convicted of a crime in a state court, and habeas corpus proceedings have been instituted by him thereafter, the legality of his extradition will not be reviewed by a federal court, his ground for discharge being that certain alleged facts which were presented to the state court were decided against him. *Eaton v. West Virginia*, (C. C. A. 1898) 91 Fed. 760, 61 U. S. App. 667, 34 C. C. A. 68, *citing Ex p. Royall*, (1886) 117 U. S. 241, 6 S. Ct. 734, 29 U. S. (L. ed.) 868, discussing the question of interference by federal authorities on writs of habeas corpus.

Review of act of governor.—When the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of the state seeking extradition allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary

process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place. *Drew v. Thaw*, (1914) 235 U. S. 432, 35 S. Ct. 137, 59 U. S. (L. ed.) 302. This case is also reported in (D. C. N. H. 1914) 214 Fed. 423 and (D. C. N. H. 1913) 209 Fed. 56.

Scope of inquiry.—The purpose of habeas corpus proceedings, challenging the validity of a warrant of extradition issued by the governor on the requisition of the governor of a sister state, is to review the legality of the action of the governor in issuing the warrant, and not to try the question of relator's guilt or innocence. *Harris v. Magee*, (1911) 150 Ia. 144, 129 N. W. 742.

On habeas corpus testimony will not be weighed as to the presence in, or absence from, the demanding state of an alleged fugitive from justice, at the time of the stated commission of a crime therein by him; and on habeas corpus it is not competent to try the question of alibi, or the guilt or innocence of the accused. *In re Thompson*, (1915) 85 N. J. Eq. 221, 96 Atl. 102.

The question of an alleged bar by the statute of limitations of the demanding state will not be determined on habeas corpus but will be left to the decision of the courts of such state. *Reed v. U. S.*, (1915) 224 Fed. 378, 140 C. C. A. 64.

The objection that an extradition requisition contains a clause that the demanding state will not be responsible for any expense attending the arrest and delivery of the alleged fugitive is not available to the accused on habeas corpus to inquire into the legality of the extradition proceedings, but is a matter for the consideration of the executive of the surrendering state when he receives the official demand for the surrender of the alleged fugitive criminal. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92.

The jurisdiction of the court on a writ of habeas corpus does not involve any executive function. It is limited to the identification of the person demanded; an inquiry whether the record shows that a crime was substantially charged against him; and whether he is a fugitive from justice. *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125. See also *Law v. State*, (Ala. 1911) 56 So. 79.

Technical sufficiency of indictment.—The questions of the technical sufficiency of the indictment and of the procedure under it are not open to inquiry on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings. *Munsey v. Clough*, (1904) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515; *Reed v. U. S.*, (1915) 224 Fed. 378, 140 C. C. A. 64; *People v. Police Com'rs*, (1905) 100 App. Div. 483, 91 N. Y. S.

760; *Ex p. Coleman*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

Presumptions.—In habeas corpus to secure the release of one in custody under an extradition warrant it is presumable that the governor had sufficient ground for believing that the prisoner was present in the demanding state when the crime was alleged to have been committed. *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502, 112 A. S. R. 98, 3 Ann. Cas. 874, 70 L. R. A. 686.

Bail on habeas corpus.—In *Connecticut* in habeas corpus to secure the release of one in custody under an extradition warrant, it is within the discretion of the Court of Common Pleas, after remanding the prisoner, to refuse to admit him to bail. *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502, 112 A. S. R. 98, 3 Ann. Cas. 874, 70 L. R. A. 686.

In *Mississippi* there is no statute allowing bail in extradition cases, either pending trial or on appeal. *Ex p. Wall*, (1904) 84 Miss. 783, 38 So. 628; *Ex n. Edwards*, (1907) 91 Miss. 621, 44 So. 827.

In *New Jersey* there is no statute authorizing a person charged with crime in another state and arrested on the governor's warrant of extradition, to be admitted to bail. *In re Thompson*, (1915) 85 N. J. Eq. 221, 96 Atl. 102.

XVI. FEES AND COSTS

Fees and costs.—Where a state statute (Kentucky) provides that mileage and expenses shall be paid to the agent of the state, in traveling to and from the jail of the county designated in the proclamation, to the place where the fugitive may be arrested, he cannot claim such mileage and expenses unless he actually reclaims and transports such fugitive. *Wilson v. Bradley*, (1898) 105 Ky. 52, 48 S. W. 166, 1088.

And this is so even though the fugitive was eventually taken into custody, tried and convicted. *Steckman v. Bedford County*, (1877) 84 Pa. St. 317.

But see *Moon v. Butler County*, (1883) 30 Kan. 458, 2 Pac. 818, wherein the court held that an agent acting with diligence and in good faith was entitled to receive his expenses although unsuccessful in receiving the fugitive.

Where the agent for the state agreed in writing, at the time a requisition was issued, that the state should not be held liable for any part of the expenses incurred in the reclamation of the fugitive, the county will not assist him thereafter to collect from the state fees which in good conscience he ought not to claim. *Booker v. Stevenson*, (1898) 8 Bush (Ky.) 39.

Where a state statute (Idaho) provides that the accounts of the person employed to bring back a fugitive must be audited and paid out of the territorial treasury,

such expenses are a charge against the state and not against the county to which the fugitive is returned. The agent acts for the state and not for the county. *Krontinger v. Board of Examiners*, (1902) 8 Idaho 463, 69 Pac. 279.

Where a state statute (Missouri) provides that, whenever the governor of a state shall demand a fugitive from justice from the executive of another state and issues his warrant to some messenger commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense is by law cognizable, that the expenses which may accrue shall be first ascertained to the satisfaction of the governor and on his certificate be allowed and paid out of the state treasury, a court cannot by mandamus compel the auditor to issue a warrant for the fees and expenses, before the governor has ascertained the amount that should be allowed and before he has issued his certificate

therefor. *State v. Allen*, (1904) 180 Mo. 27, 79 S. W. 164.

Where a proceeding before a justice of the peace to apprehend by extradition proceedings a fugitive from justice, is unauthorized by statute, a certification by such justice of the peace of the expense incurred for the return of the fugitive, is likewise unauthorized and creates no demand against the county for its payment. *Vollmer v. Dubois County*, (1913) 53 Ind. App. 149, 101 N. E. 321.

The agent of the state, named in the extradition papers, is the only person to be dealt with when allowance is made for expenses. *Rucker v. Coffee County*, (1898) 7 Kan. App. 470, 54 Pac. 141.

The expenses of a second requisition are chargeable to the county in the same manner as the expenses of a first requisition which failed, where a state statute makes such expenses chargeable against the county. *Moon v. Butler County*, (1883) 30 Kan. 458, 2 Pac. 818.

Sec. 5279. [Penalty for resisting agent, etc.] Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year. [R. S.]

Act of Feb. 12, 1793, ch. 7, 1 Stat. L. 302.

See the note to the preceding R. S. sec. 5278.

Agent of demanding state—No personal responsibility.—An agent of the demanding state who, pursuant to his appointment, obtains the arrest of the fugitive from justice, acts in a ministerial capacity; and he incurs no personal responsibility for his acts in connection therewith so long as such acts are within the scope of the authority conferred upon him and justified by the laws of the United States; and it matters not what feelings he entertained toward the fugi-

tive or what result he hoped would ensue. *In re Titus*, (1876) 8 Ben. 411, 23 Fed. Cas. No. 14,062.

Not a federal officer.—Where a demanding state has appointed an agent to receive the accused from the state surrendering him, such agent is not an officer of the United States, within the principle of former adjudications. *Robb v. Connolly*, (1884) 111 U. S. 624, 4 S. Ct. 544, 28 U. S. (L. ed.) 542; *Ex p. State*, (1883) 73 Ala. 503, 49 Am. Rep. 63.

R. S. sec. 5280. This section was as follows: "SEC. 5280. On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall

be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect."

Act of March 2, 1829, ch. 41, 4 Stat. L. 359; Act of Feb. 24, 1855, ch. 123, 10 Stat. L. 614.

It was repealed by the Act of March 4, 1915, ch. 153, § 17, 38 Stat. L. 1184. See the title SEAMEN.

Relator held to be a deserter from foreign navy.—In *Tucker v. Alexandroff*, (1902) 183 U. S. 424, 22 S. Ct. 195, 46 U. S. (L. ed.) 264 (*reversing* U. S. v. *Motherwell*, (1900) 103 Fed. 198, and *Motherwell v. U. S.*, (C. C. A. 1901) 107 Fed. 437, 48 C. C. A. 97), it was held that relator was a deserter from a Russian ship of war, and that the case came within this section and the treaty of 1832 between the United States and Russia.

No obligation to punish harborer.—"When the provisions of this statute (sec. 5280) are exhausted, the government of the United States has fulfilled its obligations with foreign powers under the commercial treaties providing for extradition of deserting seamen; it has not contracted in any such treaties to punish the harborer on this soil, nor has it so provided in its own statutes." U. S. v. *Minges*, (1883) 16 Fed. 657.

Order to deliver to ship, in excess of

authority.—Where, under a treaty between the United States and Great Britain entered into in 1892, providing that the British consul shall have power to require from the proper authority the assistance provided by law for the apprehension, recovery, and extradition of seamen who may desert from any ship belonging to a citizen of Great Britain, and under sec. 5280, R. S., in force at the time this treaty was entered into, a commissioner duly adjudged certain persons to be deserters from a British ship, and ordered them to be restored and surrendered to such ship under the direction of the British consul, it was held that he had exceeded his authority, which extended only to an order that they should be delivered to the consul, or some one authorized to act for him, which delivery might, however, be made on board the British ship. U. S. v. *Kelly*, (1901) 108 Fed. 538.

An act regulating fees and the practice in extradition cases.

[*Act of Aug. 3, 1882, ch. 378, 22 Stat. L. 215.*]

[SEC. 1.] **[Extradition cases to be heard publicly, etc.]** That all hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public. [22 Stat. L. 215.]

Section 2 of this Act relating to the fees of commissioners in extradition cases is given under the title JUDICIAL OFFICERS.

SEC. 3 **[Subpoena of witnesses for defendant—costs.]** That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States. [22 Stat. L. 215.]

See the provision from the Act of June 28, 1902, ch. 1301, set forth *infra*, p. 315.

Introduction of evidence.—The effect of this provision is not to give the accused the right to introduce any evidence which

would be admissible upon a trial under an issue of not guilty. The prime purpose of the section is to afford the defendant

the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L. R. A. (N. S.) 397.

The word "trial" is confined to such a preliminary hearing as was already

allowable under the existing practice, that is, a hearing having reference only to a commitment for future trial. *In re Wadge*, (1883) 15 Fed. 864.

Adjournment.—In *In re Wadge*, (1883) 16, Fed. 332, it was held that the commissioners' refusal to grant an adjournment to enable the accused to procure depositions from England to show an *alibi*, was, under the circumstances, a legitimate exercise of discretion.

SEC. 4. [Witness fees, costs, etc., certified to and paid by Secretary of State, etc.] That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the Government of the United States by the foreign government by whom the proceedings for extradition may have been instituted. [22 Stat. L. 216.]

SEC. 5. [Evidence on hearing.] That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act. [22 Stat. L. 216.]

When papers purporting to be depositions admitted.—Papers which purport to be depositions, and which are authenticated as required under this section, may be admitted on the hearing, notwithstanding the recitals in the introductory part show that they are not depositions, but only statements. *In re Ezeta*, (1894) 62 Fed. 972.

Section applies only to papers offered by prosecution.—This section applies only to papers or copies thereof which are offered in evidence by the prosecution to establish the criminality of the person apprehended, and does not apply to documents or depositions offered on the part of the accused any more than did the provisions of R. S. sec. 5271, *supra*, p. 281, either as originally enacted or as amended by the Act of June 19, 1876. *In re Cortes*, (1890) 136 U. S. 330, 10 S. Ct. 1031, 34 U. S. (L. ed.) 464.

Effect of section on mode of authentication.—This Act makes the consular

certificate the final and controlling guide in determining the admissibility of testimony before the extradition commissioner. When the documentary evidence has been authenticated as required by the statute, it is admissible, leaving to the commissioner merely the question of determining the sufficiency of the evidence therein contained. *Ex p. Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

In international extradition proceedings documents authenticated as required by law are admissible in evidence without being sworn to. *Ex p. La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

This section restores in substance the provisions of the Act of June 22, 1860, ch. 184, 12 Stat. L. 84, as to the mode of authentication, and supersedes the provisions on that subject of R. S. sec. 5271, *supra*, p. 281, as well as those of the Act of June 19, 1876, 19 Stat. L. 59, ch. 133, noted *supra*, p. 282. *In re Behrendt*, (1884) 22 Fed. 699; *In re McPhun*, (1887) 30 Fed. 57.

When requirements of section complied with.—Where the documents were properly authenticated for the purpose of being used in extradition proceedings, and the signature was verified by oral proof, and the documents would be received in similar proceedings in the demanding country, it was held that the requirements of this section had been complied with. *In re Wadge*, (1883) 15 Fed. 864 [following *In re Henrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,369; *In re Farez*, (1870) 7 Blatchf. 345, 8 Fed. Cas. No. 4,645; *Matter of Fowler*, (1880) 18 Blatchf. (U. S.) 430].

The words "for similar purposes" in this section must receive the same construction they received under the Act of June 22, 1860, ch. 184, 12 Stat. L. 84 (now R. S. sec. 5271, *supra*, p. 281), namely, "as evidence of criminality," the same construction having been given to similar words in prior statutes. *In re Cortes*, (1890) 136 U. S. 330, 10 S. Ct. 1031, 34 U. S. (L. ed.) 464, following *In re McPhun*, (1887) 30 Fed. 57. To the same effect see *In re Henrich*, (1867) 5 Blatchf. (U. S.) 414, 11 Fed. Cas. No. 6,369; *In re Farez*, (1870) 7 Blatchf. (U. S.) 345, 8 Fed. Cas. No. 4,645; *In re Charleston*, (1888) 34 Fed. 531; *In re Grin*, (1901) 112 Fed. 790.

The certificate of the principal diplomatic officer is sufficient if it follows the language of the statute, and the adding of the words "as evidence" will not vitiate it. *Grin v. Shine*, (1902) 187 U. S. 181, 23 S. Ct. 98, 47 U. S. (L. ed.) 130.

The certificate of the consul, if it be conformable to the Act, is of itself absolute proof that the papers so certified are receivable in the foreign country in proof of criminality; but if not conformable to the Act, resort may then be had to any oral or other proof competent to show that the documents presented are so authenticated as to entitle them to be received as evidence of criminality in the foreign country. *In re Wadge*, (1883) 16 Fed. 332; *In re McPhun*, (1887) 30 Fed. 57.

It need not appear by the consul's certificate that the depositions or documentary evidence would be competent on the trial of the accused in the foreign tribunal, if sufficient to authorize his arrest. *In re Wadge*, (1883) 16 Fed. 332.

By vice-consul.—Where the depositions in an extradition matter were authenticated by the United States vice-consul, such authentication was held sufficient under this Act, a vice-consul being an acting consul and not a deputy. *In re Herres*, (1887) 33 Fed. 165; *In re Orpen*, (1898) 86 Fed. 760, holding that the court will take judicial notice that the *chargé d'affaires ad interim*, by whom the papers were signed, was, at the time, the principal diplomatic officer in the foreign country.

Certificate insufficient.—Where the certificate of the consul stated that "all and every the certified copies hereunto attached are properly and legally authenticated and certified according to the law in force in British India, so as to enable them to be used in evidence and as proof that the originals were duly received in evidence . . . in proof of the criminality" of the accused, it was held that such certificate was not sufficient, as the words following the expression "used in evidence" were a definition of the purposes for which the copies might be received, namely, as evidence that certain originals were on file, which originals had been duly received in evidence in British India as proof of criminality, which is an entirely different thing from what the statute requires. *In re McPhun*, (1887) 30 Fed. 57.

Will supply prior defects.—The final certificate of the United States minister will supply defects, if any, in the certificates of foreign officials to the same documents. *In re Behrendt*, (1884) 22 Fed. 699; *In re Krojanker*, (1890) 44 Fed. 482.

Proof of allowance of copies.—Proof need not be given, in addition to the certificate of the consul, that the law of the demanding country would allow "copies of original depositions taken before a magistrate to be received as competent proof against the accused for the purposes of commitment." *In re Charleston*, (1888) 34 Fed. 531.

When no review by habeas corpus.—Where the evidence has been properly certified under this section, its sufficiency to establish the criminality of the accused for the purpose of extradition cannot be reviewed upon habeas corpus. *Grin v. Shine*, (1902) 187 U. S. 191, 23 S. Ct. 98, 47 U. S. (L. ed.) 130, following *In re Cortes*, (1890) 136 U. S. 330, 10 S. Ct. 1031, 34 U. S. (L. ed.) 464; *In re Wadge*, (1883) 16 Fed. 332, holding that if the depositions and proofs present a sufficient case to the commissioner for the exercise of his judicial discretion, his judgment cannot be reviewed.

Of the effect of the evidence authenticated according to this Act "it was the judicial duty of the commissioner to judge, and neither the duty nor the power to review his action thereon has been conferred upon any other judicial officer. If he deems it sufficient, the statute prescribes his further action in the premises. It then rests with the executive authority to determine, in the last resort, what is demanded by justice and the obligations of the treaty. If it appears to the President, upon a review of all the evidence, that the charge is not sustained, and that justice and the obligation of the treaty do not require the surrender of the prisoners, he can refuse it, and they can be set at liberty, either under the provisions of section 5273, [*supra*, p. 283] of the Re-

vised Statutes, or in any other appropriate manner." *In re Vandervelpen*, (1877) 14 Blatchf. 137, 28 Fed. Cas. No. 16,844.

Unsworn statements certified by the United States ambassador and the *chargé d'affaires* to be authenticated properly and legally so as to be received for similar purposes by tribunals of the country from

which the accused has fled are, by the express terms of this section, admissible in evidence in extradition proceedings. *Elias v. Ramirez*, (1910) 215 U. S. 398, 30 S. Ct. 131, 54 U. S. (L. ed.) 253, *reversing* (1907) 11 Ariz. 256, 90 Pac. 323.

SEC. 6. [Repeal.] The act approved June nineteenth, eighteen hundred and seventy-six, entitled "An act to amend section fifty-two hundred and seventy-one of the Revised Statutes of the United States", and so much of said section fifty-two hundred and seventy-one of the Revised Statutes of the United States as is inconsistent with the provisions of this act are hereby repealed. [22 Stat. L. 216.]

The Act of June 19, 1876, ch. 133, mentioned in the text amended R. S. sec. 5271, *supra*, p. 281.

[SEC. 1.] [Fees and costs—out of what appropriations payable.]
 * * * That from and after June thirtieth, nineteen hundred and three, all the fees and costs in extradition cases shall be paid out of the appropriations to defray the expenses of the judiciary, and the Attorney-General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney-General for deposit in the Treasury of the United States. [32 Stat. L. 475.]

This is from the Sundry Civil Appropriation Act of June 28, 1902, ch. 1301.

FALSE ACCOUNTS AND REPORTS

See PUBLIC OFFICERS AND EMPLOYEES

FALSE PERSONATION

See PENAL LAWS

FALSE STAMPING

Act of Feb. 21, 1905, ch. 720, 316.

Sec. 1. Stamping " United States Assay " on Gold, etc., Unlawful, 316.

2. Penalty for Violation, 316.

3. Seizure, Forfeiture, etc., 317.

Act of June 13, 1906, ch. 3289 (" Hallmark Act " or " Jewelers' Liability Act "), 317.

Sec. 1. Gold and Silver Articles — Interstate, etc., Transmission of Falsely Stamped, Forbidden, 317.

2. Gold Articles — Deviation from Marked Fineness Allowed — Tests — Actual Fineness Required, 317.

3. Silver Articles — Deviation from Marked Fineness Allowed — " Sterling " Goods — " Coin " Goods — Divergence Permitted — Tests — Actual Fineness Required, 318.

4. Plated Goods — Description Required — Use of " Sterling " or " Coin " Forbidden, 319.

5. Punishment for Violations — Jurisdiction, 320.

6. " Article of Merchandise " Defined, 320.

7. Original Packages Not Exempt from State, etc., Laws, 320.

8. Effect, 320.

An Act To prevent the use of devices calculated to convey the impression that the United States Government certifies to the quality of gold or silver used in the arts.

[Act of Feb. 21, 1905, ch. 720, 33 Stat. L. 732.]

[SEC. 1.] [Stamping " United States Assay " on gold, etc., unlawful.]

That it shall be unlawful for any person, partnership, association, or corporation engaged in commerce among the several States, Territories, District of Columbia, and possessions of the United States, or with any foreign country, to stamp any gold, silver, or goods manufactured therefrom, and which are intended and used in such commerce, with the words " United States assay," or with any words, phrases, or devices calculated to convey the impression that the United States Government has certified to the fineness or quality of such gold or silver, or of the gold or silver contained in any of the goods manufactured therefrom. Each and every such stamp shall constitute a separate offense. [33 Stat. L. 732.]

SEC. 2. [Penalty for violation.] That every person, partnership, association, or corporation violating the provisions of this Act, and every officer, director, or managing agent of such partnership, association, or corporation having knowledge of such violation and directly participating in such violation or consenting thereto, shall be deemed guilty of a misdemeanor, and, upon conviction, be punished with a fine of not more than five thousand

dollars or imprisonment for not more than one year, or both, at the discretion of the court. [33 Stat. L. 732.]

SEC. 3. [Seizure, forfeiture, etc.] That any gold, silver, or goods manufactured therefrom after the date of the passage of this Act, bearing any of the stamps, words, phrases, or devices prohibited to be used under section one hereof, and being in the course of transportation from one State to another, or to or from a Territory, the District of Columbia, or possessions of the United States, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law. [33 Stat. L. 732.]

An Act Forbidding the importation, exportation, or carriage in interstate commerce of falsely or spuriously stamped articles of merchandise made of gold or silver or their alloys, and for other purposes.

[Act of June 13, 1906, ch. 3289, 34 Stat. L. 260.]

[SEC. 1.] [Gold and silver articles — interstate, etc., transmission of falsely stamped, forbidden.] That it shall be unlawful for any person, firm, corporation, or association, being a manufacturer of or wholesale or retail dealer in gold or silver jewelry or gold ware, silver goods or silverware, or for any officer, manager, director, or agent of such firm, corporation, or association to import or export or cause to be imported into or exported from the United States for the purpose of selling or disposing of the same, or to deposit or cause to be deposited in the United States mails for transmission thereby, or to deliver or cause to be delivered to any common carrier for transportation from one State, Territory, or possession of the United States, or the District of Columbia, to any other State, Territory, or possession of the United States, or to said District, in interstate commerce, or to transport or cause to be transported from one State, Territory, or possession of the United States, or from the District of Columbia, to any other State, Territory, or possession of the United States, or to said District, in interstate commerce, any article of merchandise manufactured after the date when this Act takes effect and made in whole or in part of gold or silver, or any alloy of either of said metals, and having stamped, branded, engraved, or printed thereon, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which said article is incased or inclosed, any mark or word indicating or designed or intended to indicate that the gold or silver or alloy of either of said metals in such article is of a greater degree of fineness than the actual fineness or quality of such gold, silver, or alloy, according to the standards and subject to the qualifications set forth in sections two and three of this Act. [34 Stat. L. 260.]

This is the first section of the "Hallmark Act" or the "Jewelers' Liability Act."

SEC. 2. [Gold articles — deviation from marked fineness allowed — tests — actual fineness required.] That in the case of articles of merchandise made in whole or in part of gold or of any of its alloys so imported

into or exported from the United States, or so deposited in the United States mails for transmission, or so delivered for transportation to any common carrier, or so transported or caused to be transported as specified in the first section of this Act, the actual fineness of such gold or alloy shall not be less by more than one-half of one carat than the fineness indicated by the mark stamped, branded, engraved, or printed upon any part of such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed; except that in the case of watch cases and flat ware, so made of gold or of any of its alloys, the actual fineness of such gold or alloy shall not be less by more than three one-thousandth parts than the fineness indicated by the mark stamped, branded, engraved, or printed upon such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed: *Provided*, That in any test for the ascertainment of the fineness of any article mentioned in this section, according to the foregoing standards, the part of the article taken for the test, analysis, or assay shall be such part or portion as does not contain or have attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of said article: *Provided, further*, That in the case of any article mentioned in this section, in addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold or of its alloys contained in such article, including all solder and alloy of inferior fineness used for brazing or uniting the parts of such article (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one carat than the fineness indicated by the mark stamped, branded, engraved, or imprinted upon such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed, it being intended that the standards of fineness and the tests or methods for ascertaining the same provided in this section for articles mentioned therein shall be concurrent and not alternative. [34 Stat. L. 260.]

SEC. 3. [Silver articles — deviation from marked fineness allowed — “sterling” goods — “coin” goods — divergence permitted — tests — actual fineness required.] That in the case of articles of merchandise made in whole or in part of silver or any of its alloys so imported into or exported from the United States, or so deposited in the United States mails for transmission, or so delivered for transportation to any common carrier, or so transported or caused to be transported as specified in the first section of this Act, the actual fineness of the silver or alloy thereof of which such article is wholly or partly composed shall not be less by more than four one-thousandth parts than the actual fineness indicated by any mark (other than the word “sterling” or the word “coin”) stamped, branded, engraved, or printed upon any part of such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed; and that no such article or tag, card, or label attached thereto, or box, package, cover, or wrapper in which such article is incased or inclosed shall be marked, stamped, branded, engraved, or printed with the word “sterling” or “sterling silver” or

any colorable imitation thereof, unless such article or parts thereof purporting to be silver contains nine hundred and twenty-five one-thousandth parts pure silver; and that no such article, tag, card, label, box, package, cover, or wrapper shall be marked, stamped, branded, engraved, or printed with the words "coin" or "coin silver" or colorable imitation thereof unless such article or parts thereof purporting to be silver contains nine hundred one-thousandth parts pure silver: *Provided*, That in the case of all such articles whose fineness is indicated by the word "sterling" or the word "coin" there shall be allowed a divergence in the fineness of four one-thousandth parts from the foregoing standards: *Provided*, That in any test for the ascertainment of the fineness of any such article mentioned in this section according to the foregoing standards the part of the article taken for the test, analysis, or assay shall be such part or portion as does not contain or have attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of such article: *Provided further*, That in the case of any article mentioned in this section, in addition to the foregoing tests and standards, the actual fineness of the entire quantity of silver or of its alloys contained in such article, including all solder and alloy of inferior fineness used for brazing or uniting the parts of such article (all such silver, alloys, and solder being assayed as one piece), shall not be less by more than ten one-thousandth parts than the fineness indicated by the marked, [mark?] stamped, branded, engraved, or imprinted upon such article, or upon any tag, card, or label attached thereto, or upon any box, package, cover, or wrapper in which such article is incased or inclosed, it being intended that the standards of fineness and the tests or methods for ascertaining the same provided in this section for articles mentioned therein shall be concurrent and not alternative. [34 Stat. L. 261.]

SEC. 4. [Plated goods — description required — use of "sterling" or "coin" forbidden.] That in the case of articles of merchandise made in whole or in part of an inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plating, covering, or sheet composed of gold or silver, or of an alloy of either of said metals, and known in the market as rolled gold plate, gold plate, gold filled, silver plate, or gold or silver electroplate, or by any similar designation, so imported into or exported from the United States, or so deposited in the United States mails for transmission, or so delivered to any common carrier, or so transported or caused to be transported as specified in the first section of this Act, no such article, nor any tag, card, or label attached thereto, nor any box, package, cover, or wrapper in which such article is incased or inclosed, shall be stamped, branded, engraved, or imprinted with any word or mark usually employed to indicate the fineness of gold, unless such word or mark be accompanied by other words plainly indicating that such article or part thereof is made of rolled gold plate, gold plate, or gold electroplate, or is gold filled, as the case may be, and no such article, nor any tag, card, or label attached thereto, nor any box, package, cover, or wrapper in which such article is incased or inclosed, shall be stamped, branded, engraved, or imprinted with the word "sterling" or the word "coin," either alone or in conjunction with other words or marks. [34 Stat. L. 261.]

SEC. 5. [Punishment for violations — jurisdiction.] That each and every person, firm, corporation, or association, being a manufacturer of or a whole-sale or retail dealer in gold or silver jewelry, gold ware, silver goods, or silver-ware, who or which shall knowingly violate any of the provisions of this Act, and every officer, manager, director, or managing agent of any such corporation or association having knowledge of such violation and directly participating in such violation or consenting thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which has been conducted the transportation of the article in respect to which such violation has been committed, shall be punished by a fine of not more than five hundred dollars or imprisonment for not more than three months, or both, at the discretion of the court. Whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. [34 Stat. L. 262.]

SEC. 6. [“Article of merchandise” defined.] That the expression “article of merchandise” as used in this Act shall signify any goods, wares, works of art, commodity, or other thing which may be lawfully kept or offered for sale. [34 Stat. L. 262.]

SEC. 7. [Original packages not exempt from state, etc., laws.] That all articles of merchandise to which this Act applies which shall have been transported into any State, Territory, District, or possession of the United States, and shall remain therein for use, sale, or storage, shall, upon arrival in such State, Territory, District, or possession, be subject to the operation of all the laws of such State, Territory, District, or possession of the United States to the same extent and in the same manner as though such articles of merchandise had been produced in such State, Territory, District, or possession, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. [34 Stat. L. 262.]

SEC. 8. [Effect.] That this Act shall take effect one year after the date of its passage. [34 Stat. L. 262.]

FEDERAL RESERVE ACT

See NATIONAL BANKS

FEDERAL RESERVE BANKS

See NATIONAL BANKS

FEDERAL TRADE COMMISSION ACT

See INTERSTATE COMMERCE

FENCING ACT

See JUDICIARY; PUBLIC LANDS

FERMENTED LIQUORS

See CUSTOMS DUTIES; INTERNAL REVENUE

FILLED CHEESE ACT

See FOOD AND DRUGS; INTERNAL REVENUE

FILMS

See CUSTOMS DUTIES; MOTION PICTURES

FINE ARTS COMMISSION ACT

See PUBLIC PROPERTY, BUILDINGS AND GROUNDS

FINES, PENALTIES AND FORFEITURES

- R. S. 909. *Burden of Proof, When It Lies on Claimant in Seizure Cases*, 322.
 R. S. 923. *Seizure for Forfeiture in Certain Cases — Procedure — Publication*, 324.
 R. S. 938. *Bailing of Property Seized under Customs Laws*, 325.
 R. S. 939. *Sale after Condemnation*, 326.
 R. S. 940. *In Cases of Seizure, Bailing of Property in Vacation*, 327.
 R. S. 1041. *Judgments for Fines, How Collected*, 327.
 R. S. 1042. *Poor Convicts Sentenced and Imprisoned for Fines*, 328.
 R. S. 1047. *Limitation of Suit or Prosecution for Penalties and Forfeitures under Laws of United States*, 330.
 R. S. 5292. *Mitigation or Remission upon Summary Investigation before District Judge*, 332.
 R. S. 5293. *Remission upon Investigation under Regulations of Secretary of Treasury*, 335.
 R. S. 5294. *Remission or Mitigation of Fines, Penalties, and Forfeitures under Laws Relating to Vessels — Informers' Rights*, 336.
 R. S. 5295. *Officers and Informers May Be Witnesses*, 338.
 R. S. 5296. *Discharge of Indigent Convicts*, 338.
Act of June 22, 1874, ch. 391, 339.
 Sec. 6. Customs-Revenue Law — Payment to Informers, 339.
 7. *Officer Receiving Part of Informer's Fees — Action to Recover Money So Paid*, 340.
Act of June 26, 1884, ch. 121, 340.
 Sec. 26. Refund or Remission of Fines, etc., Illegally Assessed under Laws Relating to Vessels or Seamen, 340.

CROSS-REFERENCES

Costs in Suit for Recovery, see *COSTS*.
Jurisdiction of Suits, see *JUDICIARY*.
Recovery for Particular Offenses, Defaults, or Omissions, consult the General Index.

Sec. 909. [Burden of proof, when it lies on claimant in seizure cases.]
 In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: *Provided*, That probable cause is shown for such prosecution, to be judged of by the court. [R. S.]

Act of March 2, 1799, ch. 22, 1 Stat. L. 678.

Applicability to all suits on seizures.—The rule prescribed by this section applies to all suits on seizures under revenue laws, when probable cause for the seizure is shown. *Cliquot's Champagne*, (1865) 3 Wall. 114, 18 U. S. (L. ed.) 116. See also *Taylor v. U. S.*, (1845) 3 How.

197, 11 U. S. (L. ed.) 559; *U. S. v. Sixteen Cases Silk Ribbons*, (1870) 12 Int. Rev. Rec. 175, 27 Fed. Cas. No. 16,301. But see *The Abigail*, (1824) 3 Mason 331, 1 Fed. Cas. No. 18. And this includes suits for penalties and forfeitures under R. S. secs. 2867 and 2868 (see *CUSTOMS*

DUTIES). *The Coquitlam*, (1893) 57 Fed. 706. And also a case of seizure under R. S. sec. 3082 (see CUSTOMS DUTIES). *U. S. v. Seven Hundred and Forty Tins Opium*, (1891) 44 Fed. 798.

Where an individual cuts timber from government land without authority the remedy of the government is in an action of replevin or trespass. It cannot seize the timber, libel it, and cast on a claimant the burden of proof under this section. *Handford v. U. S.*, (C. C. A. 8th Cir. (1899) 92 Fed. 881, 35 C. C. A. 75, wherein the court said: "The logs were not seized for a violation of the navigation or revenue or other laws of the United States providing for the seizure, forfeiture, and condemnation of property, and therefore section 909 of the Revised Statutes of the United States, and the presumptions arising in the class of cases mentioned, have no application to this case. A suit by the government to recover timber cut on the public lands, or its value, 'is not a suit to recover a penalty, or to impose a punishment, or to declare a forfeiture.' *Stone v. U. S.*, (1897) 167 U. S. 178, 187, 17 S. Ct. 778, 781 [42 U. S. (L. ed.) 127]. The government claims to be the owner of the logs because they were cut on government land. The government's ownership of the logs derived in this way is not different from ownership acquired in any other way. The title of the government to the logs grown on the land of an individual, and purchased by it, is precisely the same that it is to logs grown on its own land; and if one should wrongfully take the logs of the government, purchased from the owner on whose land they grew, or wrongfully cut and remove logs from the land of the government, the remedy in either case is by an action of trespass or replevin. The case is not different in its legal aspects from what it would have been if the government agent had gone into the private residence of the plaintiffs in error, and seized and carried off their furniture on the claim that it was made out of timber cut on government land, for 'the timber at all stages of the conversion' remains the property of the owner. *Wooden-Ware Co. v. U. S.*, [1882] 106 U. S. 432, 1 S. Ct. 398 [27 U. S. (L. ed.) 230]. The right to seize and the legal consequences of the seizure would be the same. There is no higher or different right to seize logs cut from government land under existing laws than there is to seize any other kind of personal property which it is claimed the government owns. It is true that a private person may retake his personal property where it can be done without endangering the public peace. The government has this right also, but to no other or further extent, and with no different legal consequences, than in the case of a private person. Such extra

judicial redress, whether by the government or a private person, does not affect the title to the property seized, or deprive the person from whose possession it was taken of any legal right or presumption. Where the property is thus taken by one person out of the possession of another under claim of ownership, and that ownership is judicially challenged by the person from whose possession the property was taken, the burden of proof is cast upon the taker to prove his ownership whenever it is shown he took the property from the possession of the plaintiff. And this rule applies to the government as well as to a private person."

In *The Good Templar*, (D. C. Mass. 1899) 97 Fed. 651, it was left an open question whether the above section was applicable to a proceeding under R. S. sec. 4377 (see SHIPPING AND NAVIGATION): for the forfeiture of a schooner and its cargo of fish for carrying smuggled goods.

The term "probable cause" does not mean *prima facie* evidence, or such evidence as, in the absence of exculpatory proof, would justify condemnation, as this would render the provision totally inoperative; but the term means less than evidence which would justify condemnation, and imports a seizure made under circumstances which warrant suspicion. *Locke v. U. S.*, (1813) 7 Cranch 339, 3 U. S. (L. ed.) 364. See also *U. S. v. Three Thousand Eight Hundred and Eighty Boxes*, (1822) 12 Fed. 402; *The John Griffin*, (1872) 15 Wall. 29, 21 U. S. (L. ed.) 80; *Wood v. U. S.*, (1842) 16 Pet. 342, 10 U. S. (L. ed.) 987.

The failure of the claimant to produce the papers known to be in his possession, which might explain suspicions excited by the uncommon circumstances of the case, makes out a *prima facie* case, and the burden of proof to rebut it rests on him. *The Luminary*, (1823) 8 Wheat. 407, 5 U. S. (L. ed.) 617. See also *Clifton v. U. S.*, (1846) 4 How. 242, 11 U. S. (L. ed.) 957.

It is the province of the court and not the jury to judge whether there is such probable cause shown as to throw the *onus probandi* upon the claimant. *Taylor v. U. S.*, (1845) 3 How. 197, 11 U. S. (L. ed.) 559. See also *U. S. v. Sixteen Cases Silk Ribbons*, (1870) 12 Int. Rev. Rec. 175, 27 Fed. Cas. No. 16,301; *U. S. v. Gay*, (1915) 2 Gall. 359, 25 U. S. (L. ed.) 15, 193; *Buckley v. U. S.*, (1846) 4 How. 251, 11 U. S. (L. ed.) 961.

Decree on uncontradicted testimony for claimant.—Where probable cause has been shown for the seizure of a vessel to enforce a lien under R. S. sec. 3088 (see CUSTOMS DUTIES) for a penalty alleged to have been incurred by her master by violations of R. S. secs. 2806, 2807, 2809, and 3126 (see CUSTOMS DUTIES), but the uncontradicted testimony for the claimant showed that the contraband merchandise had

been received as freight in the due course of business, being delivered on the dock for shipment by a regular transfer company, and receipted for in the usual way, without any circumstances to justify suspicion on the part of the ship's officers,

and that the master had no particular knowledge in regard to the cargo in question, a decree in favor of the claimant was entered. *U. S. v. The Walla Walla*, (1891) 44 Fed. 796.

Sec. 923. [Seizure for forfeiture in certain cases — procedure — publication.] When any vessel, goods, wares, or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares, or merchandise, and gives bond to defend the prosecution thereof and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law. [*R. S.*]

Act of Aug. 4, 1790, ch. 35, 1 Stat. L. 176; Act of Dec. 31, 1792, ch. 1, 1 Stat. L. 298; Act of Feb. 18, 1793, ch. 8, 1 Stat. L. 317; Act of March 2, 1799, ch. 22, 1 Stat. L. 678, 695, 696.

Necessity of hearing.—The provision that "the court shall proceed to hear and determine the cause according to law" makes it imperative that there shall be some hearing before a decree of forfeiture, but to what extent must depend upon the circumstances of the case. "A wilful omission by the owners to answer, and thereby make disclosure as to material facts within their knowledge, might, of itself, satisfy the court that a forfeiture should be decreed. But the court will require the prosecutor to introduce full proof of the allegations in the libel, whenever the circumstances shall make it reasonable." *U. S. v. The Lion*, (1858) 1 Sprague 399, 26 Fed. Cas. No. 15,607. But see *The Mary Anne*, (1826) 1 Ware 99, 16 Fed. Cas. No. 9,195, wherein the court said: "When property is brought into court on a revenue seizure, upon an allegation of forfeiture, the service having been regularly made according to law, it is deemed to be a service on all the world, and all persons who have an interest in the thing are presumed to have notice of the pendency of the suit. If no one appears to claim, and dispute the allegations of the libel, the Act of Congress prescribing the course of the court in revenue cases directs that 'the court shall proceed to hear and determine the cause according to law.' *U. S. Laws*, ch. 128, § 89, March 2, 1799. The practice of the court, when no person intervenes

and files a claim, is to proceed by default and decree a forfeiture for want of a claim. This was the course prescribed by former laws. *U. S. Laws*, ch. 5, § 36, July 31, 1789, and ch. 62, § 67, Oct. 1, 1790. And this appears to be according to the course of the admiralty in its ordinary practice, and constitutes the law of the court. The legal notice of process having been given, the law presumes it to be brought home to all who have an interest in the thing, and if they do not appear and enter their claims they are held to be in contumacy, a decree passes on the motion of the libellant, the property is sold, and the proceeds brought into the registry; and on proof of the debt, upon a summary hearing, the libellant is entitled to be paid his debt and costs out of the proceeds. 2 *Brown's Civ. and Adm. Law*, 399-405; *Clerke's Praxis*, tit. 35. The excess is retained in the registry, for any one who shall claim and prove his title. In the case of libels for forfeiture in the name of the United States, if there be no claim, no proof of the facts is, in the ordinary practice of the court, required, but the allegations are taken to be true. The decree thus pronounced conclusively ascertains the forfeiture, and is binding on all who claim an interest in the thing. The title acquired by forfeiture is good against all the world, and cannot be called in question in any other court."

Sec. 938. [Bailing of property seized under customs laws.] Upon the prayer of any claimant to the court, that any vessel, goods, wares, or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers, for the faithful discharge of their duty; and the appraisalment shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisalment, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage-duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, as to the whole or any part of such vessel, goods, wares, or merchandise, and the claimant does not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares, or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay. [R. S.]

Act of Aug. 4, 1790, ch. 35, 1 Stat. L. 176; Act of Dec. 31, 1792, ch. 1, 1 Stat. L. 298; Act of Feb. 18, 1793, ch. 8, 1 Stat. L. 317; Act of June 9, 1794, ch. 64, 1 Stat. L. 395; Act of March 2, 1799, ch. 22, 1 Stat. L. 695, 696.

Delivery on bail is not compulsory on the court, but is a matter of sound discretion, and where the property consists wholly of dry goods and not at all of perishable articles, and there has been no delay in the prosecution, an application for release of the goods on appraisalment and bond will be refused. *Fifteen Pieces Black Silk*, (1869) 3 Ben. 189, 9 Fed. Cas. No. 4,779. See also *The Struggle*, (1813) 1 Gall. 476, 23 Fed. Cas. No. 13,550.

"Duties" as including taxes.—The "duties" required to be certified as paid, in order to entitle the claimant to a delivery of the property, include all burdens or taxes imposed upon property imported into the country, and all other burdens or taxes upon such property declared to be such by law. *U. S. v. Three Horses*, (1870) 1 Abb. 426, 28 Fed. Cas. No. 16,500.

Appraisalment as including duties.—The appraisalment of goods seized in the hands of the importer must be the actual cash value at the time of the seizure, and the legal duties paid cannot be deducted; but to the value of the goods seized in warehouse the duties need not be added. *U. S. v. Three Horses*, (1870) 1 Abb. 426, 28 Fed. Cas. No. 16,500.

But it has been held that the appraisalment of property in warehouse under bond for duties does not include the duties, as they form no part of its value at the time it was seized. *Four Cases Silk Ribbons*, (1867) 1 Ben. 214, 9 Fed. Cas. No. 4,986.

In *U. S. v. Twelve Thousand Three Hundred and Forty-seven Bags Sugar*, (1868) 1 Abb. 407, 28 Fed. Cas. No. 16,555, however, it was held that the appraisalment should include the duties whether the goods are seized in the hands of the importer or in warehouse. See also *U. S. v. One Thousand Two Hundred and Ninety-One Bales Tobacco*, (1872) 2 Lowell 107, 27 Fed. Cas. No. 15,965; *U. S. v. Cargo of Sugar*, (1874) 3 Sawy. 27, 25 Fed. Cas. No. 14,721; *Hoyt v. U. S.*, (1850) 10 How. 109, 13 U. S. (L. ed.) 348.

And as to penal duties included in the appraisalment in addition to the regular duties, see *U. S. r. Linens*, (1859) 3 Phila. (Pa.) 523, 16 Leg. Int. (Pa.) 388, 26 Fed. Cas. No. 15,604.

"In like manner as if the same had been legally entered" means no more and no less than that the claimant shall, as a condition precedent to obtaining the goods, pay the duties as claimed by the United

States, to be summarily estimated and determined by the collector on the theory of a lawful entry of the goods, taking it for granted that such lawful entry could have been made. *In re Chichester*, (1891) 48 Fed. 281.

Costs and expenses of suit.—The claimant is entitled to a delivery of the property to him upon compliance with the conditions of this section, without any additional charge for costs or expenses in the suit, and the marshal cannot require that the cost of publication should be paid by the claimant, as the statute does not attach any such requirement to the obligation to discharge the vessel or property. *U. S. v. Eight Cases Paper*, (1899) 98 Fed. 416.

Validity of bond.—Where the claimant voluntarily accepts a delivery of property on bail, it is an estoppel of his right to contest the validity of the security. *The Struggle*, (1813) 1 Gall. 476, 23 Fed. Cas. No. 13,550.

A bond obviously intended to be given in pursuance of R. S. 941 (see JUDICIARY) was held valid under this section in the Haytian Republic, (*D. C. Ore.* 1893) 57 Fed. 508. The bond was given to secure the release of a vessel seized for violating the revenue laws and the court said: "The point is also made in behalf of the libellant that the bond given in the district court for Washington is not a bond, for the reason that it contains no condition, and was obviously intended to be given

in pursuance of R. S. sec. 941, instead of section 938. The former section provides for bonds in proceedings *in rem*, in causes of admiralty jurisdiction, other than cases of seizure for forfeiture, and provides for a bond in double the value of the property claimed. The fact that the bond may have been prepared with a view to this section, and is larger than required, does not affect its validity, as to the obligation to pay at least that amount. The conditions upon which the obligation in the bond becomes absolute are contained in the statute."

A judgment on the bond ought to be in open court, after the lapse of the twenty days from the rendition of the decree. *McLellan v. U. S.*, (1812) 1 Gall. 227, 16 Fed. Cas. No. 8,895.

Remission of duties or for depreciation.—In a case in which goods were proceeded against as smuggled goods, being landed without a permit, the claimant, with sureties, executed a stipulation for value by agreement, which was designed to be a substitute for the appraisement provided for in such cases by this section. Upon final decree against the claimant, it was held that the court had no discretion to remit any part of the stipulation, either as to the amount of duties paid on the goods, or by the amount of depreciation caused by the carelessness or improper conduct of the government officers. *U. S. v. Two Trunks*, (1879) 10 Ben. 374, 28 Fed. Cas. No. 16,592.

Sec. 939. [Sale after condemnation.] All vessels, goods, wares, or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising, a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed. [R. S.]

Act of Aug. 4, 1790, ch. 35, 1 Stat. L. 177; Act of Dec. 31, 1792, ch. 1, 1 Stat. L. 298; Act of Feb. 18, 1793, ch. 8, 1 Stat. L. 317; Act of March 2, 1799, ch. 22, 1 Stat. L. 696.

Amount to be paid into court.—In *U. S. v. Fifty-one Dozen Pieces Merchandise*, (1864) 2 Sprague 100, 25 Fed. Cas. No. 15,094, it was held that, under section 90

of the Act of March 2, 1799, from which this section was in part taken, the marshal was to pay into the registry of the court the gross proceeds of the sale, less

the expenses of the sale, and that the marshal's commissions for the sale of property and collecting and paying over the proceeds formed part of the expenses so to be deducted, and that all other fees, charges, and expenses, whether of the marshal or any other officer or person, for services not relating to the sale, were to

be paid by an order of the court from the proceeds after they were paid into the registry. See also *The Phebe*, (1837) 1 Ware 360, 19 Fed. Cas. No. 11,065.

This section is cited in *U. S. v. Fifty-nine Demijohns Aguadiente, etc.*, (S. D. Fla. 1889) 39 Fed. 401.

Sec. 940. [In cases of seizure, bailing of property in vacation.] In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same authority to order any vessel, or cargo, or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term time, and to appoint appraisers, and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale, as are had in like cases when ordered in term time: *Provided*, That upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases. [R. S.]

Act of Aug. 4, 1790, ch. 35, 1 Stat. L. 176; Act of Dec. 31, 1792, ch. 1, 1 Stat. L. 298; Act of Feb. 18, 1793, ch. 8, 1 Stat. L. 317; Act of March 2, 1799, ch. 22, 1 Stat. L. 695, 696; Act of April 5, 1832, ch. 66, 4 Stat. L. 503.

Sec. 1041. [Judgments for fines, how collected.] In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided*, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid. [R. S.]

Act of June 1, 1872, ch. 255, 17 Stat. L. 198.

Intent of section.—This section means nothing more than that the government in enforcing judgment for fines and penalties is not restricted to mere imprisonment of the defendant; that it may proceed also by execution against the defendant's property, as in civil cases. It would seem, therefore, that Congress has not seen fit to provide any greater rights for the federal government when collecting fines imposed in criminal cases by execution than are given individuals in the collection of private debts. *Clark v. Allen*, (W. D. Va. 1902) 114 Fed. 374, *affirmed* (C. C. A. 4th Cir. 1903) 126 Fed. 738, 62 C. C. A. 58.

Mode of enforcing sentence.—If nothing

be said in the judgment concerning the mode of enforcing a fine, the district attorney, at his election, may adopt the method by execution under this section, or by a *capias*. But when the judgment of the court imposes a fine and costs, and orders "that executions for said fine and costs be issued against" the defendant, that is an exclusive mode of enforcing the sentence, and the district attorney has no authority to order a *capias* to be issued. *In re Teuscher*, (1877) 23 Int. Rev. Rec. 202, 23 Fed. Cas. No. 13,846.

Following state practice.—Where the law of a state does not authorize a levy and sale of real estate on a common-law judgment in favor of an individual, the

federal courts are by R. S. sec. 916 (see JUDICIARY) restricted to the same practice, and an execution on a penal or criminal judgment can only be enforced by execution against the goods and chattels of the defendant. *Clark v. Allen*, (1902) 117 Fed. 699.

A homestead allowed by a state law cannot be subjected to the payment of fines imposed for violations of the federal statutes. *Clark v. Allen*, (1902) 114 Fed. 374, *affirmed* (C. C. A. 4th Cir. 1903) 126 Fed. 738, 62 C. C. A. 58; *U. S. v. Stacey*, (S. D. Ala. 1907) 155 Fed. 510. See also *Fink v. O'Neil*, (1882) 106 U. S. 272, 1 S. Ct. 325, 27 U. S. (L. ed.) 196.

Effect of death of defendant.—The purpose of a fine imposed in a criminal case is the punishment of the defendant personally for the offense of which he has been convicted, and while the federal statutes provide for the collection of a fine by execution as in case of civil judgments, there is no provision making it a debt, and where a defendant upon whom a fine has been imposed by a federal court dies before the fine has been paid or collected, the cause abates, and the fine cannot be collected from his estate. *U. S. v. Mitchell*, (1908) 163 Fed. 1014, *affirmed* (C. C. A. 1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145.

Liability on distiller's bond.—In *United States v. Thompson* (D. C. Ky. 1891) 45 Fed. 468, it appeared that a certain distiller was indicted, tried and fined for violating R. S. sec. 3279 (see INTERNAL REVENUE). Execution was issued and returned *nulla bona*, whereupon suit was begun on the distiller's bond, conditioned that the defendant "shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, . . . then this obligation shall be void; otherwise it shall remain in full force." The petition was demurred to but the demurrer was overruled. The court said: "The real ques-

tion is, we apprehend, whether the plaintiff, having proceeded by indictment, and having obtained a sentence thereunder of \$500 fine, which may, under the law, be enforced against Thompson by a *capias pro fine* as well as by an execution against his property, it can now recover on this bond. Section 1041, Rev. St. The penalty declared under section 3279 of the internal revenue laws could have been recovered in a civil action (see sec. 3213 [given in INTERNAL REVENUE]), and in that event we presume the penalty could have been enforced against the property of Thompson only, and not by a *capias pro fine*; but we do not think such a judgment could be enforced by a suit on the bond, if a judgment under an indictment could not be. The difference in enforcing the judgments in these two proceedings can make no difference in the question of liability on the bond. The inquiry in each case is the fine or penalty covered by the bond. The bond provides that if Thompson 'shall pay all penalties incurred or fines imposed on him, . . . then this obligation shall be void; otherwise it shall remain in full force.' The only limitation is that the penalties incurred or fines imposed on him shall be for a violation of a provision of law in relation to his duty and business as a distiller at the place designated in the bond. It may be claimed that the 'penalties incurred or the fines imposed' are only those which may be declared by a court in a suit on the bond in which the sureties have a right to appear and contest, but such a contention is answered by the language of the bond. The bond is a guaranty of the principal's conduct, and an obligation that they shall pay all penalties incurred or fines imposed. The fines must be imposed, and a non-payment by the principals, before the sureties are liable on the bond. I do not see why, upon general principles, the defendants are not bound on their bond."

For another case under this section, see *Ex p. Barclay*, (1907) 153 Fed. 669.

Sec. 1042. [Poor convicts sentenced and imprisoned for fines.] When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath:

"I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for may [my] future use or benefit. So help me God." And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts. [R. S.]

Act of June 1, 1872, ch. 255, 17 Stat. L. 198.

See R. S. sec. 5296, *infra*, p. 338.

R. S. secs. 1042 and 5296 (*infra*, pp. 328, 338) are mere repetitions of each other with slight change of phraseology, the repetition no doubt being due to inadvertence on the part of the revisers. Both sections are taken from section 14 of the Act of June 1, 1872 (17 Stat. 196), which act purports to be one "to further the administration of justice," and of which most of the sections have specific reference to the circuit and district courts of the United States. U. S. v. Mills, (1898) 11 App. Cas. (D. C.) 500.

Maximum term of imprisonment.—This section implies that a fine imposed may be enforced by imprisonment until it is paid. There is nothing, however, to indicate that any imprisonment to enforce the payment of a fine imposed may be extended beyond the maximum term of imprisonment fixed by Congress in punishment of the particular offense denounced, and certainly no authority for imprisonment in a state prison in default of the payment of a fine imposed. *In re Greenwald*, (1896) 77 Fed. 590; *Ex p. Peeke*, (1906) 144 Fed. 1016, *affirmed* (C. C. A. 1907) 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314.

"Jail."—The word "jail" as used in the last sentence of this section does not imply that no prisoner should be held in a penitentiary for nonpayment of a fine or a fine and costs, but was used merely to indicate the place of confinement, and hence a federal prisoner could be properly retained in the same institution where he had served his term of imprisonment for the nonpayment of a fine, or a fine and costs, assessed as a part of the sentence, until the fine was paid, or the prisoner applied to take the poor debtor's oath after the expiration of thirty days from the completion of his term. *Haddox v. Richardson*, (C. C. A. 1909) 168 Fed. 635, 94 C. C. A. 99.

State laws.—In the case of *In re Sanborn*, (N. D. Cal. 1892) 52 Fed. 583, the court after quoting the above section said: "Having legislated upon the subject so as to provide for the discharge of the poor convict, upon certain conditions, after a service of thirty days for the nonpayment of the fine, how can it be said with reason that the discharge of the convict worth more than \$20 has been left to be regulated by the laws of the state when the conditions might be such as to discharge such

a convict without any service whatever for the nonpayment of the fine? Such an interlacing of national and state authority in the execution of the criminal laws of the general government would only be tolerated where the procedure has been clearly established."

Homestead exemption.—This section construed in connection with the section immediately preceding it evidences an intention on the part of Congress to place the United States on an equality with civil contract creditors in the enforcement of judgments in criminal and penal cases, and to give the families of poor convicts the full benefit of the exemption and homestead laws of the states as against such judgments; and in the absence of any statute expressly providing therefor, an execution on a judgment for a fine in favor of the United States cannot be levied on the defendant's homestead in a particular state, although under the state law such homestead is only exempt from contract debts, and not from judgments for torts or in favor of the commonwealth in criminal cases. *Allen v. Clark*, (C. C. A. 1903) 126 Fed. 738, 62 C. C. A. 58, *affirming* (W. D. Va. 1902) 114 Fed. 374.

Erroneous discharge on habeas corpus.—Where a prisoner in the penitentiary, after having served the imprisonment part of the sentence, was erroneously discharged on habeas corpus because it was supposed that his incarceration could not be continued for nonpayment of the fine assessed, it was held that the United States, on reversal of such order, could retake and return him to the penitentiary from which he had been released, and hold him therein until he had been lawfully discharged by payment of the fine, or by taking the poor debtor's oath after thirty days' additional imprisonment, as authorized by this section. *Haddox v. Richardson*, (C. C. A. 1909) 168 Fed. 635, 94 C. C. A. 99.

Conditional pardon.—A petitioner for discharge on habeas corpus had been sentenced to be imprisoned six months and pay a fine and costs and stand committed until fine and costs were paid, but was granted "a full pardon on condition that he shall first pay the fine and costs aforesaid." It was held that the condition of the pardon was precedent, and until the fine and costs were paid the sentence, as well for the imprisonment as the fine and

costs, remained in full force, and unless the fine and cost were sooner paid the petitioner would not be entitled to his discharge; under this section, until he had served the entire six months' imprisonment and in addition thirty days for nonpayment of his fine and costs. *In re Ruhl*, (1878) 5 Sawy. 186, 20 Fed. Cas. No. 12,124.

District of Columbia.—The powers vested by this section of the Revised Statutes in United States commissioners are to be exercised in the District of Columbia only with reference to those cases in which per-

sons are held in prison for the nonpayment of a fine under sentences of the Supreme Court of the District of Columbia sitting as a Circuit or District Court of the United States for this district and administering the general Penal Code of the United States; and there is no warrant of law for the exercise of such powers with reference to the local penal law of the District of Columbia and the sentence of the police court. *U. S. v. Mills*, (1898) 11 App. Cas. (D. C.) 500, followed in *Hartrauft v. Mullowny*, (1915) 43 App. Cas. (D. C.) 44.

Sec. 1047. [Limitation of suit or prosecution for penalties and forfeitures under laws of United States.] No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: *Provided*, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property. [*R. S.*]

Act of March 2, 1799, ch. 22, 1 Stat. L. 695; Act of March 26, 1804, ch. 40, 2 Stat. L. 290; Act of April 20, 1818, ch. 91, 3 Stat. L. 452; Act of Feb. 28, 1839, ch. 36, 5 Stat. L. 322; Act of March 3, 1863, ch. 76, 12 Stat. L. 741; Act of July 25, 1868, ch. 236, 15 Stat. L. 183.

For the limitation of suits for penalties and forfeitures under the Act of June 22, 1874, ch. 391, § 22, see the title CUSTOMS DUTIES, vol. 2, p. 1183.

The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such. *Meeker v. Lehigh Val. R. Co.*, (1915) 236 U. S. 412; 35 S. Ct. 328, 59 U. S. (L. ed.) 644, Ann. Cas. 1916 B. 691. See to the same effect *Chattanooga Foundry, etc., Co. v. Atlanta*, (1906) 203 U. S. 390, 27 S. Ct. 65, 51 U. S. (L. ed.) 241, affirming (*E. D. Tenn.* 1900) 101 Fed. 900.

State statutes of limitations.—The operation of state statutes of limitations is excluded as to all suits for penalties and forfeitures covered by this section. *U. S. v. Banister*, (1895) 70 Fed. 44. See also *McGlinchy v. U. S.*, (1875) 4 Cliff. 312, 16 Fed. Cas. No. 8,803.

Form of proceeding as affecting application of section.—This section embraces an action of debt as well as an action on information, because almost every fine or forfeiture under penal statutes may be recovered in either form of suit. The statute cannot be restricted to the form of proceeding, but applies to the subject-matter. *U. S. v. Platt*, (1840) 27 Fed. Cas. No. 16,054a. See *Stockwell v.*

U. S., (1871) 13 Wall. 531, 20 U. S. (L. ed.) 491; *Parsons v. Hunter*, (1836) 2 Sumn. 419, 18 Fed. Cas. No. 10,778; *U. S. v. Allen*, (1810) 4 Day (Conn.) 474, 24 Fed. Cas. No. 14,431.

Limitations.—*Ignorance of the fact of the commission of an offense*, and of the creation thereby of a right to bring suit for the forfeiture incurred, does not prevent the running of the statute or the accruing of the forfeiture sued for, as respects the thing or person sued, as between it or him and the United States. *U. S. v. Maillard*, (1871) 4 Ben. 459, 26 Fed. Cas. No. 15,709.

Fraudulent concealment by the defendants of the acts set forth in the causes of action does not bar the running of the statute of limitations, until the discovery of the fraud. "A court cannot engraft on a statute of limitations an exception which the statute itself does not make." *U. S. v. Maillard*, (1871) 4 Ben. 459, 26 Fed. Cas. No. 15,709.

Statutes of limitations apply to the legal remedies and not to the rights of the parties. Whether the statute of limitations does or does not bar a claim on behalf of the government is, therefore, a judicial question to be determined by the courts and not by the Attorney-General (1897) 21 Op. Atty-Gen. 557.

Actions affected by section.—An action for damages under section 7 of the Antitrust Act of July 2, 1890 (see TRADE COMBINATIONS AND TRUSTS), is not an action for a penalty within the meaning of this section. *Atlanta v. Chattanooga Foundry, etc., Co.*, (1906) 203 U. S. 390, 27 S. Ct. 65, 51 U. S. (L. ed.) 241, *affirming* (1900) 101 Fed. 900.

Violation of Interstate Commerce Act.—The section is not applicable to a liability existing under sections 8, 9, 14 and 16 of the Act to regulate commerce (see INTERSTATE COMMERCE), since the liability sought to be enforced is not punitive but strictly remedial. *Meeker v. Lehigh Val. R. Co.*, (1915) 236 U. S. 412, 35 S. Ct. 328, 59 U. S. (L. ed.) 644.

But in *Carter v. New Orleans, etc., R. Co.*, (C. C. A. 5th Cir. 1906) 143 Fed. 99, 74 C. C. A. 293, it was held that an action to recover damages for discrimination in violation of the Interstate Commerce Act, providing that for a violation of the terms of the Act the carrier should be liable to the persons injured for the full amount of damages sustained, and for a reasonable counsel or attorney's fee to be taxed by the court, was within the five-year limitation of this section. *Carter v. New Orleans, etc., R. Co.*, (C. C. A. 5th Cir. 1906) 143 Fed. 99, 74 C. C. A. 293.

Offenses against banking laws.—A forfeiture of the rights, privileges, and franchises of a bank, under R. S. sec. 5239 (see NATIONAL BANKS), is one which accrues under the provisions of the laws of the United States, and is therefore subject to the limitation of this section. *Welles v. Graves*, (1890) 41 Fed. 459.

A suit against the president of a bank to recover damages for the injury to the bank and its creditors from his negligence and bad faith, as occupying a trust relation to the stockholders and to the assets in his hands, is not a suit for a penalty or forfeiture for a violation of any of the acts of Congress in relation to banking associations. *Stearns v. Lawrence*, (C. C. A. 1897) 83 Fed. 738, 54 U. S. App. 532, 28 C. C. A. 66.

The liability of the directors of a bank, under R. S. sec. 5239 (see NATIONAL BANKS), is dependent, not only on the fact of a violation of some one or more of the provisions of the banking laws, but also on the fact of causing damage by such violation to the association, its shareholders, or other parties, and such liability is not to be deemed a penalty, within the meaning of that term as used in this section. *Welles v. Graves*, (1890) 41 Fed. 459.

Collecting delinquent internal revenue taxes.—Under this section the government may not recover unpaid special taxes and penalties against persons engaged in the business of rectifying, purifying, and refining distilled spirits, for a longer period

than five years from the date of suit brought. *U. S. v. Smith, etc., Co.*, (1911) 184 Fed. 532.

Under R. S. sec. 3184 (see INTERNAL REVENUE), providing for the collection of delinquent internal revenue taxes with a penalty of five per cent. thereon and interest at the rate of one per cent. a month, such interest is not a penalty, but is recoverable as interest, and the limitation of five years, prescribed by section 1047 for suits to recover penalties, does not apply to a suit to recover such interest as a part of the debt. *U. S. v. Guest*, (C. C. A. 1906) 143 Fed. 456, 74 C. C. A. 590.

Customs revenue cases.—This section does not apply to customs revenue cases, which are subject to the three-year limitation for similar proceedings "accruing under the customs revenue laws of the United States," which is provided in section 22, Act June 22, 1874, ch. 391, 18 Stat. L. 190 (see CUSTOMS DUTIES). *U. S. v. Wittemann*, (C. C. A. 1907) 152 Fed. 377, 81 C. C. A. 503.

Action on official bond.—An action of debt against a surety on the official bond of an officer of the United States is not a suit for a penalty or forfeiture accruing under the laws of the United States. The provisions of this section do not apply to a civil action upon a bond, whether it be in favor of the United States or a private person. *Raymond v. U. S.*, (1876) 14 Blatchf. 51, 20 Fed. Cas. No. 11,596. To the same effect see *U. S. v. U. S. Fidelity, etc., Co.*, (C. C. A. 4th Cir. 1915) 221 Fed. 27, 136 C. C. A. 553, wherein the court held that this section refers to the recovery of a statutory penalty or forfeiture only, and has no application to a suit brought upon the bond of a surety.

Land held in violation of law.—An action brought under section 3 of the Act of July 1, 1862, ch. 126, 12 Stat. L. 501, providing that all real estate, exceeding a certain amount in value, acquired or held by any corporation or association for religious or charitable purposes, during the existence of the territorial government, shall be forfeited, etc., is not barred by this section when the property has been acquired or held in violation of the law within five years before the commencement of the action. "In contemplation of law, the land itself is guilty, and it is the guilt of the land that makes it forfeitable by reason of its being employed in an unlawful use." *U. S. v. Tithing Yard*, (1893) 9 Utah 273, 34 Pac. 55.

A libel in rem against a steamboat to enforce, by the condemnation and sale of the boat, a lien created by R. S. sec. 4469 (see STEAM VESSELS), is governed by the provisions of this section, and the action to enforce the lien accrues when the violation of the law is established by the verdict of the jury and the judgment

of the court, in the personal action against the master and owners. *Hatch v. The Boston*, (1880) 3 Fed. 807.

Section cited in *U. S. v. One Dark Bay Horse*, (1904) 130 Fed. 240.

Sec. 5292. [Mitigation or remission upon summary investigation before district judge.] Whenever any person who shall have incurred any fine, penalty, or forfeiture, or disability, or may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability by authority of any provisions of law for imposing or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and for regulating the same, or providing for the suppression of insurrections or unlawful combinations against the United States, shall prefer his petition to the judge of the district in which such fine, penalty, or forfeiture, or disability has accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the judge shall inquire, in a summary manner, into the circumstances of the case; first causing reasonable notice to be given to the person claiming such fine, penalty, or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof; and shall cause the facts appearing upon such inquiry to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury. The Secretary shall thereupon have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same was incurred without willful negligence, or any intention of fraud in the person incurring the same; and to direct the prosecution, if any has been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just. [*R. S.*]

Act of March 3, 1797, ch. 13, 1 Stat. L. 506; Act of Feb. 11, 1800, ch. 6, 2 Stat. L. 7; Act of March 2, 1803, ch. 18, 2 Stat. L. 210; Act of July 13, 1861, ch. 3, 12 Stat. L. 257; Act of May 20, 1862, ch. 81, 12 Stat. L. 405.

R. S. secs. 5292 to 5296 constitute title LXVIII of the Revised Statutes, "Remission of Fines, Penalties, and Forfeitures."

This section was amended to read as above given by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 252. The amendment consisted in adding after the words "licensing vessels" the words "and for regulating the same," and after the words "terms or conditions," at the close, the word "as."

As to relief from fines, penalties, and forfeitures under the customs laws see the title CUSTOMS DUTIES.

Source of section.—This section was taken from section 1 of the Act of March 3, 1797. (1911) 29 Op. Atty.-Gen. 261.

Defective punctuation.—As this section is printed, it is liable to erroneous construction by reason of defective punctuation. By reference to the title of the original Act of 1797, it would seem that the language "any person," and "any fine, penalty," etc., is limited to the "certain cases therein mentioned," which are cases "levying or collecting any duties or taxes," and "registering and recording of ships," enrolling and licensing ships," etc. (1894) 20 Op. Atty.-Gen. 705.

Repeal as to penal duties.—This section in its relation to penal duties under the customs laws was repealed by the Antimoiety Act of June 22, 1874, ch. 391, § 17.

(See CUSTOMS DUTIES, vol. 2, p. 1181.) (1895) 21 Op. Atty.-Gen. 283. See also (1894) 21 Op. Atty.-Gen. 102.

Fine, penalty, forfeiture, or disability.—*A debt due to the United States under a bond given for duties is not a fine, penalty, forfeiture, or disability.* (1814) 1 Op. Atty.-Gen. 176.

A forfeited bond, given to entitle the party to the benefit of drawback of duties on merchandise imported, is neither a fine, penalty, forfeiture, nor disability, within the meaning of this statute. (1829) 2 Op. Atty.-Gen. 278.

"Additional duties" provided for by section 7 of the Customs Administrative Act of June 10, 1890, ch. 407, are penalties within this and the next sections, and sections 17-20 of the Antimoiety Act of June

22, 1874, ch. 391. (See CUSTOMS DUTIES.) (1893) 20 Op. Atty.-Gen. 660. See also (1843) 4 Op. Atty.-Gen. 182.

The additional tax under R. S. sec. 4219, (see TONNAGE DUTIES), of fifty cents per ton, attaching to a vessel by reason of noncitizenship of an officer, is not a penalty which can be remitted or mitigated under this section. (1881) 17 Op. Atty.-Gen. 120. See also (1843) 4 Op. Atty.-Gen. 273; *In re Laidlaw*, (1890) 42 Fed. 401.

Maritime prize.—In *The Gray Jacket*, (1866) 5 Wall. 342, 18 U. S. (L. ed.) 646, it was held that the Secretary of the Treasury had no authority to remit in any case of property captured as maritime prize of war.

Duties and taxes due on property seized cannot be remitted by the Secretary of the Treasury. *Dorshimer v. U. S.*, (1868) 7 Wall. 166, 19 U. S. (L. ed.) 187.

Seizure of imported merchandise.—The Secretary of the Treasury is without authority to remit or mitigate a seizure made pursuant to the provisions of subsection 7 of section 28 of the Act of Aug. 5, 1909 (superseded by the Underwood Tariff Act of Oct. 3, 1903, ch. 16, sec. III, subsec. I; see CUSTOMS DUTIES), on shipments of imported merchandise where the appraised value of such merchandise exceeded their entered value more than 75 per cent. (1911) 29 Op. Atty.-Gen. 261.

Time of exercising authority of remission.—The Supreme Court early held that the authority of remission given by this section existed from the doing of the act resulting in the liability until the fine or forfeiture was reduced to actual possession by the government, and could be exercised both after as well as before the actual adjudication. (1911) 29 Op. Atty.-Gen. 261.

Conditions precedent to taking cognizance of petition.—Two particulars are required to be established as conditions precedent to taking cognizance of a petition: (1) that the petitioner is interested in the subject claimed as forfeited; (2) that a case of forfeiture actually exists, which must appear by sentence of condemnation actually passed upon the subject-matter; or by a distinct, unequivocal admission of the party intervening by petition. *The Princess of Orange*, (1831) 19 Fed. Cas. No. 11,431.

Notice of application for remission.—Although the control of the prosecution is absolutely in the United States, yet this section expressly requires that the party claiming the forfeiture shall have notice of any application for its remission, that he may have opportunity of showing cause against such remission, and the collector, as such party, is entitled to appear and make all legal objections to the application, whether it is presented by the United

States or an individual. *The Princess of Orange*, (1831) 19 Fed. Cas. No. 11,431.

Appearance by district attorney for claimant.—After a forfeiture has been declared, the district attorney may appear in his individual, as distinguished from his official, capacity to support a petition for remission. *The Princess of Orange*, (1831) 19 Fed. Cas. No. 11,431.

Authority of court.—"In the preliminary steps for procuring a remission, the court, in the first instance, inquires summarily into the facts and circumstances of the case, and reports them to the secretary. It reports facts and not the evidence of facts. In making this statement the judge acts judicially. The facts must be proved by legal and competent evidence, and of the competency of the evidence he must judge. The evidence must not only be competent and conduce to prove the facts stated, but must satisfy the judicial conscience of the judge that they are true. But whether, when proved, they are sufficient to establish the further fact that the forfeiture was incurred without wilful negligence or intention of fraud, is referred exclusively to the judgment of the Secretary of the Treasury. It does not belong to the judge to express an opinion on this point." *The Palo Alto*, (1847) 2 Ware 344, 18 Fed. Cas. No. 10,700. See also *The Margareta*, (1815) 2 Gall. 515, 16 Fed. Cas. No. 9,072.

The power of remission being confined exclusively to the Secretary of the Treasury, the act of the court in making the order of restoration is more in the nature of a ministerial than of a judicial act, for it is simply to carry into effect the remission, so that the order of the court is not such a judicial act as would prevent the operation of a revocation by the secretary of the warrant of remission. *The Palo Alto*, (1847) 2 Ware 344, 18 Fed. Cas. No. 10,700.

The judge does not act solely in a ministerial capacity in taking the proceedings required by this statute. "He does so undoubtedly in reporting the facts after ascertaining what the facts are, because he is not authorized by the act to express any opinion upon their sufficiency or effect; but he takes the proofs judicially, and must accordingly decide upon the competency and pertinency of the proofs offered, and it must, as a necessary incident to the duty required of him by the act, devolve upon him to decide whether or no a case exists of which he can take cognizance." *The Princess of Orange*, (1831) 19 Fed. Cas. No. 11,431.

Authority of secretary—Generally.—Whether the facts found by the judge "are sufficient to establish the further fact that the forfeiture was incurred without wilful negligence or intention of fraud, is referred exclusively to the judgment of the Secretary of the Treasury. It does

not belong to the judge to express an opinion on this point. The secretary forms his opinion on the facts stated alone, and, under the law, no evidence can be submitted to him by either or both parties, as it is not on the evidence, but on the facts found and stated, that he is to act." Either party may express dissatisfaction to the secretary, who may remand the case to the judge to make further inquiry, and on such re-examination the facts may be restated or the statement may be amended, but it is only on such restatement that the secretary can act, and not on the evidence. *The Palo Alto*, (1847) 2 Ware 344, 18 Fed. Cas. No. 10,700. See *Gallego v. U. S.*, (1820) 1 Brock. 430, 9 Fed. Cas. No. 5,201; (1896) 21 Op. Atty-Gen. 280.

The power of remission is confined exclusively to the discretion of the Secretary of the Treasury, and when he has decided the court has no judgment to exercise on the subject, but is bound to issue the order of restoration. *The Palo Alto*, (1847) 2 Ware 344, 18 Fed. Cas. No. 10,700.

It is not compulsory upon the secretary to exercise the power of remission, but it is a subject submitted to his sound discretion. *The Margaretta*, (1815) 2 Gall. 515, 16 Fed. Cas. No. 9,072.

Sufficiency of facts.—When the statement of facts is transmitted to the secretary, his opinion as to their sufficiency to bring the case within the statute is conclusive, and cannot be questioned in any collateral inquiry. *The Margaretta*, (1815) 2 Gall. 515, 16 Fed. Cas. No. 9,072. See *The Cotton Planter*, (1810) 1 Paine 23, 6 Fed. Cas. No. 3,270.

The secretary may impose terms as conditions precedent to the remission of a forfeiture, and may require not only the payment of the costs of the prosecution, but of additional or penal duties for undervaluation of forfeited imported merchandise. *Jungbluth v. Redfield*, (1858) 4 Blatchf. 219, 14 Fed. Cas. No. 7,583.

But the secretary cannot mitigate or remit upon any terms or conditions which would leave the officer who seized liable to a suit for damages. (1852) 5 Op. Atty-Gen. 658.

The secretary may revoke a warrant of remission at any time before the precept of a court carrying it into effect is finally executed by the delivery of the goods to the claimant. *The Palo Alto*, (1847) 2 Ware 344, 18 Fed. Cas. No. 10,700.

After a fine has been paid to and distributed by the collector, the secretary has no power to remit any part thereof. (1900) 23 Op. Atty-Gen. 237. See also (1837) 3 Op. Atty-Gen. 237; *U. S. v. Collier*, (1855) 3 Blatchf. 325, 25 Fed. Cas. No. 14,833.

Conditional remission.—When the remission is conditional on payment of costs, it is a condition precedent, and the re-

mission is inoperative until the costs are paid. And when the costs are tendered, but the attorney declines to receive them, because, the collector not having furnished him with the item of the costs of seizure and custody, he was unable to complete the taxation, such tender is equivalent to payment for the purpose of vesting in the claimant a right to the possession of the property, and an order of restitution ought not to be delayed. *The Palo Alto*, (1847) 2 Ware 344, 18 Fed. Cas. No. 10,700.

The part claimed by officers of the government in a penalty or forfeiture is included in the effect of the remission of the fine, penalty, or forfeiture. *U. S. v. Morris*, (1822) 1 Paine 209, 26 Fed. Cas. No. 15,816, *affirmed* (1825) 10 Wheat. 246, 6 U. S. (L. ed.) 314. See also *The Princess of Orange*, (1831) 19 Fed. Cas. No. 11,431; *McLane v. U. S.*, (1832) 6 Pet. 404, 8 U. S. (L. ed.) 443; (1847) 4 Op. Atty-Gen. 573. But see *The Hollen*, (1818) 1 Mason 431, 12 U. S. (L. ed.) 6,608; *The Margaretta*, (1815) 2 Gall. 515, 16 Fed. Cas. No. 9,072.

In *U. S. v. Lancaster*, (1821) 4 Wash. 64, 26 Fed. Cas. No. 15,557, it was held that the power of remission extended to the interest of an individual in the penalty any time before judgment.

Postponement of trial for penalty.—If an action is pending to recover the penalty the court need not postpone the trial of the cause until the Secretary of the Treasury shall have acted upon a petition of the defendant for a remission of such penalty. *Peacock v. U. S.*, (C. C. A. 9th Cir. 1903) 125 Fed. 583, 60 C. C. A. 389.

Discontinuance of prosecution.—A prosecution is not at an end, in legal or common phraseology, so long as an execution be necessary to produce the fruits of it, and the Secretary of the Treasury may direct the prosecution to be discontinued at any time prior to the receipt of the money, even if the power to direct a remission does not extend to the money after it has been received and distributed. *U. S. v. Morris*, (1822) 1 Paine 209, 26 Fed. Cas. No. 15,816, *affirmed* (1865) 10 Wheat. 246, 6 U. S. (L. ed.) 314. See *U. S. v. Collier*, (1855) 3 Blatchf. 325, 25 Fed. Cas. No. 14,833.

Writ of restoration.—The warrant of remission does not give the claimant a direct authority to retake the goods, but on filing the remittitur and complying with its terms, the court will direct a precept to be issued for the restoration of the property, and order the suit to be dismissed. The statute does not in such cases direct a writ of restoration, but it is necessary to the orderly course of judicial proceedings, so that the record may show what disposition is made of the property. *The Palo Alto*, (1847) 2 Ware 344, 18 Fed. Cas. No. 10,700.

Appeal.—No appeal to the Court of Claims or to any other court can be admitted from the decision of the Secretary of the Treasury. *Dorheimer v. U. S.* (1868) 7 Wall. 166, 19 U. S. (L. ed.) 187.

Sec. 5293. [Remission upon investigation under regulations of Secretary of Treasury.] The Secretary of the Treasury is authorized to prescribe such rules and modes of proceeding to ascertain the facts upon which an application for remission of a fine, penalty, or forfeiture is founded, as he deems proper, and, upon ascertaining them, to remit the fine, penalty, or forfeiture, if in his opinion it was incurred without willful negligence or fraud, in either of the following cases:

First. If the fine, penalty, or forfeiture was imposed under authority of any revenue law, and the amount does not exceed one thousand dollars.

Second. Where the case occurred within either of the collection-districts in the States of California or Oregon.

Third. If the fine, penalty, or forfeiture was imposed under authority of any provisions of law relating to the importation of merchandise from foreign contiguous territory, or relating to manifests for vessels enrolled or licensed to carry on the coasting-trade on the northern, northeastern, and northwestern frontiers.

Fifth. If the fine, penalty, or forfeiture was imposed by authority of any provisions of law for levying or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and the case arose within the collection-district of Alaska, or was imposed by virtue of any provisions of law relating to fur-seals upon the islands of Saint Paul and Saint George. [*R. S.*]

Act of July 14, 1832, ch. 233, 4 Stat. L. 597; Act of Sept. 28, 1850, ch. 79, 9 Stat. L. 509; Act of June 27, 1864, ch. 164, 13 Stat. L. 198; Act of July 18, 1866, ch. 201, 14 Stat. L. 182; Act of July 27, 1868, ch. 273, 15 Stat. L. 242; Act of July 1, 1870, ch. 185, 16 Stat. L. 179; Act of July 1, 1870, ch. 189, 16 Stat. L. 182.

As originally enacted, the first subdivision of this section was as follows: "If the fine, penalty, or forfeiture was imposed under authority of any provisions of law for imposing or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and the amount does not exceed fifty dollars." The Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 253, amended this original section in the following terms: "Section fifty-two hundred and ninety-three is amended by striking out the first subdivision, and transposing the fourth subdivision so as to read as the first subdivision." The matter in the text has been arranged in accordance with this amendment. There is now no subdivision "fourth."

As to provisions for the remission of penalties, etc., under the customs laws, see the title **CUSTOMS DUTIES**.

"Any revenue law" includes the internal revenue laws as well as the customs revenue laws. (1901) 23 Op. Atty.-Gen. 398.

The limit of one thousand dollars, referred to in this section, refers to the amount of the penalty to be remitted, and not to the value of the merchandise whose importation led to the imposition of the penalty. (1894) 21 Op. Atty.-Gen. 101.

When the amount of penal duties exceeds the limit of one thousand dollars, the Secretary of the Treasury is not authorized to remit until after the proper proceeding before the district judge. (1894) 21 Op. Atty.-Gen. 101.

Upon an entry covering two invoices of sugar imported by the same vessel to the

same consignee representing two different principals, penal duties were levied; on each invoice the penal duty was less than one thousand dollars, but the duties if combined exceeded one thousand dollars. The Secretary of the Treasury had authority to remit these penal duties. (1895) 21 Op. Atty.-Gen. 283.

The penalty of fifty per cent. imposed upon a bank under R. S. sec. 3176 (see **NATIONAL BANKS**), because of its failure to make timely return of its liability for the special tax levied under section 2 of the War Revenue Act of 1898, may be remitted under this section. (1901) 23 Op. Atty.-Gen. 398. See also (1882) 17 Op. Atty.-Gen. 433.

Fraudulent undervaluation by one member of firm.—When one member of a firm, in entering goods consigned to the firm, has committed a fraudulent undervaluation, the Secretary of the Treasury is not authorized to remit the consequent penalties or "additional duties" imposed by the Customs Administrative Act (see *CUSTOMS DUTIES*). When a fraud has been committed or attempted by one member of a partnership in a transaction which he is conducting on behalf of the firm, it is not regarded as his individual act simply, but the firm, as a firm, is regarded as guilty. (1894) 21 Op. Atty.-Gen. 90.

Forfeiture for killing fur seals.—The power of remission resides in the Secretary of the Treasury under the fifth paragraph of this section, in a case of the forfeiture of a vessel for being engaged in the killing of fur seals in violation of the provisions of R. S. sec. 1956 (see *ALASKA*), only when the forfeiture "was imposed by virtue of any provisions of law relating to fur seals upon the islands of St. Paul and

St. George." (1887) 18 Op. Atty.-Gen. 584; (1887) 19 Op. Atty.-Gen. 5.

Before this section was amended by the Act of Feb. 27, 1877, the Attorney-General said that the Secretary of the Treasury had "power to remit fines, penalties, or forfeitures imposed under authority of the laws mentioned in the first paragraph of section 5293, excepting such of those laws as relate to the registering, recording, enrolling, or licensing of vessels, in cases where the amount of the fine, penalty, or forfeiture does not exceed one thousand dollars, and where there has been no summary inquiry and statement of facts by a judge, as provided for in section 5292 of the Revised Statutes; that where the fine, penalty, or forfeiture was imposed under any of the laws above excepted you have power to remit the same, without summary inquiry and statement provided for in section 5292, if the amount does not exceed fifty dollars, but not if it exceeds that sum." (1874) 14 Op. Atty.-Gen. 454.

Sec. 5294. [Remission or mitigation of fines, penalties, and forfeitures under laws relating to vessels — informers' rights.] The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to vessels or discontinue any prosecution to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper. [*R. S.*]

This section was amended "so as to read as" above given by the Act of March 2, 1896, ch. 37, 29 Stat. L. 39.

Originally this section was as follows:

"SEC. 5294. The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine or penalty provided for in laws relating to steam-vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment, or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction, prior to the application for the remission of the penalty; and the Secretary shall have authority to ascertain the facts upon all such applications, in such manner and under such regulations as he may deem proper." Act of Feb. 28, 1871, ch. 100, 16 Stat. L. 458.

It was first amended by an Act of Dec. 15, 1894, ch. 7, 28 Stat. L. 595, by substituting the word "vessels" for "steam-vessels" where it occurred in the first sentence of the section. It was again amended by the Act of March 2, 1896, ch. 37, 29 Stat. L. 39, to read as given in the text.

For provisions relating to the remission of fines, etc., incurred under the customs laws, see the title *CUSTOMS DUTIES*.

Scope of section.—In *Findlay v. U. S.*, (C. C. A. 9th Cir. 1915) 225 Fed. 337, 139 C. C. A. 207, the court, commenting on

the scope of this section, said: "Section 5294 of the Revised Statutes had its origin as section 64 of the Act of Feb. 28,

1871, entitled, 'An Act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes.' 16 Stat. 440, 458. . . . The limitation here placed upon the authority of the Secretary of the Treasury to remit or mitigate only the fines and penalties provided in that act and to discontinue only the prosecutions to recover penalties denounced in that act is so plainly stated that further inquiry seems out of place, but, in view of the method adopted by the Revision Commission in incorporating the provisions of this act into the Revised Statutes in 1874, it will be well to notice that every provision of the section, including the exception relating to imprisonment and removal from office, and the rights of informers, had direct and apt relation to other sections of that act. The act contains 71 sections, and relates to the supervision and inspection of hulls, boilers, etc., of vessels navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce or open to general or competitive navigation, including coastwise seagoing vessels, and vessels navigating the Great Lakes when navigating within the jurisdiction of the United States. It is provided that the act shall not apply to public vessels of the United States or vessels of other countries, nor to boats propelled in whole or in part by steam for navigating canals. Sixty-six of these sections were carried into the Revised Statutes without substantial change as sections 4399 to 4500, under title 52, entitled 'Regulation of Steam Vessels.' [See STEAM VESSELS.] Section 71, the last section of the Act of 1871, was a repealing section of previous acts, and necessarily disappeared in the revision. The remaining four sections were transferred to other titles of the Revised Statutes; section 64, the section now under consideration, becoming section 5294 of the Revised Statutes, and incorporated under title 68 with other sections of the same general character under the title 'Remission of Fines, Penalties, and Forfeitures.' But the section as revised was not enlarged in its scope and did not lose its identity or relation to the other sections of the Revised Statutes to which it had previously been related in the original act before the revision. This identity and relation was indicated and preserved by striking out the words 'this act' in the original statute and inserting in lieu thereof in the Revised Statutes the words 'provided for in laws relating to steam vessels,' pointing directly to title 52, entitled 'Regulation of Steam Vessels,' where the remainder of the Act of February 28, 1871, had been transferred. The identity and relation was further indicated and preserved in the Revised Statutes by retaining the exceptions

relating to imprisonment and removal from office and the rights of informers, precisely as they appeared in the original section, where they had apt relation to other sections of the original act, and when transferred had apt relation to other sections of title 52. It thus appears that the authority of the Secretary of the Treasury under section 5294 of the Revised Statutes was limited to the remission or mitigation of the fines and penalties provided for in the laws relating to steam vessels navigating the navigable waters of the United States, and to the discontinuance of prosecutions to recover penalties denounced in such laws as contained in title 52 of the Revised Statutes."

Constitutionality.—The President, under the unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress, and this constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment. But that power is not exclusive in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States. If there can be any doubt as to the constitutionality of such legislation, the practice in reference to remissions by the Secretary of the Treasury and other officers has been observed and acquiesced in for nearly a century, and ought not to be disturbed. *The Laura*, (1885) 114 U. S. 411, 5 S. Ct. 881, 29 U. S. (L. ed.) 147. But see *Ex p. Marquand*, (1815) 2 Gall. 552, 16 Fed. Cas. No. 9,100.

But in *Steamboat Minnesota Case*, (1864) 11 Op. Atty-Gen. 122, the Attorney-General advised the President that the President had the power neither to remit a forfeiture incurred for a violation of section 2 of the Act of July 7, 1838, which provided for the forfeiture of a vessel for transporting goods or passengers without a license, nor to afford relief against a judgment which might have been entered upon a bond accepted by a district court as a substitute for the vessel seized under the authority of the statute. The forfeiture incurred in such a case was one within the remitting power of the Secretary of the Treasury, under this statute, and he alone had authority, under the law, to mitigate the same. The grant of power in the Constitution to the President to pardon "offenses against the United States" is, in its terms, and in its obvious sense, limited to offenses, to crimes and misdemeanors against the United States, and does not embrace any case of forfeiture, loss, or condemnation not imposed by law as a punishment for an offense. See also (1863) 10 Op. Atty-Gen. 452. But see (1847) 4 Op. Atty-Gen. 573.

The phrase "relating to vessels" does not mean to include all laws which may

affect vessels, however remotely or indirectly, but rather the laws which relate to and regulate vessels on the side of commerce and navigation as their original and direct purpose. So that the remission of a fine to which a vessel or her master is liable under section 10 of the Act of March 3, 1891, 26 Stat. L. 1086 (superseceded by the Act of Feb. 20, 1907, ch. 1134, sec. 19; see IMMIGRATION), for allowing the escape of three alien immigrants whose deportation had been duly ordered, is unprovided for. (1900) 23 Op. Atty.-Gen. 271. See also (1894) 20 Op. Atty.-Gen. 705.

Remission after suit instituted.—The Secretary of the Treasury may remit a penalty after a suit for its recovery has been instituted by a private person. "If the libellant had, by virtue of his suit, an inchoate interest in such penalties, that interest was acquired subject to the power of the secretary to destroy it by a remission applied for before the right is ascertained and established by the judgment of the proper court." *The Laura*, (1885) 114 U. S. 411, 5 S. Ct. 881, 29 U. S. (L. ed.) 147.

Distinction between compromise and remission.—There is a clear distinction between the compromise of a doubtful case, as under R. S. sec. 3469 (see CLAIMS), and the remission of a penalty, forfeiture, or disability, as under this section. The former power is a fiscal one, but the latter is in the nature of a pardoning power. (1895) 21 Op. Atty.-Gen. 264. See also (1900) 23 Op. Atty.-Gen. 18; (1899) 19 Op. Atty.-Gen. 344. But see (1894) 20 Op. Atty.-Gen. 727.

Amendment as including forfeitures.—The Attorney-General advised the Secretary of the Treasury that this section as

amended by the Act of Dec. 15, 1894, ch. 7, did not authorize the remission of forfeitures. "A clear omission from a statute like this cannot be supplied upon any considerations of supposed oversight, inconsistency, or hardship." (1896) 21 Op. Atty.-Gen. 291. (This opinion was given on Jan. 10, 1896; and on March 2, 1896, this section was further amended, evidently to supply the omission pointed out.)

Authority of Secretary of Commerce and Labor.—In (1911) 29 Op. Atty.-Gen. 149, it was held that the Act of February 14, 1903, establishing the Department of Commerce and Labor and transferring to it certain duties then performed by the Secretary of Treasury conferred on the Secretary of that department the authority to remit under this section.

An application for remission of fines and penalties is obviously based upon an admission that the fine or penalty has been incurred. *Findlay v. U. S.*, (C. C. A. 9th Cir. 1915) 225 Fed. 337, 139 C. C. A. 207.

Remission of costs.—The costs which are not, as a general rule, charged against the defendant when proceedings are discontinued by the plaintiff, may be remitted or mitigated by the Secretary of Commerce and Labor in accordance with the provisions of this section. (1911) 29 Op. Atty.-Gen. 149.

Remission of penalty after final judgment.—The Secretary of Commerce and Labor has authority under this section, to remit a penalty after entry of final judgment incurred for violating a provision of law relating to vessels and seaman and to discontinue the prosecution. (1911) 29 Op. Atty.-Gen. 149.

Sec. 5295. [Officers and informers may be witnesses.] Any officer or other person entitled to or interested in a part or share of any fine, penalty, or forfeiture incurred under any law of the United States, may be examined as a witness in any of the proceedings for the recovery of such fine, penalty, or forfeiture by either of the parties thereto, and such examination shall not deprive such witness of his share or interest in such fine, penalty, or forfeiture. [R. S.]

Act of Feb. 28, 1865, ch. 67, 13 Stat. L. 442.

Sec. 5296. [Discharge of indigent convicts.] When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and costs, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the

matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the State where oath is administered;) and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts. [R. S.]

Act of June 1, 1872, ch. 255, 17 Stat. L. 198.

Similar provisions were made by R. S. sec. 1042, *supra*, p. 328.

SEC. 6. [Customs-revenue law — payment to informers.] That no payment shall be made to any person furnishing information in any case wherein judicial proceedings shall have been instituted, unless his claim to compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services duly certified by said court or judge for the information of the Secretary of the Treasury; but no certificate of the value of such services shall be conclusive of the amount thereof. And when any fine, penalty, or forfeiture shall be collected without judicial proceedings, the Secretary of the Treasury shall, before directing payment to any person claiming such compensation, require satisfactory proof that such person is justly entitled thereto. [18 Stat. L. 187.]

This and the following section are from the Act of June 22, 1874, ch. 391, "An act to amend the customs-revenue laws and to repeal moiety laws." For the other sections of this Act, see the title CUSTOMS DUTIES.

Constitutionality.—The duties sought to be imposed upon the court by this section are administrative, and not judicial, and Congress cannot constitutionally impose them. U. S. v. Queen, (1900) 105 Fed. 269.

In *Ex p. Riebeling*, (1895) 70 Fed. 310, the court said: "It will be observed that the Act confers no power upon the court to render judgment in favor of the informer for the amount which may be found due him. . . . The duty enjoined is not a judicial duty, but a mere direction to the court to ascertain and establish certain facts for the information of the Secretary of the Treasury, and the question for the court to determine is whether it has jurisdiction to proceed in accordance with the prayer of the applicant. After giving the subject careful consideration the court has reached the conclusion that Congress is without authority, under the Constitution, to require the judiciary to discharge other than judicial functions, and hence that the present proceedings

must be dismissed for the want of jurisdiction."

In *Ex p. Gans*, (E. D. Mo. 1883) 17 Fed. 471, it appeared that a petition was filed, alleging that the petitioner gave the original information in a smuggling case, theretofore finally disposed of by the court, in which the proceeds of the property were paid into the treasury pursuant to the decree, and the petition prayed for a certificate as provided for in this section, but the court said that the "case" had disappeared from the docket and it had no further control of it. "What is the supposed function of the court? If to be reviewed by the Secretary of the Treasury, its action is not judicial; and only judicial functions can be devolved on [it]. The Act of 1874 presents several anomalies in this respect. If the decision as to informers is committed solely to the discretion of the secretary, the duty to decide is purely executive, and the information upon which he is to act should come from executive sources. Section 6 provides that

where no judicial proceedings are had, the secretary shall require satisfactory proofs; but where such proceedings shall have been instituted, he must, before payment, have the certificate of the court, by which, however, he is not bound as to compensation awarded. This provision may be intended as a check on the secretary, but what function does the court perform? These suggestions are made for the purpose of directing attention to the anomaly of confounding or confusing judicial and executive functions."

Informer's right as a share of fund.—There is, by this statute, nothing remaining to the informer analogous to a right *in rem* to obtain a share of the fund *in specie*, but only a personal claim against the government to reasonable compensation. *In re Jayne*, (1886) 28 Fed. 419.

Certificate as advisory only.—This section "contemplates the certificate of the

court or judge for the information of the Secretary of the Treasury where judicial proceedings have been instituted against persons violating the law, so as to afford the secretary some knowledge of the character and value of the information given by informers resulting in the institution of proceedings, but the certificate in such cases is only advisory and never conclusive." *Eager v. U. S.*, (1897) 32 Ct. Cl. 571.

Act of June 16, 1880.—This section has no application to a case of expenses incurred by the secretary under the Act of June 16, 1880, ch. 235, 21 Stat. L. 265, as to the expenses of detecting and convicting persons engaged in counterfeiting and other felonies, but only to claims of informers under the Act of which this section forms a part. *In re Brittingham*, (1880) 5 Fed. 191.

SEC. 7. [Officer receiving part of informer's fees — action to recover money so paid.] That except in cases of smuggling as aforesaid, it shall not be lawful for any officer of the United States, under any pretense whatever, directly or indirectly, to receive, accept, or contract for any portion of the money which may, under any of the provisions of this or any other act, accrue to any such person furnishing information; and any such officer who shall so receive, accept, or contract for any portion of the money that may accrue as aforesaid shall be guilty of a misdemeanor, and, on conviction thereof, shall be liable to a fine not exceeding five thousand dollars, or imprisonment for not more than one year, or both, in the discretion of the court, and shall not be thereafter eligible to any office of honor, trust, or emolument. And any such person so furnishing information as aforesaid, who shall pay to any such officer of the United States, or to any person for his use, directly or indirectly, any portion of said money, or any other valuable thing, on account of or because of such money, shall have a right of action against such officer or other person, and his legal representatives, to recover back the same, or the value thereof. [*18 Stat. L. 187.*]

See the note to the preceding section 6 of this Act.

SEC. 26. [Refund or remission of fines, etc., illegally assessed under laws relating to vessels or seamen.] That whenever any fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or seamen has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same, the Secretary of the Treasury, if on investigation he finds that such fine, penalty, forfeiture, exaction, or charge was illegally, improperly, or excessively imposed, shall have the power, either before or after the same has been covered into the Treasury, to refund so much of such fine, penalty, forfeiture, exaction, or charge as he may think proper,

from any moneys in the Treasury not otherwise appropriated. [23 Stat. L. 59.]

The above section 26 is from the Act of June 26, 1884, ch. 121, "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes."

Still in force.—This section is still in force. (1909) 28 Op. Atty.-Gen. 21.

Fines and penalties prior to date of Act.—The power to refund moneys under this statute does not extend to payments of fines and penalties exacted and recovered prior to the date of the Act, and of which an application for remission was made within a year from the date of payment. (1885) 18 Op. Atty.-Gen. 282.

Necessity that protest accompany payment.—A protest need not accompany the payment of a fine, etc., to entitle one to prefer an application to the Secretary of the Treasury for its remission. (1884) 18 Op. Atty.-Gen. 63.

Head tax under Immigration Act.—This statute does not authorize the secretary of the treasury to refund a tax levied on passengers not citizens of the United States, in accordance with the requirement of the Act of Aug. 3, 1882, ch. 376, entitled "An Act to regulate immigration" (superseded by subsequent acts, see IMMIGRATION), where, by a prior treaty between the United States and the country from which the vessel came, the citizens of either country were to be entitled to the same rights as might be granted by the other to its citizens. The secretary cannot regard a legal tax as "improperly" collected, because it might involve the country in a controversy with a foreign nation. *Thingvall Line v. U. S.*, (1889) 24 Ct. Cl. 255.

The Secretary of the Treasury is author-

ized to refund the head tax levied under the provisions of the Act of Aug. 3, 1882, ch. 376, 22 Stat. L. 214 (superseded by subsequent acts, see IMMIGRATION), or so much thereof as he may think proper, if on investigation he finds that the exaction thereof was "illegally, improperly, or excessively imposed." (1890) 19 Op. Atty.-Gen. 660.

Tonnage tax.—All charges improperly or excessively imposed and erroneously or illegally collected on foreign-built yachts, pleasure boats and vessels not used or intended to be used for trade, under section 37 of the Act of Aug. 5, 1909 (repealed by the Act of Oct. 3, 1913, ch. 16, sec. IV, S. 38 Stat. L. 201; see TONNAGE DUTIES), may be refunded under the provisions of this section. (1909) 28 Op. Atty.-Gen. 21.

The Secretary of the Treasury is authorized to repay the tonnage tax imposed on a steamer, if on investigation he finds that it was "illegally, improperly, or excessively imposed," and if the commissioner of navigation shall have first decided under section 3, Act of July 5, 1884, ch. 221 (see SHIPPING AND NAVIGATION), that such tax was erroneously or illegally exacted. (1890) 19 Op. Atty.-Gen. 660.

Legally imposed.—This statute does not give the Secretary of the Treasury a power of remission in cases where a competent tribunal shall have decided that such fines and penalties were legally imposed. (1885) 18 Op. Atty.-Gen. 282.

FISH AND FISHERIES

- I. BUREAU OF FISHERIES, 342.
- II. REGULATION OF FISHERIES, 345.

I. Bureau of Fisheries, 342.

- R. S. 4395. *Appointment of Commissioner of Fish and Fisheries*, 342.
- R. S. 4396. *Duties of the Commissioner*, 343.
- R. S. 4397. *Executive Departments to Aid Investigations*, 343.
- R. S. 4398. *Powers of Commissioner*, 343.

Act of May 31, 1880, ch. 113, 344.

Sec. 1. Fish Commission Vessels to Be on Same Footing as Coast Survey, 344.

Act of March 3, 1885, ch. 360, 344.

Sec. 1. Detail from Revenue Marine for Fish Commission, 344.

Act of March 3, 1887, ch. 362, 344.

Sec. 1. Detailed Statement of Expenditures for "Propagation of Food-Fishes," 344.

Act of Aug. 5, 1892, ch. 380, 344.

Sec. 1. Annual Estimates, 344.

Act of Jan. 29, 1909, ch. 51, 344.

Fish-Culture Stations to Be Established, 344.

Act of March 4, 1911, ch. 285, 345.

Sec. 1. Designation of Officer to Act During Absence of Commissioner and Deputy Commissioner, 345.

II. Regulation of Fisheries, 345.

- R. S. 4391. *Agreement for Fishing Voyage*, 345.
- R. S. 4392. *Penalty for Violating Agreement*, 346.
- R. S. 4393. *Recovery of Shares of Fish under Agreement*, 347.
- R. S. 4394. *Discharge of Vessel upon Bond by Owner*, 348.

CROSS-REFERENCES

In Alaska, see ALASKA.

Rules of Navigation, see COLLISIONS.

Distribution of Specimens to Educational Institutions, see EDUCATION.

In Hawaiian Islands, see HAWAIIAN ISLANDS.

Construction of Fishways in Rivers, and Fishing or Dredging in Harbor Channels, see RIVERS, HARBORS AND CANALS.

Vessels Engaged in, see SHIPPING AND NAVIGATION.

Sponge Fishing, see SPONGES.

Exemption of Vessels from Tonnage Duties, see TONNAGE DUTIES.

I. BUREAU OF FISHERIES

Sec. 4395. [Appointment of commissioner of fish and fisheries.] That there shall be appointed by the President, by and with the advice and consent of the Senate, a person of scientific and practical acquaintance with the

fish and fisheries to be a Commissioner of Fish and Fisheries, and he shall receive a salary at the rate of five thousand dollars a year, and he shall be removable at the pleasure of the President. Said Commissioner shall not hold any other office or employment under the authority of the United States or any State. [R. S.]

Originally this section was as follows:

"Sec. 4395. There shall be appointed by the President, with the advice and consent of the Senate, from among the civil officers or employes of the Government, a commissioner of fish and fisheries, who shall be a person of proved scientific and practical acquaintance with the fishes of the coast, and who shall serve without additional salary." Res. of Feb. 9, 1871, No. 22, 16 Stat. L. 594.

By the Act of Jan. 20, 1888, ch. 1, 25 Stat. L. 1, "An Act to amend the law concerning the commissioner of fish and fisheries," the words given in the text were substituted.

The fish commission and the office of commissioner of fish and fisheries and all that pertains to the same were placed under the jurisdiction and made a part of the Department of Commerce and Labor by the Act of Feb. 14, 1903, ch. 552, § 4, 32 Stat. L. 826, which established that department. See the title COMMERCE DEPARTMENT.

Provisions authorizing the designation of an officer to perform the duties of the commissioner during his absence were made by the Act of March 4, 1911, ch. 285, § 1, *infra*, p. 345. And see the note to said Act.

The salaries of the commissioner and other employees have been increased from year to year. Appropriations for the purpose were made by the Sundry Civil Appropriation Act of March 3, 1915, ch. 75, § 1, 38 Stat. L. 873.

Sec. 4396. [Duties of the commissioner.] The commissioner of fish and fisheries shall prosecute investigations and inquiries on the subject, with the view of ascertaining whether any and what diminution in the number of the food-fishes of the coast and the lakes of the United States has taken place; and, if so, to what causes the same is due; and also whether any and what protective, prohibitory, or precautionary measures should be adopted in the premises; and shall report upon the same to Congress. [R. S.]

Res. of Feb. 9, 1871, No. 22, 16 Stat. L. 594.

A detailed statement of expenditures was required by the Act of March 3, 1887, ch. 302, § 1, *infra*, p. 344.

The requisites of estimates for the fish commission were prescribed by the Act of Aug. 5, 1892, ch. 380, § 1, *infra*, p. 344.

Sec. 4397. [Executive departments to aid investigations.] The heads of the several Executive Departments shall cause to be rendered all necessary and practicable aid to the commissioner in the prosecution of his investigations and inquiries. [R. S.]

Res. of Feb. 9, 1871, No. 22, 16 Stat. L. 594.

Sec. 4398. [Powers of commissioner.] The commissioner may take or cause to be taken at all times, in the waters of the sea-coast of the United States, where the tide ebbs and flows, and also in the waters of the lakes, such fish or specimens thereof as may in his judgment, from time to time, be needful or proper for the conduct of his duties, any law, custom, or usage of any State to the contrary notwithstanding. [R. S.]

Res. of Feb. 9, 1871, No. 22, 16 Stat. L. 594.

State laws.—"This enactment may not improperly be construed as suggesting that, as against the law of a state, the fish commissioner might not otherwise have the right to take fish in places covered by the state law." *Manchester v. Massachusetts*, (1891) 139 U. S. 240, 11 S. Ct. 559, 35 U. S. (L. ed.) 159.

[SEC. 1.] **[Fish commission vessels to be on same footing as coast survey.]** * * * And the Secretary of the Navy is hereby authorized to place the vessels of the United States Fish Commission on the same footing with the Navy Department as those of the United States Coast and Geodetic Survey. [21 Stat. L. 151.]

This is from the Deficiencies Appropriation Act of May 31, 1880, ch. 113.

[SEC. 1.] **[Detail from revenue marine for fish commission.]** * * * The Secretary of the Treasury is authorized to detail from time to time for duty under the Commissioner of Fish and Fisheries any officers and men of the Revenue Marine Service whose services can be spared for such duty. [23 Stat. L. 494.]

This is from the Sundry Civil Appropriation Act of March 3, 1885, ch. 360.
For provisions relating to the Revenue Marine Service, see the title COAST GUARD.

[SEC. 1.] **[Detailed statement of expenditures for "propagation of food-fishes."]** * * * That the Commissioner of Fish and Fisheries shall submit to Congress at its next session a detailed statement of the expenditures for the fiscal year eighteen hundred and eighty-seven under all appropriations for "propagation of food-fishes;" and annually thereafter a detailed statement of expenditures under all appropriations for "propagation of food-fishes" shall be submitted to Congress at the beginning of each session thereof. [24 Stat. L. 523.]

This is from the Sundry Civil Appropriation Act of March 3, 1887, ch. 362.

[SEC. 1.] **[Annual estimates.]** * * * That the Commissioner of Fish and Fisheries shall embrace in the estimates of appropriations for the Fish Commission for the fiscal year eighteen hundred and ninety-four, and each year thereafter estimates for all officers, clerks, and other employees whose services are permanent and continuous in their character and deemed to be necessary for an efficient and economical execution of the appropriations for the Fish Commission. [27 Stat. L. 362.]

This is from the Sundry Civil Appropriation Act of Aug. 5, 1892, ch. 380.

An Act To establish two or more fish-cultural stations on Puget Sound.

[Act of Jan. 29, 1909, ch. 51, 35 Stat. L. 589.]

[Fish-culture stations to be established.] That the Secretary of Commerce and Labor be, and he is hereby, authorized and directed to establish two or more fish-cultural stations on Puget Sound, or its tributaries in the State of Washington, for the propagation of salmon and other food fishes,

and to make the necessary surveys, and purchase sites, construct ponds and buildings, construct, purchase, and hire boats and equipments, and employ such assistance as may be required for the construction and operation of such fish-cultural stations at suitable points to be selected by the Secretary of Commerce and Labor, and the number of such stations to be determined by him, and for said purpose the sum of fifty thousand dollars is hereby authorized to be appropriated. [35 Stat. L. 589.]

By the Act of March 4, 1913, ch. 141, § 1, 37 Stat. L. 736, given under the title LABOR DEPARTMENT, there was created a Department of Labor, and the Secretary of Commerce and Labor was designated the Secretary of Commerce.

See the notes to R. S. sec. 4395, *supra*, p. 342.

[SEC. 1.] [Designation of officer to act during absence of Commissioner and Deputy Commissioner.] * * * Hereafter in the case of the absence of the Commissioner and Deputy Commissioner of Fisheries the Secretary of Commerce and Labor may designate some officer of said bureau to perform the duties of the Commissioner during their absence. [36 Stat. L. 1436.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

Previous provisions of the Act of March 3, 1883, ch. 143, § 1, 22 Stat. L. 628, and Act of March 3, 1885, ch. 359, 23 Stat. L. 450, authorizing an assistant commissioner to discharge the duties of the commissioner during his absence, were superseded by the provisions of the text.

II. REGULATION OF FISHERIES

Sec. 4391. [Agreement for fishing voyage.] The master of any vessel of the burden of twenty tons or upward, qualified according to law for carrying on the bank and other cod fisheries, or the mackerel fishery, bound from a port of the United States to be employed in any such fishery, at sea, shall, before proceeding on such fishing-voyage, make an agreement in writing with every fisherman who may be employed therein, except only an apprentice or servant of himself or owner, and, in addition to such terms of shipment as may be agreed on, shall, in such agreement, express whether the same is to continue for one voyage or for the fishing-season, and shall also express that the fish or the proceeds of such fishing-voyage or voyages which may appertain to the fishermen shall be divided among them in proportion to the quantities or number of such fish which they may respectively have caught. Such agreement shall be indorsed or counter-signed by the owner of such fishing-vessel or his agent. [R. S.]

Act of June 19, 1813, ch. 2, 3 Stat. L. 2; Act of March 3, 1865, ch. 117, 13 Stat. L. 535.

Sections 4391-4398 constituted title LI of the Revised Statutes entitled "Regulation of Fisheries." The Act of Feb. 28, 1897, ch. 288, 24 Stat. L. 434, related to the importing and landing of mackerel caught during the spawning season. It is omitted as expired.

Application of R. S. secs. 4391-4394.—The provisions in R. S. secs. 4391-4394, inclusive, apply to the bank and cod and to the mackerel fishery, having been in force

in reference to the former since the passage of the Act of June 19, 1813, ch. 2, 3 Stat. L. 2, and having been extended to the latter by the Act of March 3, 1865,

ch. 117, 13 Stat. L. 535. *Story v. Russell*, (1892) 157 Mass. 152, 31 N. E. 753.

Food fisheries.—All these sections relate solely to food fisheries. *Manchester v. Massachusetts*, (1891) 139 U. S. 240, 11 S. Ct. 559, 35 U. S. (L. ed.) 159.

Whaling voyages.—This section does not apply to whaling voyages. *The Atlantic*, (1849) Abb. Adm. 451, 2 Fed. Cas. No. 620.

Nature of engagement as partnership.—The kind of engagement entered into in fishing voyages, by which the fishermen are engaged for a share of the proceeds of the voyage instead of for wages at a fixed rate, constitutes a species of imperfect partnership, the men being directly interested in the fruits of the adventure and depending for their remuneration on its success. "But the fishermen are not in such cases considered as partners with the owner in the proper sense of the word. The shares for which they contract are in the nature of wages, and an action of assumpsit lies at common law, or a libel may be brought in the admiralty for their share of the proceeds or profits of the adventure, to be ascertained by a final settlement of the voyage." *The Crusader*, (1837) 1 Ware 437, 6 Fed. Cas. No. 3,456 [citing *Macomber v. Thompson*, (1833) 1 Sumn. 384, 16 Fed. Cas. No. 8,919; *Wilkinson v. Fraiser*, (1803) 4 Esp. (Eng.) 182; *The Frederick*, (1803) 5 C. Rob. (Eng.) 14].

Agreement, with whom made.—This section "is positive and unequivocal, that the master of every fishing vessel of more than twenty tons shall, before proceeding on his voyage, make an agreement in writing, for shares, with every fisher-

man employed therein. By this law the agreement is to be made with the master, and it is the master's duty to have the articles signed." *Whalen v. The Silver Spring*, (1854) 29 Fed. Cas. No. 17,477.

Parol, followed by written, agreement.—Where persons made a parol agreement with the master of a fishing boat to serve thereon as mariners and fishermen for the fishing season for certain wages in money, and under such agreement they went on board, but some seven or eight days thereafter, while the vessel was fitting for the voyage, and at the master's request, they signed a written agreement corresponding in all respects with the form of the fishing agreement usually adopted where the master and crew are shipped to serve for shares of the fish caught during the season or voyage, without reading or understanding the terms thereof, it was held that they were entitled to wages according to the oral agreement, such agreement not being modified or varied in any respect by the written agreement. *Sweeney v. Cloutman*, (1862) 2 Cliff. 85, 23 Fed. Cas. No. 13,685.

Effect of shipping fishermen on different terms.—This section is in the same language as are section 1 of the Act of June 19, 1813, ch. 2, 3 Stat. L. 2, and section 4 of the Act of Feb. 16, 1792, ch. 6, 1 Stat. L. 229, which latter Act has reference to fishing bounties. It was held that a shipment of fishermen upon terms different from those set forth in this section, or not in writing as herein required, would not be "contrary to the provisions of any Act of Congress," in the sense of R. S. sec. 4523 (see title SEAMEN). *The Cornelia M. Kingsland*, (1885) 25 Fed. 856.

Sec. 4392. [Penalty for violating agreement.] If any fisherman, having engaged himself for a voyage or for the fishing-season in any fishing-vessel and signed an agreement therefor, thereafter and while such agreement remains in force and to be performed deserts or absents himself from such vessel without leave of the master thereof, or of the owner or his agent, such deserter shall be liable to the same penalties as deserting seamen are subject to in the merchant service, and may in the like manner, and upon the like complaint and proof, be apprehended and detained; and all costs of process and commitment, if paid by the master or owner, shall be deducted out of the share of fish or proceeds of any fishing-voyage to which such deserter had or shall become entitled. Every fisherman, having so engaged himself, who during such fishing-voyage refuses or neglects his proper duty on board the fishing-vessel, being thereto ordered or required by the master thereof, or otherwise resists his just commands to the hindrance or detriment of such voyage, besides being answerable for all damages arising thereby, shall forfeit to the use of the owner of such vessel his share of any public allowance which may be paid upon such voyage. [R. S.]

Act of June 19, 1813, ch. 2, 3 Stat. L. 2.

"Fishermen" and "seamen."—Fishermen in the Revised Statutes, and in all our legislation from the inception of the

government downwards, have been treated distinctively under the name of 'fishermen:' never under the name of 'seamen.'

The *Cornelia M. Kingsland*, (1885) 25 Fed. 856; *Telles v. Lynde*, (1891) 47 Fed. 912.

For additional authorities see the notes under R. S. sec. 4391, *supra*, p. 345.

Sec. 4393. [Recovery of shares of fish under agreement.] Whenever an agreement or contract is so made and signed for a fishing-voyage or for the fishing-season, and any fish caught on board such vessel during the same are delivered to the owner or to his agent, for cure, and sold by such owner or agent, such vessel shall, for the term of six months after such sale, be liable for the master's and every other fisherman's share of such fish, and may be proceeded against in the same form and to the same effect as any other vessel is by law liable, and may be proceeded against for the wages of seamen or mariners in the merchant service. Upon such proceeding for the value of a share or shares of the proceeds of fish so delivered and sold it shall be incumbent on the owner or his agent to produce a just account of the sales and division of such fish according to such agreement or contract; otherwise the vessel shall be answerable upon such proceeding for what may be the highest value of the shares demanded. But in all cases the owner of such vessel or his agent, appearing to answer in such proceeding, may offer thereupon his account of general supplies made for such fishing-voyage and of other supplies therefor made to either of the demandants, and shall be allowed to produce evidence thereof in answer to their demands respectively; and judgment shall be rendered upon such proceeding for the respective balances which upon such an inquiry shall appear. [R. S.]

Act of June 19, 1813, ch. 2, 3 Stat. L. 2.

Introductory.—This section provides, when an agreement is made and signed as set out in R. S. sec. 4391, *supra*, p. 345, "and the fish taken have been cured and sold by the owner, that the vessel shall for six months after such sale be liable for the skipper's and each seaman's share, and may be proceeded against as any other vessel may be for seamen's wages, and on such process the owners shall produce a just and true account of the sales and division of the fish according to the agreement; otherwise the ship shall be answerable for the highest value of the shares demanded." The *Ianthe*, (1856) 3 Ware 126, 12 Fed. Cas. No. 6,992.

Necessity of written agreement.—"This Act does not contemplate or provide for the case of a fisherman shipped without a written agreement, and by not providing for it leaves the rights of the parties to be determined by the principles of law governing other parol contracts, that is, it leaves them just such rights as are secured by their agreements, and gives them no others." The *Ianthe*, (1856) 3 Ware 126, 12 Fed. Cas. No. 6,992.

A case not governed by the above section but showing liability under an oral agreement is *The Carrier Dove*, (D. C. Mass. 1899) 93 Fed. 978, wherein the facts were as follows: The owners of a fishing vessel had made with its master an oral agreement for the fishing voyage.

The master was to ship the crew, the owners having no connection with the crew except through the master. The terms agreed upon between the master and the owners and between the master and the crew were to the effect that, of the gross proceeds of the catch, after deducting certain expenses, one-quarter was to go to the owners; the remainder, after deducting certain expenses, was to be divided equally among the crew, including the master. The master sold the catch, collected the price, and absconded therewith. It was held that the crew retained their character as seamen and that they had a lien for their shares against the vessel, as such shares were virtually wages. The court said: "This case seems to be covered by *Crowell v. Knight*, [1874] 2 Lowell 307 [6] Fed. Cas. No. 3,445. There the circumstances were in some respects more favorable to the claimants than here. The libelants were 'sharesmen,' of whom there were four, while seven other seamen were shipped for special wages in money. In that case, there was stronger reason than in this in holding the libelants to be partners and joint charterers. It is true that in *Crowell v. Knight* it was said that 'they [the sharesmen] have no voice in the disposal of the catch in any respect,' while here it was otherwise; but this difference seems to me not very important. The

method of sale is not decisive upon the question of title, and was probably adopted largely for the convenience of all parties. The supreme court of Massachusetts has decided that seamen have no lien upon the catch for their pay. *Story v. Russell*, [1892] 157 Mass. 152, 31 N. E. 753. But that case was made to turn largely upon a construction of R. S. secs. 4391-4394, which provisions are not applicable here. The same court has decided, in a case like this in some respects, that those who furnish supplies have no lien. *Rich v. Jordan*, [1895] 164 Mass. 127, 41 N. E. 56. This may be true. For the sake of argument, it may be admitted that, if courts of admiralty considered seamen to deal on equal terms with owners, the former might not prevail in a case like

that at bar; but, considering the favor always shown in admiralty to seamen, I think that the agreement here made should not be construed to deprive them of their lien." *The Carrier Dove*, (D. C. Mass. 1899) 93 Fed. 978.

Lien on fish.—Under this section the fisherman has no lien on the fish or their proceeds. *Story v. Russell*, (1892) 157 Mass. 152, 31 N. E. 753.

Proceeding in rem.—This section plainly imports that courts of admiralty cannot afford the remedy of a proceeding *in rem* without the authority of a positive statute. *The Fair Play*, (1830) Blatchf. & H. Adm. 136, 8 Fed. Cas. No. 4,615.

For additional authorities see the notes under R. S. sec. 4391, *supra*, p. 345.

Sec. 4394. [Discharge of vessel upon bond by owner.] When process shall be issued against any vessel so liable, if the owner thereof or his agent will give bond to each fisherman in whose favor such process shall be instituted, with sufficient security, to the satisfaction of two justices of the peace, of whom one shall be named by such owner or agent, and the other by the fisherman or fishermen pursuing such process, or if either party shall refuse, then the justice first appointed shall name his associate, with condition to answer and pay whatever sum shall be recovered by him or them on such process, there shall be an immediate discharge of such vessel. Nothing in this or the preceding section shall prevent any fisherman from having his action at common law for his share or shares of fish or the proceeds thereof. [R. S.]

Act of June 19, 1813, ch. 2, 3 Stat. L. 2.

See notes under R. S. sec. 4391, *supra*, p. 345.

FLAGS

- R. S. 1791. *The Flag to Be Thirteen Stripes and Thirty-seven Stars*, 349.
R. S. 1792. *A Star to Be Added for Every New State*, 350.
R. S. 218. *Collecting Flags, etc., by Secretary of War*, 350.
R. S. 428. *Collecting Flags, etc., by Secretary of Navy*, 350.
R. S. 1554. *Same Subject*, 351.
R. S. 1555. *Preservation of Flags, etc., in Some Public Place*, 351.

CROSS-REFERENCES

On Vessels Engaged in Fur Seal Fishing, see *ALASKA*.

On Coast Guard Vessels, see *COAST GUARD*.

Registration of as Trademark Forbidden, see *TRADEMARKS*.

Sec. 1791. [The flag to be thirteen stripes and thirty-seven stars.]

The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field. [R. S.]

Act of Jan. 13, 1794, ch. 1, 1 Stat. L. 341; Act of April 4, 1818, ch. 34, 3 Stat. L. 415.

Use of flags in history of human race.—From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the government, early in their history prescribed a flag as symbolical of the existence and sovereignty of the nation. Indeed, it would have been extraordinary if the government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot. *Halter v. Nebraska*, (1907) 205 U. S. 34, 27 S. Ct. 419, 51 U. S. (L. ed.) 696, 10 Ann. Cas. 525.

Use of flag for advertising purposes.—In *Halter v. Nebraska*, (1907) 205 U. S. 34, 27 S. Ct. 419, 51 U. S. (L. ed.) 696, 10 Ann. Cas. 525, it was held that a state statute prohibiting the use of the flag for advertising purposes was not in violation of any provision of the Constitution of the United States. The court said: "It may be well at the outset to say that Congress has established no regulation as to the use of the flag, except that in the Act approved February 20, 1905, authorizing the registration of trademarks in commerce with foreign nations and among the states, it was provided that no mark shall be refused as a trademark on account of its nature 'unless such mark . . . consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof or of any state or municipality or of any foreign nation.' 33 Stat. 724, § 5 [see *TRADEMARKS*]. The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the Union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching

the conclusion that a majority of the states have, in their legislation, violated the Constitution of the United States. Our attention is called to two cases in which the constitutionality of such an enactment has been denied. *Ruhrat v. People*, [1900] 185 Ill. 133; *People v. Van De Carr*, [1904] 178 N. Y. 425. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege, impliedly, if not expressly, granted by the Federal Constitution, as unduly discriminating and partial in its character, and as infringing the personal liberty guaranteed by the state and federal constitutions. In the other case, decided by the Court of Appeals of New York, the statute, in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the Federal Constitution as depriving the owner of property without due process of law, and as taking private property for public use without just compensation. In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own

fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people. Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the Constitution of the United States or that it relates to a subject exclusively committed to the national government. . . . It may be said that as the flag is an emblem of national sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that in the absence of national legislation the state is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the general government, but over which, in the absence of national legislation, the state may exert some control in the interest of its own people."

Sec. 1792. [A star to be added for every new State.] On the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission. [R. S.]

Act of April 4, 1818, ch. 34, 3 Stat. L. 415.

Sec. 218. [Collecting flags, etc., by Secretary of War.] The Secretary of War shall from time to time cause to be collected and transmitted to him, at the seat of Government, all such flags, standards, and colors as are taken by the Army from the enemies of the United States. [R. S.]

Act of April 18, 1814, ch. 78, 3 Stat. L. 133.

By Res. of Feb. 28, 1905, No. 22, 33 Stat. L. 1284, the Secretary of War was authorized to deliver to the proper authorities of various states certain Union and Confederate battle flags then in the custody of the War Department, and by a Res. of June 29, 1906, No. 43, 34 Stat. L. 837, the Secretary of War was authorized to deliver to the Confederate Memorial Literary Society of Richmond, Virginia, all the Confederate flags then in the custody of the War Department which could not be traced to the ownership or custody of the troops of any particular state.

Sec. 428. [Collecting flags, etc., by Secretary of Navy.] The Secretary of the Navy shall from time to time cause to be collected and transmitted to him at the seat of Government all flags, standards, and colors taken by the Navy from the enemies of the United States. [R. S.]

Act of April 18, 1814, ch. 78, 3 Stat. L. 133.

This provision, with slight variation in language, is repeated in R. S. sec. 1554, given on the page following.

Sec. 1554. [Same subject.] The Secretary of the Navy shall cause to be collected and transmitted to him, at the seat of Government of the United States, all such flags, standards, and colors as shall have been or may hereafter be taken by the Navy from enemies. [R. S.]

Act of April 18, 1814, ch. 78, 3 Stat. L. 133.

The provisions of this section are substantially the same as those in the preceding R. S. sec. 428.

Sec. 1555. [Preservation of flags, etc., in some public place.] All flags, standards, and colors of the description mentioned in the foregoing section, which are now in the possession of the Navy Department, or may hereafter be transmitted to it, shall be delivered to the President, for the purpose of being, under his direction, preserved and displayed in such public place as he may deem proper. [R. S.]

Act of April 18, 1814, ch. 78, 3 Stat. L. 133.

FOOD AND DRUGS

I. Food and Drugs Generally, 353.

Act of May 9, 1902, ch. 784, 353.

Sec. 1. Imitation Dairy Products Subject to State Laws, 353.

5. Inspection — Marking — Regulations by Secretary of Agriculture — Penalties, 355.

Act of July 1, 1902, ch. 1357, 357.

Sec. 1. Dairy and Food Products — False Labeling of Place of Origin Forbidden, 357.

2. Penalty for Violation — Jurisdiction, 357.

Act of April 23, 1904, ch. 1486, 357.

Sec. 1. Nutritive Investigations, 357.

Act of June 30, 1906, ch. 3915 ("Food and Drugs Act" or "Hepburn Act"), 358.

Sec. 1. Manufacture of Adulterated, etc., Food or Drugs Prohibited — Penalty, 358.

2. Interstate, etc., Commerce of Adulterated or Misbranded Goods Prohibited — Penalty — Articles for Export — Domestic Consumption, 360.

3. Rules and Regulations to Be Made — Scope, 367.

4. Chemical Examinations — Notice of Result — Hearings — Certificate of Violations to District Attorney, 368.

5. Legal Proceedings, 369.

6. Terms Defined — "Drugs" — "Food," 370.

7. Adulterations Defined, 371.

Drugs, 371.

Confectionery, 371.

Food, 371.

8. Misbranding Defined, 376

Drugs, 379.

Food, 379.

9. Guaranty from Manufacturer — Contents, 390.

10. Seizure of Original Packages in Interstate and Foreign Commerce — Disposal, if Condemned — Delivery to Owner if Not to Be Sold, etc. — Proceedings, 392.

11. Examination of Imported Foods and Drugs — Admission Denied Adulterated or Misbranded Goods — Destruction, etc. — Delivery Pending Examination — Bond Required — Charges, 396.

12. Insular Possessions Included — "Person" Defined — Liability of Corporations, etc., 397.

13. Effect, 397.

Act of May 23, 1908, ch. 192, 397.

Sec. 1. Report of Payments to State Officials, etc., 397.

Act of Aug. 10, 1912, ch. 234, 398.

Sec. 1. Sanitary Regulation of Renovated Butter Factories. 398.

II. Viruses, Serums and Analogous Products, 398.

Act of July 1, 1902, ch. 1578, 398.

- Sec. 1. Regulation of Sale of and Interstate Traffic in Viruses, Serums, etc., 398*
- 2. False Labels, etc., 399.*
- 3. Inspection, 399.*
- 4. Board to Prescribe Regulations for Licenses, 399.*
- 5. Enforcement of Regulations, etc., 400.*
- 6. Interference with Officers, etc., Prohibited, 400.*
- 7. Punishment for Violation, 400.*
- 8. Repeal, 400.*

Act of March 4, 1913, ch. 145, 400.

- Sec. 1. Viruses, Serums, etc., for Domestic Animals — Preparation — Sale — Importation — Inspection — Licenses, 400.*

III. Sale of Drugs in China, 402.

Act of March 3, 1915, ch. 74, 402.

- Sec. 1. Practice of Pharmacy in China — Regulation — Unlicensed American Pharmacists Prohibited from Doing Business, 402.*
- 2. Licenses to Practice — Application — Qualification of Applicants, 403.*
- 3. Issuance of License, 403.*
- 4. Revocation of License — Grounds, 403.*
- 5. License Displayed in Place of Business, 404.*
- 6. Sale, etc., of Certain Poisons — Necessity of Written Order or Prescription — Preservation of Order, 404.*
- 7. Sale, etc., of Certain Other Poisons — Regulations Governing — Packages Labeled — Record Kept of Sales, etc., 405.*
- 8. Fraudulent Representations, 406.*
- 9. Preservation of Prescriptions — Copies Supplied — Inspection Permitted — Container of Drugs Labeled, 406.*
- 10. Unlicensed Pharmacists — Use of Title Prohibited, 406.*
- 11. Penalties — Enforcement, 406.*
- 12. "Consul" Defined, 407.*
- 13. Effect of Act as Modifying or Revoking Former Act, 407.*

CROSS-REFERENCES

Standard Barrels for Apples, see AGRICULTURE.

Animals and Meat Products, see ANIMALS.

Drawback on Exportation of Drugs, see CUSTOMS DUTIES.

Food Fishes, see FISH AND FISHERIES.

Importation of Opium and Other Drugs, Tea, and Inspection of Articles of Food and Drink, see IMPORTS AND EXPORTS.

Taxation and Inspection of Dairy Products as Imitations and Adulterations Thereof, see INTERNAL REVENUE.

I. FOOD AND DRUGS GENERALLY

[**Sec. 1.**] [**Imitation dairy products subject to State laws.**] That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance

of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. [32 Stat. L. 194.]

This and the following section 6 are from the Oleomargarine Act of May 9, 1902, ch. 784. For sections 3 and 4, amending the Act of Aug. 2, 1886, ch. 840, §§ 3, 8, and sections 6 and 7 of this Act, see the title INTERNAL REVENUE.

Validity of early state statutes regulating the sale of imitation dairy products—Introductory.—Prior to the enactment of the above section there were several important decisions defining the limits of state legislation relative to imitation dairy products in the light of the commerce clause of the Federal Constitution. These decisions are considered at this place.

Power entirely to exclude.—Since 1872 or 1873, when oleomargarine was first made, it has been well known as an article of food, and has become a proper subject of commerce among the states and with foreign nations, being recognized as such by this Act; and therefore it cannot be wholly excluded from importation into one state from another in which it was manufactured; for, although a state has power to regulate the introduction of any article, including a food product, so as to insure its purity, yet such police power does not include the total exclusion even of an article of food. The Act of Pennsylvania of May 21, 1885 (Laws of Pa., 1885, p. 22), the violation of which was made a misdemeanor punishable by fine and imprisonment, was therefore held invalid to the extent that it prohibited the introduction of oleomargarine from another state and its sale in the original package. *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1. See also *Collins v. New Hampshire*, (1898) 171 U. S. 30, holding that sections 19, 20, ch. 127, Pub. Stat. N. H. (1891), declaring it unlawful to sell, offer for sale, etc., oleomargarine as a substitute for butter, unless it was of a pink color, was invalid, being in their necessary effect prohibitory.

The Minnesota Act of April 19, 1899, entitled "An act to prevent fraud in the sale of dairy products," etc., sec. 16, forbade the sale of oleomargarine, colored or otherwise, made to resemble butter. Oleomargarine, made in another state, was brought into Minnesota by the manufacturer's agent, offered for sale, and sold by him in the original package, having

the revenue stamps and marks required under the above noted Act of Aug. 2, 1886, and composed of the materials mentioned in section 2 thereof. It was held that, oleomargarine being a lawful article of commerce, the Minnesota Act, so far as it applied to such sale, was unconstitutional. *In re Brundage*, (1899) 96 Fed. Rep. 963 (following *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1; *Collins v. New Hampshire*, (1898) 171 U. S. 30.) See also *McAllister v. State*, (1902) 94 Md. 291 (following *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1, and *Fox v. State*, (1899) 89 Md. 386), where the court said: "No state law can be held validly to prohibit the sale in original packages of oleomargarine colored yellow in imitation of yellow butter unless it is alleged and proved that the coloring matter is impure and injurious to health—for otherwise it would follow that a pure article of commerce manufactured in another state could be excluded from sale in this state even in original packages."

The Ohio Act of March 7, 1890, entitled "An act to prevent deception in the sale of dairy products, and to preserve the public health," which prohibited the manufacture or sale of oleomargarine unless it was manufactured and sold in separate and distinct form, and in such manner as would at once advise the consumer of its real character, free from any coloring matter or other ingredients which would cause it to look like butter, etc., was held to be unconstitutional as interfering with interstate commerce in prevention of the sale of oleomargarine when brought from another state and sold in the original packages. *In re Worthen*, (1891) 58 Fed. Rep. 467.

Fraudulent imitation of butter.—In *Plumley v. Massachusetts*, 155 U. S. 461, it was adjudged that a statute of Massachusetts, imposing a penalty on the manufacture, sale, offering for sale, or having in possession with intent to sell, "any article or compound, made wholly or partly out of any fat, oil or oleaginous

substance, or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream from the same," was constitutional and valid, as applied to sales in Massachusetts of oleomargarine made in another state, artificially colored so as to look like yellow butter, and imported in the packages in which it was sold.

Original package broken.—The Federal Constitution does not interfere in the least with the power of a state to regulate or prohibit the manufacture or sale of oleomargarine in the state, or imported into the state, if once the original package has been broken. *In re Worthen*, (1891) 58 Fed. Rep. 467; *Com. v. Crane*, (1893) 158 Mass. 218, citing *State v. Newton*, (1888) 50 N. J. L. 534.

Removal of labels and stamp.—In *U. S. v. Green*, (1905) 137 Fed. 179, it was held that this section did not divest renovated butter of its interstate commerce character so as immediately to entitle a consignee to remove marks and labels upon it without liability for violating section 5 of this Act. The court said: "Without going into the numerous cases bearing to some extent, even though indirectly, on the question, this court is of the opinion that in making process or renovated butter transported into a state, and remaining therein for use, consumption, sale, or storage therein, subject on arrival in such state to the operation and effect of the laws of such state enacted in the exercise of its police power to the same extent

and in the same manner as though such articles had been produced in such state, and declaring that same shall not be exempted from such laws by reason of being introduced into such state in original packages or otherwise, Congress did not intend to confer any power and has not conferred any power on any person to remove the marks, labels, stamps, etc., from process or renovated butter. When the packages are used the marks, stamps, etc., are to be destroyed. New York has passed no law allowing this to be done, and it is not seen that such a law could be passed in the legitimate exercise of the police power of the state. Section 1 of the Oleomargarine Act was not intended to abrogate any penalty imposed for the violation of the penal provisions referred to, or to permit the acts therein forbidden, or to empower a state to make any law interfering with the operation of such laws, unless there should arise a conflict between the laws of the United States and those of the state passed in the legitimate exercise of its police power. It is perfectly clear that to permit the removal of the stamps, marks, labels, etc., on packages of a food product of this character, and specifically authorized by law, while such articles remain an article of interstate commerce, or even thereafter, when we consider the objects and purposes of the law, would not only defeat the objects and purposes of the legislative body as to inspection, etc., but open the doors wide to frauds on the revenue. The placing of the marks, etc., on the packages implies they are to remain."

SEC. 5. [Inspection — marking — regulations by Secretary of Agriculture — penalties.] All parts of an Act providing for an inspection of meats for exportation, approved August thirtieth, eighteen hundred and ninety, and of an Act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, approved March third, eighteen hundred and ninety-one, and of amendment thereto approved March second, eighteen hundred and ninety-five, which are applicable to the subjects and purposes described in this section shall apply to process or renovated butter. And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process Butter" and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section into effect,

and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same. Any person, firm, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court. [32 Stat. L. 196.]

See the notes to the preceding section 1 of this Act. The provisions of the Meat Inspection Act of June 30, 1906, ch. 3913, re-enacted as the Act of March 4, 1907, ch. 2907, given under the title ANIMALS, vol. 1, p. 397, were extended to cover renovated butter factories as defined by this Act and by the Act of Aug. 10, 1912, ch. 284, § 1, *infra*, p. 398.

For the Act of Aug. 30, 1890, ch. 839, mentioned in the text, see the titles ANIMALS, vol. 1, p. 394; IMPORTS AND EXPORTS.

For the Act of March 3, 1891, ch. 555, amended as mentioned in the text, see the title ANIMALS, vol. 1, p. 395.

Validity of regulation prohibiting dealer from obliterating marks, etc.—The purpose of this section is to provide for the sanitary inspection and the marking and branding of "process" or "renovated" butter at the place of manufacture, to the end that none shall be shipped from the factory which can in any way be injurious to the health of the consumer, and the section authorizes the Secretary of Agriculture to cause such inspection to be made, and to "make all needful regulations for carrying this section into effect." A regulation, however, which prohibits a dealer, receiving or handling such butter after it has been duly inspected, marked, and branded, and shipped from the factory, from obliterating the marks or brands thereon has no relation to such sanitary purpose, and finds no warrant in the statute, being calculated only to prevent fraud on the part of the dealer in his relations with his customers, and there is nothing in the statute which will support an indictment or information for the violation of such regulation. *U. S. v. Bohl*, (1903) 125 Fed. 625, wherein the court said: "The subjects of section 5 of the Act of May 9, 1902, ch. 784, 32 Stat. 196, . . . are clearly 'process or renovated butter,' and the marking and branding thereof, prior to transportation. It is equally clear that the purposes of the section are to provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which can in any way be injurious to the health of the consumer. The Acts of August 30,

1890, and March 3, 1891, chs. 839, 555, 26 Stat. 414, 1089 . . . as amended March 2, 1895, ch. 169, 28 Stat. 727 [see ANIMALS] so far as they touch upon these subjects and purposes, are ingrafted into section 5 of Act of 1902, and all rules and regulations adopted by the Secretary of Agriculture, which are calculated to carry such subjects and purposes into full effect, have all the force of the statute itself. Other portions of the Act in question may gain their efficacy from the taxing clause of the Constitution, but section 5 goes to the commerce clause as the fountain whence its vigor springs. It is idle to discuss whether or not the tub of butter, when it reaches the wholesaler, is still an article of interstate commerce. Our crucial question is this: Does a rule or regulation forbidding the obliteration of the brand, as charged, tend in any manner to aid the enforcement of strict sanitary inspection and care, or, if it pleases the inquirer, in the collection of the tax thereon? It is my opinion that the rule was of no value in either regard; it was, on the contrary, calculated to prevent fraud and subterfuge on the part of the dealer in his relations with the consumer. I do not decide that Congress has no power to take up that matter. I am content to say that in section 5 no such action was taken, nor was any attempt made to do so. Beyond all this, if the Congress did intend to take such a step it signally failed in its effort. It would be necessary to read into section 5, not only the general provisions of the Acts relating to the inspection of meats and carcasses, but also the definite penalty

inflicted for an infraction of the former laws, in a situation analogous to that which the Secretary of Agriculture attempts to provide for in his rules and

regulations under this Act. Such action is not permissible, either on strict legal principles or upon the basis of fair dealing with the individual citizen."

An Act To prevent a false branding or marking of food and dairy products as to the State or Territory in which they are made or produced.

[*Act of July 1, 1902, ch. 1357, 32 Stat. L. 632.*]

[SEC. 1.] **[Dairy and food products—false labeling of place of origin forbidden.]** That no person or persons, company or corporation, shall introduce into any State or Territory of the United States or the District of Columbia from any other State or Territory of the United States or the District of Columbia, or sell in the District of Columbia or in any Territory any dairy or food products which shall be falsely labeled or branded as to the State or Territory in which they are made, produced, or grown, or cause or procure the same to be done by others. [32 Stat. L. 632.]

Further provisions relating to misbranding were made by the Act of June 30, 1906, ch. 3915, *infra*, p. 358.

What constitutes false labeling.—Wherever the natural inference to be drawn from the form or words of a brand or label is contrary to the fact as to the state or territory in which the article referred to is made, produced, or grown, the case would seem to be within the letter and spirit of this Act. For example the use of the words "Birkenwald's Daisy Sugar Corn, S. Birkenwald Co., Milwaukee, Wis.," by that company on canned goods produced in another state, has been held to be a violation of this section. (1903) 24 Op. Atty.-Gen. 695.

This Act does not, however, provide that such products shall be labeled or branded so as to show the state or territory in

which they are produced. It provides merely that such products shall not be falsely labeled or branded as to the state or territory in which they are made, produced, or grown. The mere omission of the place of manufacture cannot be said to be in violation of that law; nor is the name of the wholesale dealer on the label or brand necessarily a representation that he is the manufacturer or producer. (1902) 24 Op. Atty.-Gen. 125.

Importation from foreign countries.—This Act applies not only to domestic articles, but also to those imported from foreign countries which are labeled as being of domestic origin. (1903) 24 Op. Atty.-Gen. 675.

SEC. 2. [Penalty for violation — jurisdiction.] That if any person or persons violate the provisions of this Act, either in person or through another, he shall be guilty of a misdemeanor and shall be punished by a fine of not less than five hundred nor more than two thousand dollars; and that the jurisdiction for the prosecution of said misdemeanor shall be within the district of the United States court in which it is committed. [32 Stat. L. 632.]

See the note to the preceding section 1 of this Act.

[SEC. 1.] **[Nutritive investigations.]** * * * To enable the Secretary of Agriculture to investigate and report upon the nutritive value of the various articles and commodities used for human food, with special suggestions of full, wholesome, and edible rations less wasteful and more economical than those in common use, including special investigations on the nutritive value and economy of the diet in public institutions; and the agricultural experiment stations are hereby authorized and directed to cooperate

with the Secretary of Agriculture in carrying out said investigations in such manner and to such extent as may be warranted by a due regard to the varying conditions and needs of the respective States and Territories, and as may be mutually agreed upon; and the Secretary of Agriculture is hereby authorized to require said stations to report to him the results of any such investigations which they may carry out, whether in cooperation with said Secretary of Agriculture or otherwise, * * * dollars. [33 Stat. L. 294.]

This is from the Agricultural Appropriation Act of April 23, 1904, ch. 1486.

An Act For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

[Act of June 30, 1906, ch. 3915, 34 Stat. L. 768.]

[SEC. 1.] **[Manufacture of adulterated, etc., food or drugs prohibited — penalty.]** That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court. [34 Stat. L. 768.]

This is the first section of the "Food and Drugs Act" or the "Hepburn Act."

Constitutionality of Act.—The constitutionality of this Act is generally conceded and well established, since it is a proper regulation of interstate commerce. *U. S. v. Sweet Valley Wine Co.*, (N. D. Ohio 1913) 208 Fed. 85; *Shawnee Milling Co. v. Temple*, (S. D. Ia. 1910) 179 Fed. 517; *U. S. v. Seventy-Four Cases Grape Juice*, (W. D. N. Y. 1910) 181 Fed. 629.

Congress has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence of other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McDer-*

mott v. Wisconsin, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, reversing (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

This Act is not unconstitutional as an attempted exercise by Congress of police power belonging to the states. *U. S. v. Four Hundred and Twenty Sacks Flour*, (1910) 180 Fed. 518.

Purpose of Act.—"The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of

food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court." *U. S. v. Lexington Mill, etc., Co.*, (1914) 232 U. S. 399, 34 S. Ct. 337, 58 U. S. (L. ed.) 658, L. R. A. 1915B 774, *affirming* (C. C. A. 8th Cir. 1913) 202 Fed. 615, 121 C. C. A. 23. See to the same effect *U. S. v. Coca Cola Co.*, (1916) 241 U. S. 265, 36 S. Ct. 573; *Hall-Baker Grain Co. v. U. S.*, (C. C. A. 8th Cir. 1912) 198 Fed. 614, 117 C. C. A. 318; *Galt v. U. S.*, (1913) 39 App. Cas. (D. C.) 470.

The object of the Food and Drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any state from any other state "of any article of food or drugs which is adulterated or misbranded, within the meaning of this act." The purpose is to keep such articles "out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold or in original unbroken packages." *Savage v. Jones*, (1912) 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182.

Construction.—The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this Act must be considered and construed. *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, *reversing* on other grounds (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

The purpose of the Act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it. *U. S. v. Antikamnia Chemical Co.*, (1914) 231 U. S. 654, 34 S. Ct. 222, 58 U. S. (L. ed.) 419, *reversing* on other grounds (1911) 37 App. Cas. (D. C.) 343.

It is the duty of the court, in interpreting this Act, to keep constantly in mind the legislative intent, the evils sought to be overcome, and, if possible, to give substantial force and effect to that intent. In view of the remedial object and purpose of the statute it should be liberally con-

strued. *Galt v. U. S.*, (1913) 39 App. Cas. (D. C.) 470.

The Food and Drugs Act is a police regulation enacted to conserve the public health and should be construed liberally to meet the evils intended to be embraced within its provisions. *Dade v. U. S.* (1913) 40 App. Cas. (D. C.) 94.

Slander based on alleged violation of Act.—A statement regarding certain toothpowder that it "was a cheap product, good only for polishing the surface of the teeth, and that it contained harmful ingredients, principally grit, which would scratch the enamel from the teeth" is not slanderous as charging the violation of the Food and Drugs Act. *Hopkins Chemical Co. v. Read Drug, etc., Co.*, (1914) 124 Md. 210, 92 Atl. 478.

State statutes.—This Act is directed against the adulteration and misbranding of articles of food transported in interstate commerce, and a state statute directed to the manner of selling a certain product at retail is not repugnant to it. *Armour v. North Dakota*, (1916) 240 U. S. 510, 36 S. Ct. 440, *affirming* (1913) 27 N. D. 177, 145 N. W. 1033, Ann. Cas. 1916B 1147.

But a state statute in conflict with the provisions of the Food and Drugs Act is void. *McDermott v. State of Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, *reversing* (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315, wherein the court said: "The state may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the Acts of Congress, its provisions must yield to the superior federal power given to Congress by the Constitution."

A state statute prohibiting the sale of food preservatives containing boric acid is not invalid as to sales within the state. *Price v. Illinois*, (1915) 238 U. S. 446, 35 S. Ct. 892, 59 U. S. (L. ed.) 1400, *affirming* (1913) 257 Ill. 587, 101 N. E. 196, Ann. Cas. 1914A 1154.

In *Oreaset Mfg. Co. v. Mickle*, (D. C. Ore. 1914) 216 Fed. 246, which was a case of misbranding and adulteration under the food laws of Oregon, it was urged that Congress had by its legislation fully occupied and covered the field relative to the protection of the public against the adulteration or misbranding of articles of food, and therefore that the state legislation as it might affect foods dealt in in interstate commerce was void and inoperative. The court did not decide the question, since in its view the product

involved in the instant case did not fall within the denunciation of the local act.

See further on the question of the validity of state statutes affecting foods and drugs, the notes under section 8 of this Act, *infra*, p. 379.

Tea Inspection Act.—This Act is not intended as a substitute for the special

Tea Inspection Act (Act of March 2, 1897, 29 Stat. L. 604, see IMPORTS AND EXPORTS), but both statutes are cumulative so far as the importation of tea is concerned. (1907) 26 Op. Atty-Gen. 166.

Notes construing this Act will be found in 21 Ann. Cas. 1323; Ann. Cas. 1915A 45.

SEC. 2. [Interstate, etc., commerce of adulterated or misbranded goods prohibited — penalty — articles for export — domestic consumption.] That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act. [34 Stat. L. 768.]

The provisions of this and the following sections of this Act supersede the provisions of sections 2 and 3 of the Act of Aug. 30, 1890, ch. 839, which were as follows:

"SEC. 2. That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug or any vinous, spirituous or malt liquors, adulterated or mixed with any poisonous or noxious chemical drug or other ingredient injurious to health. Any person who shall knowingly import into the United States any such adulterated food or drug, or drink, knowing or having reasons to believe the same to be adulterated, being the owner or the agent of the owner, or the consignor or consignee of the owner, or in privy with them, assisting in such unlawful act, shall be deemed guilty of a misdemeanor, and liable to prosecution therefor in the district court of the United States for the district into which such property is imported; and, on conviction, such person shall be fined in a sum not exceeding one thousand dollars for each separate shipment, and may be imprisoned by the court for a term not exceeding one year, or both, at the discretion of the court." [26 Stat. L. 415.]

"SEC. 3. That any article designed for consumption as human food or drink, and any other article of the classes or description mentioned in this act, which shall be imported into the United States contrary to its provisions, shall be forfeited to the United States, and shall be proceeded against under the provisions of chapter eighteen of title thirteen

of the Revised Statutes of the United States; and such imported property so declared forfeited may be destroyed or returned to the importer for exportation from the United States after the payment of all costs and expenses, under such regulations as the Secretary of the Treasury may prescribe; and the Secretary of the Treasury may cause such imported articles to be inspected or examined in order to ascertain whether the same have been so unlawfully imported." [26 Stat. L. 415.]

R. S. sec. 3449 contrasted.—This section and section 10, *infra*, p. 392, require that a different brand or mark shall be placed upon an article transported in interstate or foreign commerce from that required by R. S. sec. 3449 (see INTERNAL REVENUE). (1908) 26 Op. Atty-Gen. 474.

Limitation to interstate and foreign commerce.—This section is limited in its application to interstate and foreign commerce. The prohibition therein contained runs against the introduction of misbranded drugs into any state, or territory, or the District of Columbia, from any other part of the United States, or from any foreign country. *U. S. v. Tucker*, (S. D. Ohio 1911) 188 Fed. 741.

A manufacturer who sells adulterated goods to a wholesale dealer engaged in interstate commerce is involved in a transaction pertaining to interstate commerce and is subject to the provision of the Food and Drugs Act. *Glaser v. U. S.* (C. C. A. 7th Cir. 1915) 224 Fed. 84, 139 C. C. A. 566.

This Act is not void for uncertainty and indefiniteness, in that no standard of grade, quality, or purity is prescribed, but that the determination of the standard is left to the courts, as such objection may be obviated by requiring specific and properly drawn pleading. *U. S. v. Four Hundred and Twenty Sacks Flour*, (1910) 180 Fed. 518.

Inclusion of articles not the subject of bargain and sale.—The Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. *Dr. J. L. Stephens Co. v. U. S.*, (C. C. A. 6th Cir. 1913) 203 Fed. 817, 122 C. C. A. 135.

"Shipment" as used in this section is not limited to a shipment for sale, though it must be in the way of commerce. *Philadelphia Pickling Co. v. U. S.*, (C. C. A. 3d Cir. 1913) 202 Fed. 150, 120 C. C. A. 429, wherein the court said: "Does the Act apply where the owner has shipped to himself for some other business purpose than sale? The trial judge directed the verdict, but no complaint is made of this, if his construction of the Act was correct. The statute imposes penalties in three sections, but we are concerned only with sections 2 and 10. The latter section provides for condemnation, and permits an offending article to be seized, if it 'is being transported from one state, territory, district, or insular possession to another for sale; or having been transported remains unloaded, unsold, or in original unbroken packages; or if it be sold or offered for sale in the District of

Columbia, or the territories or insular possessions of the United States; or if it be imported from a foreign country for sale; or if it is intended for export to a foreign country.' This section speaks repeatedly of sale, and the courts have had several occasions to consider what Congress meant by the language quoted. In *U. S. v. Sixty-Five Casks Liquid Extracts*, (N. D. W. Va. 1909) 170 Fed. 449, it appeared that the casks in question (which were insufficiently marked) contained a liquid that had been manufactured and shipped by the owner's agent in Michigan to the owner himself in West Virginia for the primary purpose of being bottled and properly labeled there. It was not to be sold until this had been done, and the District Court held *inter alia* (pages 445, 446) that Congress 'did not . . . have power to restrict one from manufacturing in one state such product and removing it from that state to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured.' The Court of Appeals affirmed the judgment in a brief opinion ([C. C. A. 4th Cir. 1910] 175 Fed. 1022, 99 C. C. A. 667), which is silent concerning the power of Congress, and merely gives the following reason for affirmance: 'No attempt to avoid the law, either directly, indirectly, or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extract proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court below.' In *U. S. v. Forty-Six Packages*, etc., [S. D. Ohio 1910] 183 Fed. 642, it was held that a libel in rem under section 10 was defective, because it failed to aver that the articles seized were transported 'for sale.' The foregoing cases are referred to in *Hipolite Egg Co. v. U. S.* [1911] 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364, and although they are not definitely disapproved they are certainly not accepted as correct. At the best, they are noticed with a word or two of comment, and of course they must yield if they clash with the decision or the opinion of the Supreme Court. One of the

points decided in the *Hipolite Case* is that section 10 permits the condemnation of adulterated food, although it has not been transported for sale directly, but is intended solely for use as raw material in the manufacture of another product. This is clear, for the court on page 52 of 220 U. S., on page 365 of 31 S. Ct. (55 U. S. (L. ed.) 364), states the first contention of the Egg Company to be that 'section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product.' And this contention is declared (page 55 of 220 U. S., on page 368 of 31 S. Ct. [55 U. S. (L. ed.) 364]) to be 'untenable.' . . . It is true that this is a prosecution under section 2, and not a seizure under section 10; but the difference (if important) is in favor of section 2, for its meaning is not restricted by the words 'for sale,' and is therefore even broader than the language of section 10. One of the chief objects of the act is declared in section 2, namely, to forbid 'the introduction into any state or territory,' etc., 'of any article of food . . . which is adulterated;' and, while the section does not attempt to punish criminally every method of 'introduction,' it does punish the method here in question—'any person who shall ship or deliver for shipment from any state or territory,' etc., 'shall be guilty of a misdemeanor,' etc.—and the breadth of the prohibition justifies us at least in refusing to narrow the ordinary meaning of the words that define the crime. Of course, the shipment must be in the way of 'commerce.' Such a limitation is constitutionally necessary; but, if the limitation be assumed, no reason is perceived why 'shipment' should be construed to mean 'shipment for sale.' Its ordinary meaning in this connection covers any shipment for any purpose in the course of commerce, and we accept this as the intended scope of the word. And the correctness of such construction seems more probable when we observe that the next penal clause of section 2 should apparently be construed in a similar manner. This clause applies to any person 'who shall receive in any state or territory,' etc., 'and, having so received, shall deliver in original unbroken packages, . . . or [shall] offer to deliver, to any person any such article so adulterated'—the delivery being punished whether it be 'for pay or otherwise.' In other words, to receive and deliver offending articles in the course of commerce is indictable, whatever the business purpose may be. The Court of Appeals of the Second Circuit in *U. S. v. Three Hundred Cans*, 189 Fed. 352, 111 C. C. A. 83, has also ruled that, since the *Hipolite* decision at all events, a libel for condemnation need no longer aver that the articles were trans-

ported for sale—the food there in question having been shipped from Nebraska by the owner to himself in New York, and remaining unsold in original unbroken packages."

Inclusion of articles not to be used as food.—The transportation of decomposed eggs, which are actually unfit for food, for use in tanning is prohibited by this section, as the use to which they are to be put does not take the same out of the category of "adulterated article of food." *U. S. v. Thirteen Crates Frozen Eggs*, (S. D. N. Y. 1913) 208 Fed. 950, wherein the court said: "It seems to me clear that the purpose of Congress was to prohibit the transportation of articles in interstate commerce which come within the definition given in the statute and make them subject to seizure and condemnation if so transported. If such is not the purpose, then interstate commerce may be flooded with eggs of this character and the government will be compelled to prove that the intent of the one transporting the article was to use or sell same as an article of food. Even if the burden is not shifted and the presumption is that it was intended to use or sell such an article as food or as an article of food, still the owner so transporting the article will escape the operation of the statute by swearing to an undisclosed intent which the government will be unable to disprove, unless the article has been actually put on sale or sold as an article of food."

Meaning of "package" and "original unbroken package."—The word "package," as used in the Act, "means the package which passes into the possession of the public, of the real consumer; and the words 'original unbroken package' relate . . . to the package in the form in which it is received by the vendee or consignee." *Dr. J. L. Stephens Co. v. U. S.*, (C. C. A. 6th Cir. 1913) 203 Fed. 817, 122 C. C. A. 135.

"Package" clearly refers to the immediate container of the article which is intended for consumption by the public. *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, *reversing* on other grounds (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

Intent.—The mere sending of deleterious or harmful substance by a shipper, even though he may have nothing to do with the condition of the article sent and has no knowledge of such condition, makes him liable to the penalty. *U. S. v. Sprague*, (E. D. N. Y. 1913) 208 Fed. 419.

Test for determining adulteration or misbranding.—The article of food or drugs the shipment or delivery for shipment in interstate commerce of which is prohibited and punished is such as is adulterated or misbranded within the meaning of the

Act. What it is to adulterate or misbrand food or drugs within the meaning of the Act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined. *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, *reversing* (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

In *U. S. v. Frank*, (S. D. Ohio 1911) 189 Fed. 195, it was held that the Secretary of Agriculture under authority of the Act of March 3, 1905, ch. 1405, 33 Stat. L. 874 (which was superseded by section 11 of this Act, *infra*, p. 396, had fixed the standards of purity for certain foods and these standards were to be looked to in determining whether food had been transported which was adulterated and misbranded. See *contra* *U. S. v. St. Louis Coffee, etc., Mills*, (E. D. Mo. 1909) 189 Fed. 191, wherein the court said: "The circular No. 19 issued by the Secretary of Agriculture was issued long before the enactment of the statute under which this proceeding is had, and for that reason, if for no other, cannot be considered in determining the question of the guilt or innocence of the defendant in this case."

In a libel for forfeiture of alleged adulterated vinegar, it was held that the government was not limited to the standards mentioned in the Agricultural Department bulletin No. 65 and circular 19, nor to methods of analysis adopted under regulation No. 4, but might make use of any accurate test. *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

Persons liable to prosecution.—The officers of a corporation which manufactured a misbranded or adulterated food product, shipped by its manager in interstate commerce, were held to be subject to prosecution therefor where they employed the manager and authorized him to operate the plant and sell the product without restriction, and the previous course of business had been to ship on orders to other states. *U. S. v. Mayfield*, (1910) 177 Fed. 765.

A sale under R. S. sec. 1241 (see **WAR DEPARTMENT AND MILITARY ESTABLISHMENT**), by government officers, of drugs and medicines purchased for the use of the army and afterward condemned as being unfit for use, is as much subject to the provisions of the Food and Drugs Act as a sale by a private person would be under similar circumstances, and would render the officers making the sale liable under that Act, unless the drugs and medicines so sold were labeled in accordance with its provisions. (1908) 26 Op. Atty.-Gen. 546.

Shipment induced by government agent.

—The fact alone that the only interstate shipment shown of a misbranded food article by the manufacturer was secretly

induced by an agent of the Department of Agriculture was held not to be a defense to a prosecution therefor under the Food and Drugs Act, the reasons for the action of such agent not appearing. *U. S. v. Morgan*, (1910) 181 Fed. 587.

"Delivery" as essential element of offense.—The mere receipt of an adulterated or misbranded drug does not constitute an offense, where claimants have not delivered, or offered to deliver, the drug in unbroken packages; and it appears that the claimants retained the packages in their possession, opened and tested them, and caused the standard of strength, quality, and purity to be plainly stamped on the containers prior to seizure. *U. S. v. Five Boxes Asafœtida*, (1910) 181 Fed. 561.

Conspiracy to violate Act.—In *Mitchell v. U. S.*, (C. C. A. 2d Cir. 1916) 229 Fed. 357, 143 C. C. A. 477, a judgment was affirmed convicting the defendants of conspiracy to violate this Act by misbranding coffee.

Notice and hearing.—When proceedings for violation of the Food and Drugs Act by adulteration or misbranding are instituted at the instance of the Department of Agriculture, whether such proceedings are *in personam* or for a forfeiture of goods under section 10, it would seem that the notice of examination and opportunity to be heard provided for by section 4 are necessary conditions precedent and must be alleged and proved; but under section 5 a district attorney may institute such a proceeding upon complaint of any state health officer or any adequate proof without the action of the agents of the department. *U. S. v. Seventy-Four Cases Grape Juice*, (1910) 181 Fed. 629.

See further as to whether notice and hearing are required as a condition precedent to the institution of proceedings by the district attorney, the notes under section 4, *infra*, p. 368.

Venue.—The crime consists of "shipping or offering for shipment," which is the act of starting the shipment of the goods by some common carrier, or other means of transportation, having as its first step a delivery for shipment, and the prosecution should be begun in the district where the delivery is made. *U. S. v. Hopkins*, (E. D. N. Y. 1912) 199 Fed. 649.

Information—Generally.—Offenses arising under this Act may be prosecuted upon information supported by the oath of some one having knowledge of the facts showing the existence of probable cause. An information signed merely by a district attorney is insufficient. *U. S. v. Wells*, (W. D. Tenn. 1913) 225 Fed. 320. See to the same effect, *U. S. v. Weeks*, (S. D. N. Y. 1912) 225 Fed. 1017.

In *U. S. v. Hopkins*, (1912) S. D. N. Y. 228 Fed. 173, the court said: "It is suggested that, so extraordinary are the prosecutions or proceedings brought under

the pure food law, some new procedure should be brought out in respect of them, apparently for the purpose of preventing a trial occurring on the criminal side of the court until after the facts have been looked into by the court itself. This is a startling innovation, and so far as I am concerned might be disposed of by expressing my unwillingness to attempt such new procedure, and my belief that juries are far more apt to be extremely tender of defendants and their rights, real or pretended, than any judge could be. But it is perhaps advisable to indicate, even at some length, the view that no such method of judging facts is permitted by the criminal law. It is the invariable practice in this district to prosecute under the pure food law by criminal information; that is, the government alleges a misdemeanor. It is not open to doubt that Congress has created several possible misdemeanors by the passage of the Act in question. Procedure by criminal information is common-law practice, and, being a matter of practice, it needs no statute to support it. Originally it was a concurrent remedy with indictments for all misdemeanors except misprision of treason. In practice, even before the independence of the United States, leave to file informations was seldom sought by the Attorney-General, except at the instance of a high officer of government. Information under the pure food law are perfect representatives of this ancient practice, being brought by the district attorney under leave of court at the instance of the Department of Agriculture. In the United States the function of an information is limited, however, by the constitutional provision that no one shall be held to answer for a 'capital or otherwise infamous crime,' except on presentment by the grand jury. On this subject, generally, see 2 Hawk. P. C. ch. 26, § 3, page 326 *et seq.*; *U. S. v. Waller*, [1871] 1 Sawy. 701, [28] Fed. Cas. No. 16,634; *Ex p. Wilson*, [1885] 114 U. S. 425, 5 S. Ct. 935, 29 U. S. (L. ed.) 89; *U. S. v. De Walt*, [1888] 128 U. S. 393, 9 S. Ct. 111, 32 U. S. (L. ed.) 485. An information, therefore, being no novelty, it does not become one by being applied to a new misdemeanor. The course of trial is and must remain that of an indictment."

Since a defendant may not be imprisoned in the penitentiary unless sentenced to confinement for more than a year, no imprisonment in the penitentiary can be imposed for violation of this Act; and hence the institution of proceedings thereunder by information of the district attorney is not a violation of Const. U. S., Amend. 5, providing that no person shall be held to answer for an infamous crime except on presentment or indictment of a grand jury. *U. S. v. J. Lindsay Wells Co.*, (1910) 186 Fed. 248.

On a prosecution by information against

a corporation where no warrant of arrest is applied for or can be issued, an information filed by the United States attorney under the sanction of his official oath, and without verification, will be sufficient, but where the information is not so filed but is upon the oath of several parties named in annexed affidavits, these affidavits cannot be considered by the court to help out the information if taken before a notary public, because such an officer has no authority under the laws of the United States to administer any oaths in connection with criminal proceedings. *U. S. v. Schallinger Produce Co.*, (E. D. Wash. 1914) 230 Fed. 290, wherein the court said: "At common law an information might be filed by the Attorney-General simply on his oath of office and without verification; and it has generally been held in this country, following the common-law rule, that verification of an information by the prosecuting officer is unnecessary, unless required by some statutory or constitutional provision. There is no law of the United States requiring verification of informations by the prosecuting officer, but a verification of some kind is no doubt indispensable under the fourth amendment to the Constitution, where a warrant of arrest is sought or applied for. See *Weeks v. U. S.*, [C. C. A. 2d Cir. 1914] 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B 651, decided by the Circuit Court of Appeals for the Second Circuit June 18, 1914, where this question is fully considered. Inasmuch as this prosecution is against a corporation, where no warrant of arrest is applied for or can be issued, I am of opinion that an information filed by the United States attorney under the sanction of his official oath, and without verification, would be sufficient. But the information under consideration was not so filed, for it expressly states upon its face that it is upon the oath of the several parties named in the annexed affidavits. Unless I am at liberty to consider these affidavits, therefore, the information has no sanction whatever. As already stated, the three principal affidavits were taken before notaries public in other states, and the fourth, standing alone, is of no avail. The question therefore arises: Can these affidavits, taken before notaries, be considered by the court? I am of opinion that they cannot. . . . The United States attorney frankly conceded this on the argument, but contended that inasmuch as this is a prosecution against a corporation, commenced by summons, it must be deemed to be a civil action. To this proposition I cannot yield assent. All persons, whether natural or artificial, stand upon an equal footing before the criminal laws of the country. True, a corporation, by reason of its inherent nature, cannot commit certain crimes, and may not be arrested or imprisoned; but

a proceeding against it for the violation of a criminal statute is, and must be, in its very nature, a criminal proceeding with all the incidents of such a proceeding until the legislature has declared otherwise. Believing, therefore, that the information in itself is insufficient, because not under the sanction of the official oath of the United States district attorney, and that I may not consider the affidavits of notaries thereto attached, the motion to quash must be granted; and it is so ordered."

When filed.—In *U. S. v. Schurman*, (1910) 177 Fed. 581, it appeared that the defendants manufactured and sold in interstate commerce "Dutch tea rusk." The packages were marked "Genuine Dutch Tea Rusk," and stated that the contents were "made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.;" the word "Holland" where it first occurred in type was so large and prominent as to hold the attention and mislead purchasers into supposing that the article was a genuine importation from Holland. A hearing was had under the rules of the Department of Agriculture, in which respondents claimed that the markings were not misleading, but offered to change the labels as directed by the government, if found otherwise. It was held that since the defendant's violation of Food and Drugs Act prohibiting the branding of an article of food so as to purport to be a foreign product when it was not so was doubtful, leave would not be granted to file an information prior to notice of adverse finding by the department and an opportunity to alter the labels as directed.

Sufficiency of averments.—Averments that a fluid was labeled "Flavor of Lemon and Citral—A Pure Flavor," and that it did not contain an appreciable quantity of lemon oil which was an essential ingredient of a pure lemon flavor, did not state facts sufficient to show a misbranding because they failed to show that the fluid was labeled a pure flavor of lemon, or that lemon oil was an essential element of a pure flavor of lemon and citral. An averment that the defendant intended that the label "Flavor of Lemon and Citral—A Pure Flavor" should be understood by the public and purchasers to mean a pure flavor or extract of lemon was futile, because the accepted and usual signification of the label is that the article is not a pure flavor of extract of lemon, but that it is a flavor of lemon and citral. An averment that one who branded an article with a label whose accepted and usual signification correctly describes it intended that the public or purchasers should understand that the label had an opposite and unusual significance fails to disclose any misbranding. *Nave-McCord Mercantile Co. v. U. S.*, (C. C. A. 1910) 182 Fed. 46, 104 C. C. A. 486.

Sufficiency of affidavits supporting information.—In *U. S. v. Baumert*, (1910) 179 Fed. 736, it appeared that an information for violating the pure food law was sworn to on information and belief by the United States district attorney supported by certain letters purporting, but not proved, to have been written or authorized by accused taking issue with the Agricultural Department's claim of violation; also a statement not in the form of an affidavit, by an analyst of the Agricultural Department, to which was attached a notary's certificate that it had been subscribed and sworn to, etc. The paper contained no venue, nor was there any certificate attached to it showing that the person certifying it was a notary or authorized to take and certify oaths and affirmations, and that it was taken and subscribed as required by the laws of the state, etc. It was held that the information was not sufficiently proved to justify the issuance of process.

Pleas to information.—The pleas to an information must be either in abatement, in bar, or the general issue. A motion to quash is not a pleading and therefore is not included. *U. S. v. Hopkins*, (S. D. N. Y. 1912) 228 Fed. 173, wherein it was held that a pleading labeled "Plea and Answer" and containing merely a statement of evidence intended to support a plea of not guilty, was not a plea at all. The court said: "Tested by these rules, this defendant has (1) pleaded the general issue, which is of course proper and sufficient; (2) the statute of limitations is raised by special plea, which is permissible, but not necessary (*U. S. v. Brown*, [1873] 2 Lowell 267, [24] Fed. Cas. No. 14,665); (3) a plea is tendered of *autrefois acquit*, concerning which plea the record is in the same condition as found by me in *United States v. Robinson* (memorandum filed January 18, 1910); and, finally, (4) the evidential matter as above digested is put into a pleading. It may first be noted that the plea of *autrefois acquit* or convict should not be tendered simultaneously with the general issue. It is the rule in criminal law, as it was at common law on the civil side, that defenses both dilatory and peremptory, if they did not go to the merits of the controversy, should be pleaded first, in order that judgment (if against defendant) might be *respondens oster*. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (*Rex v. Taylor*, [1824] 3 B. & C. 502, [10 E. C. L. 166]) had been modified. This, however, being a matter of detail only, I have examined the record as if the prosecution had filed a replication to the plea of *autrefois acquit*, and find by the record that the previous information failed for what the court considered defects apparent on the face thereof.

Therefore it was no information, and the defendant was never in jeopardy. Notwithstanding the informality of the fourth plea, what is sought to be raised is, I think, plain enough, viz., unless this defendant shipped a 'drug,' it is not guilty under this information. 'Drug' is defined by the sixth section of the act, and the standard of drugs is to be ascertained from the United States Pharmacopoeia by the seventh section thereof. What the Pharmacopoeia says, therefore, the defendant asserts the court may take judicial cognizance of, and, having done this, it is found that neither leaf senna nor gum tragacanth is a drug in the sense in which the Pharmacopoeia uses that word; i. e., 'substances used solely for medicinal purposes and when professionally bought, sold, and dispensed as such.' If such a plea as this (plainly in bar, if it is anything) can be tried, it must be tried either by the court or the jury; and, no matter which course of trial is adopted, it is a sure test of a good plea that the trying power can give judgment or verdict either way. If it be regarded as a plea triable by the court only, judgment against the defendant would be respondent ouster; but such judgment would be based necessarily upon the insufficiency of the facts alleged, admitting them to be true. This reduces the whole matter to an absurdity, for, if the facts alleged (as I understand them) be true, the defendant is not guilty, and the court has no more power to pronounce a judgment of not guilty than it has to enter one of guilty. I think this analysis shows that the alleged plea amounts to no more than a statement of evidence intended to support the plea of not guilty; therefore it is not a plea at all. It is ordered that the pleas of not guilty and statute of limitations stand, that the plea of autrefois acquit be overruled after an inspection of the records of this court, and that the remainder and balance of the document filed and entitled 'Plea and Answer' be stricken from the files as unauthorized by law."

Alleging misbranding.—The information should set out the facts which go to show a misbranding. *U. S. v. St. Louis Coffee, etc., Mills*, (E. D. Mo. 1909) 189 Fed. 191.

Sufficiency of indictment alleging misbranding.—In *Schraubstadter v. U. S.*, (C. C. A. 9th Cir. 1912) 199 Fed. 568, 118 C. C. A. 42, the court said: "The first objection interposed by defendants challenges the sufficiency of the indictment. The alleged misbranding was preliminarily investigated by the proper officer of the Department of Agriculture, but it will be seen that the fact of such investigation is not set forth in the indictment, nor does it show that any notice was given by the Secretary of Agriculture to the defendants, notifying them of the

violation of said act, nor that defendants were thereby afforded an opportunity to present evidence or to be heard. For these and other grounds of like nature it is contended that the indictment is insufficient. In other words, it is argued that the indictment should set forth the doing of the things required to be done under sections 4 and 5 of the act in question. The very contention has been set at rest to the contrary in the case of *U. S. v. Morgan*, 222 U. S. 274, 32 S. Ct. 81, 56 U. S. (L. ed.) 198. The defendants in that case added mineral salts to water drawn from the water supply in New York city, and, charging it with carbonic acid, bottled and sold it as 'Imperial Spring Water.' An invoice of this they sold and shipped into New Jersey, and were indicted for shipping misbranded goods in interstate commerce. The indictment there, as here, did not set forth the facts the want of which it is claimed renders the present one objectionable. The court held the indictment sufficient, however, reversing the judgment of the court below to the contrary."

Sufficiency of information alleging adulteration.—An information which charges that there was an adulteration of an article, but fails to state in what particular it was adulterated, states a conclusion without making the necessary averments from which the conclusion can be fairly reached. *U. S. v. St. Louis Coffee, etc., Mills*, (E. D. Mo. 1909) 189 Fed. 191.

Statute of limitations.—The general statute of limitations, formerly two years, and now three, applies to prosecutions under this Act. *U. S. v. Hopkins*, (E. D. N. Y. 1912) 199 Fed. 649, wherein the court said: "The defendant also pleads the statute of limitations in an original way. The Pure Food and Drugs Law provides for a hearing upon notice, after examination, and, if an adulteration of a drug shall be found, that an opportunity of a hearing shall be given. If, after the hearing, it appears that any of the provisions of the act have been violated, the statute is specific and technical in its description of the acts prohibited, and in the statement of the penalty therefor. The defendant, therefore, invokes the well-known doctrine that a specific statute, repealing in terms, or in necessary effect, the provisions of the general statute, shall be held to prevail over all the provisions of a general statute, which are thus expressly or impliedly set aside. The general statute of limitations, formerly two years and now three years, by the statute of 1876 (Act of April 13, 1876, c. 56, 19 Stat. 32; now R. S. sec. 1044, see CRIMINAL LAW) is claimed by the defendant to have been repealed, inasmuch as no specific limitation is placed upon the prosecution under the Pure Food and Drugs Law, and as the language of the sections throughout

the entire statute indicates that immediate and prompt action is to be had. The defendant invokes the doctrine of laches, not so much as a sufficient defense to the prosecution of this information itself, but it relies upon that doctrine as an argument for its claim that the general statute of limitations is inapplicable, and hence that it is inferentially repealed through the intent spelled out of the requirement for immediate action. The defendant would apparently seek to substitute for the general statute of limitations, of three years after the commission of an offense, an ambiguous and uncertain equitable determination by the court as to whether the proceedings had been so promptly conducted that the prosecution should be allowed to go on. The theory of a statute of limitations is no longer dependent upon the presumption of some grant freeing the person interested from prosecution, or the lapse of time within which the evidence has presumably been lost. It is rather a definite period prescribed by law, within which an indictment must be filed, provided the defendant is not a fugitive. There is nothing in the Pure Food and Drugs Law which interferes with the operation of a statute of three years, beyond which delay cannot be allowed. Whether or not laches on the part of the government officials had intervened, and whether the defendant's rights had thereby been prejudicially affected, or whether the act which was charged as an offense has been reduced to a mere technicality, would be something for the court to take into account in imposing sentence. But it cannot be said that the intent of Congress was to set up different standards or time limits for the actual filing of an indictment (either greater or less than three years as the case might be) by provisions in the law intended to assure a speedy hearing and a prompt method of determining whether acts would be considered by the department as violations of the law, from which a criminal prosecution might result. Even if the acts in question had been terminated, and the prosecution might thereby depend upon methods or practices long since discontinued, or if the defendant, because of the delay in insti-

tuting proceedings, had continued upon a course which it ultimately found would bring itself in conflict with the government, these matters, again, would be questions to be considered in imposing sentence, and are not a bar to the filing of an information at any time within the three-year period."

Punishment for violation.—No imprisonment for the first offense but merely a fine is provided for by this section where the offense is a petty one. *Frank v. U. S.* (C. C. A. 6th Cir. 1911) 192 Fed. 864, 113 C. C. A. 188.

Question for jury.—It is for the jury to say from the evidence submitted to it whether the defendant's articles were adulterated, and they are to determine the weight to be given expert evidence on the question. *Glaser v. U. S.*, (C. C. A. 7th Cir. 1915) 224 Fed. 84, 139 C. C. A. 566.

In *Shawnee Milling Co. v. Temple*, (1910) 179 Fed. 517, it was held that whether flour, bleached by the use of nitrogen peroxide under the Andrews patent, or pursuant to the Alsop process, was flour so treated that inferiority was concealed, or containing added poisonous ingredients which might render it injurious to health, in violation of the pure food law, was a question of fact for determination by a jury, or by the court if a jury was waived.

Construction of section 2 of earlier Act of 1890.—Section 41 of chapter 661, Laws of N. Y. (1893), which provides that an article shall be deemed to be adulterated within the meaning of the Act if it be "colored, or coated, or polished, or powdered, whereby damage is concealed, or it is made to appear better than it really is, or of greater value," does not contravene section 2 of the Act of Aug. 30, 1890 (noted under sec. 2 of this Act *supra*, p. 360), forbidding the importation into the United States of any adulterated or unwholesome food or drug or any vinous, spirituous or malt liquors, etc.; this latter Act containing no provisions authorizing the importation of articles for the purpose of deceiving and defrauding purchasers and consumers. *Crossman v. Lurman*, (1902) 171 N. Y. 329, 63 N. E. 1097, 98 A. S. R. 599, *affirmed* (1904) 192 U. S. 189, 24 S. Ct. 235, 48 U. S. (L. ed.) 401.

SEC. 3. [Rules and regulations to be made—scope.] That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief

health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country. [34 Stat. L. 768.]

As to the change in the title of the Secretary of Commerce and Labor, see COMMERCE DEPARTMENT.

Scope of authority given secretaries.—The power given the secretaries is one of regulation only. It is an administrative power, and does not entitle them to alter or add to the Act. *U. S. v. Antikamnia Chemical Co.*, (1914) 231 U. S. 654, 34 S. Ct. 222, 58 U. S. (L. ed.) 419, Ann. Cas. 1915A 49, *reversing* (1911) 37 App. Cas. (D. C.) 343.

The Secretaries of the Treasury, Agriculture, and Commerce and Labor are restricted to the making of rules and regulations for carrying out the provisions of this Act and have no authority to review findings of fact and reports made to the Secretary of Agriculture. (1912) 29 Op. Atty.-Gen. 494.

It is within the power of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, under this section, to promulgate a rule or regulation which requires that the name of the parent sub-

stance shall follow that of the derivative on labels placed on packages containing drugs which come within the provisions of section 8, *infra*, p. 379; but in the absence of such a rule no offense would be committed under the Act by the omission, nor could the article for that reason alone be dealt with as misbranded. (1909) 27 Op. Atty.-Gen. 143.

Findings of referee board.—The referee board, established by the Secretary of Agriculture as a board of his department and charged with the duty of considering and reporting upon the wholesomeness or the deleterious character of such foods, or articles used in foods, as might be referred to it, has authority only to investigate and report, and its findings are not conclusive on the courts or on the Secretary of Agriculture, but are simply for the information of the latter. (1912) 29 Op. Atty.-Gen. 494.

SEC. 4. [Chemical examinations — notice of result — hearings — certificate of violations to district attorney.] That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid. [34 Stat. L. 769.]

Somewhat similar provisions were contained in the Agricultural Appropriation Acts for many years prior to the enactment of the text.

Scope of section.—This section does not apply to a libel for forfeiture under section 10. *U. S. v. Nine Barrels Olives*, (E. D. Pa. 1910) 179 Fed. 983.

Enforcement of Act by Secretary of Agriculture.—The direct and active enforcement of the statute is cast upon the Department of Agriculture and upon that

department alone. (1912) 29 Op. Atty.-Gen. 494.

Notice and hearing.—In practice most prosecutions are based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the

sample was received; if he voluntarily attends he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the department or a trial in court. The provision as to the hearing there is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If for any reason the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States by virtue of R. S. secs. 771, 1022 (given in JUDICIAL OFFICERS AND CRIMINAL LAW, respectively). So an improper finding by the department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this Act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service. *U. S. v. Morgan*, (1911) 222 U. S. 274, 32 S. Ct. 81, 56 U. S. (L. ed.) 198, reversing (S. D. N. Y. 1910) 181 Fed. 587. See to the same effect *U. S. v. Seventy-Five Boxes Alleged Pepper*, (D. C. N. J. 1912) 198 Fed. 934; *U. S. v. American Laboratories*, (E. D. Pa. 1915) 222 Fed. 104. Compare *Frank v. U. S.* (C. C. A. 6th Cir. 1911) 192 Fed. 864, 113 C. C. A. 188, wherein the court said: "Upon the argument in this court, defendants urged that the information was improperly

filed, and should be dismissed for that reason, upon the authority of *U. S. v. Twenty Cases Grape Juice*, (C. C. A. 2d Cir. 1911) 189 Fed. 331 [111 C. C. A. 63], where it was held that in case the district attorney acts solely in pursuance of the report of the Secretary of Agriculture, under sections 4 and 5 of the Food and Drugs Act, the notice and hearing provided by section 4 are conditions precedent to the filing of the information; such notice and hearing not appearing in this case. It would be enough to say that this proposition is not properly before us from the fact that no motion to dismiss for this reason was presented below, nor is the question raised by any pleading or presented by assignment of error. We do not, however, construe the information as showing that it was filed without investigation by the district attorney, or solely by authority of sections 4 and 5 of the Act."

"Just what may be the purpose of the requirements of section 4 that the Secretary of Agriculture shall give the notice and opportunity to be heard may not be entirely clear. It will be observed that this section only requires the notice to be given to the person from whom the sample is obtained, who may be only the bailee of the property of which it is a sample, and knows nothing of its ingredients, and affording him an opportunity to be heard. This may be for the purpose of ascertaining who is the real violator of the law, if the analysis shows such violation, with a view of affording him an opportunity to discontinue its violation and proceed lawfully in the conduct of his business under the act and the requirements of the Department of Agriculture." *U. S. v. Seventy-Five Barrels Vinegar*, (N. D. Ia. 1911) 192 Fed. 350.

Who is the "proper" United States district attorney.—In this section it is provided that the Secretary of Agriculture shall at once certify the fact to the "proper" United States district attorney. This means and means no more than that the proceedings shall be certified to the district attorney in whose district prosecution should be had. *U. S. v. Hopkins*, (E. D. N. Y. 1912) 199 Fed. 649.

SEC. 5. [Legal proceedings.] That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided. [34 Stat. L. 769.]

Duty of United States attorney to institute proceedings.—This section imposes upon the United States attorney of

the proper district the duty, whenever he is informed by the local authorities, or by the report and certificate of the Secretary

of Agriculture, that the law has been violated, to commence without delay the appropriate proceedings for the alleged violation of this Act. And whenever such information or report is made to him he has no discretion but to proceed as directed by that section; and he is not required to investigate and determine whether or not the Secretary of Agriculture has performed his duty under the law. *United States v. Seventy-Five Barrels Vinegar*, (N. D. Ia. (1911) 192 Fed. 350.

Report of Secretary of Agriculture.—In *U. S. v. Twenty Cases Grape Juice*, (C. C. A. 2d Cir. 1911) 189 Fed. 331, 111 C. C. A. 63, the court construing this section, particularly the provision relating to the report of the Secretary of Agriculture, said: "The different sections of the Food and Drugs Act while relating to different subjects are consistent and, in many respects, interdependent. The second section provides that any person violating the provisions of the Act shall be guilty of a misdemeanor and subject to fine and imprisonment. The tenth section provides that articles sold or transported in violation of the provisions of the Act shall be liable to seizure and condemnation. Both sections relate to penalties for violations of the Act. The penalty under one section is a fine and imprisonment. The penalty under the other section is the forfeiture of the misbranded or adulterated goods. Both sections are penal in their nature. Punishment is as well inflicted by the forfeiture and loss of property as by a fine. The two sections taken together (with the first section which relates to manufacture in territories) cover the subject of the punishment imposed for breaches of the provisions of the statute. Section 5 of the Act must also be read in connection with sections 2 and 10. The latter, as we have seen, relate to penalties. The former provides for the enforcement of such penalties. It makes it the duty of the proper district attorney upon the presentation of 'satisfactory evidence' of a violation of the Act by any state health or food officer to cause appropriate proceedings to be instituted and prosecuted. It also provides that the district attorney shall institute such proceedings in case the Secretary of Agriculture shall report to him any violations of the Act. But in

this case it is not required that evidence of a violation of the Act shall be presented. The report of the secretary is in itself made the basis of proceedings. Now, if section 5 stood apart from other provisions of the statute it would contravene a practice so long and well established as almost to amount to a fundamental right, viz., that proceedings for the punishment of the citizens shall be instituted only after investigation by some public official. To compel a district attorney to institute proceedings upon the report of another official without requiring the latter to investigate before making such report would be most extraordinary. And this Act does not so require. It is made the duty of the district attorney to act upon the report of the Secretary of Agriculture without the presentation of evidence required in other cases only because section 4 of the Act throws the duty of making investigation upon the secretary before he makes his report. The preliminary examination in such case is made by the secretary instead of the district attorney. The sections are interdependent and must be read together, and when so read they are found to present an orderly and a just procedure. As then the 'report' of the Secretary of Agriculture referred to in section 5 is the certificate of facts which he is required to make under section 4, it necessarily follows that the steps required to be taken preliminary to certifying the facts—including notice and hearing—must be taken before such a report as the law requires can be made. And it also follows, upon principles already considered, that when such report is at all a prerequisite to proceedings under section 5, it is as necessary to proceedings for the enforcement of penalties by way of forfeiture as by way of fine or imprisonment."

"Proper courts of the United States."—The Police Court of the District of Columbia, while not a court of the United States under the Federal Constitution, is nevertheless a proper court of the United States in the sense in which that phrase is used in this Act for a prosecution of its violation. *Huylers v. Houston*, (1914) 41 App. Cas. (D. C.) 452; *Hartranft v. Mullowny*, (1915) 43 App. Cas. (D. C.) 44.

SEC. 6. [Terms defined—"drugs"—"food."] That the term "drug," as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall

include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound. [34 Stat. L. 769.]

"Drugs" and "food" as mere terms of description.—"The terms 'drugs' and 'food' as here used are mere terms of description. If the Pharmacopœia or National Formulary says something is a drug, it is a drug under the meaning of the Act. Or if it comes under the other description of what a drug is, it is a drug, and so food also is described. There are no standards fixed in either case, for, if any substance or mixture is intended to be used for the cure, mitigation, or prevention of disease of either man or other animals, it is nevertheless a drug whether it is recognized in the Pharmacopœia or National Formulary or not. The standard for food was fixed by the Department of Agriculture under the Act of 1903 [ch. 1008, 32 Stat. L. 1158, now superseded by section 11 of this Act, *infra*, p. 396]. If one in the business of making food

products would look for the standard he would find it in the promulgations of the Secretary of Agriculture made under direct authority of Congress. The Act of 1903 does not describe any offense, but the Act of 1906 [sec. 2, *supra*, p. 360] says that if any article of food adulterated or misbranded is manufactured or transported so as to become the subject of interstate commerce, the maker, transporter, etc., shall be guilty of an offense. How shall it be known whether he is guilty of an offense or not? The answer is clear. By referring to the standards which have been established under the authority of Congress." U. S. v. Frank, (S. D. Ohio 1911) 189 Fed. 195.

Wine as "food."—Food as used in this section includes "wine." U. S. v. Sweet Valley Wine Co., (N. D. Ohio 1913) 208 Fed. 85.

SEC. 7. [Adulterations defined.] That for the purposes of this Act an article shall be deemed to be adulterated:

[Drugs.] In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

[Confectionery.] In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.

[Food.] In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious

ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. [34 Stat. L. 769.]

Construction of sections 7 and 8.—In *Weeks v. U. S.*, (C. C. A. 2d Cir. 1915) 224 Fed. 64, 139 C. C. A. 626, Lacombe, J., said: "The case calls for the construction of sections 7 and 8 of the Pure Food and Drugs Act. Prior sections forbid in general terms of the manufacture and shipment in interstate commerce of any article of food or drugs which is adulterated or misbranded. Those two sections (7 and 8) undertake to define the words 'adulterated' and 'misbranded' as used in the statute. Had they been phrased in general terms, it might not be difficult to construe and apply them to the concrete facts of each case as they are developed on a trial. But the draftsman apparently thought that the more words he used the more plainly would he express the meaning intended. Not unnaturally an opposite result has been accomplished. The sections are most difficult of construction; possibly the phrasing of some of their provisions may operate to defeat the object probably intended. But we cannot rewrite the sections; if amendment be needed to make the act effective, that will be a matter for the consideration of Congress."

"Added" ingredient injurious to health.—An ingredient may be an "added" one though it is a constituent of a food product having a distinctive name, as for example, caffeine in coca cola. *U. S. v. Coca Cola Co.*, (1916) 241 U. S. 265, 38 S. Ct. 573, *reversing* (E. D. Tenn. 1911) 191 Fed. 431, (C. C. A. 6th Cir. 1914) 215 Fed. 535, 132 C. C. A. 47, wherein Mr. Justice Hughes, construing the various provisions of the Act for the purpose of getting at the meaning of the provision relating to added poisonous or deleterious ingredients, said: "Reading the provisions here in question in the light of the context, we observe: (a) That the term 'adulteration' is used in a special sense. For example, the product of a diseased animal may not be adulterated in the ordinary or strict meaning of the word, but by reason of its being that product the article is adulterated within the meaning of the Act. The statute with respect to 'adulteration' and 'misbranding' has its own glossary. We cannot, therefore,

assume that simply because a prepared 'food' has its formula and distinctive name, it is not, as such, 'adulterated.' In the case of confectionery, it is plain that the article may be 'adulterated' although it is made in strict accordance with some formula and bears a fanciful trade name, if in fact it contains an 'ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.' And the context clearly indicates that with respect to articles of food the ordinary meaning of 'adulteration' cannot be regarded as controlling. (b) The provision in section 7, subdivision Fifth, assumes that the substance which renders the article injurious, and the introduction of which causes 'adulteration,' is an ingredient of the article. It must be an 'added' ingredient; but it is still an ingredient. Component parts, or constituents, of the article which is the subject of the described traffic are thus not excluded but are included in the definition. The article referred to in subdivision Fifth is the article sought to be made an article of commerce,—the article which 'contains' the ingredient. (c) 'Adulteration' is not to be confused with 'misbranding.' The fact that the provisions as to the latter require a statement of certain substances if contained in an article of food, in order to avoid 'misbranding,' does not limit the explicit provisions of section 7 as to adulteration. Both provisions are operative. Had it been the intention of Congress to confine its definition of adulteration to the introduction of the particular substances specified in the section as to misbranding, it cannot be doubted that this would have been stated, but Congress gave a broader description of ingredients in defining 'adulteration.' It is 'any' added poisonous or 'other added deleterious ingredient,' provided it 'may render such article injurious to health.' (d) Proprietary foods, sold under distinctive names, are within the purview of the provision. Not only is 'food' defined as including articles used for food or drink 'whether simple, mixed or compound,' but the intention to include 'proprietary

foods' sold under distinctive names is manifest from the provisos in section 8 which the claimant invokes. 'Mixtures or compounds' which satisfy the first paragraph of the proviso are not only 'articles of food,' but are to enjoy the stated immunity only in case they do 'not contain any added poisonous or deleterious ingredients.' By the concluding clause of section 8, it is provided that nothing in the Act shall be construed to require manufacturers of 'proprietary foods' to disclose 'their trade formulas' except in so far as the provisions of the Act 'may require to secure freedom from adulteration or misbranding,' and the immunity is conditioned upon the fact that such foods 'contain no unwholesome added ingredient.' Thus the statute contemplates that mixtures or compounds manufactured by those having trade formulas, and bearing distinctive names, may nevertheless contain 'added ingredients' which are poisonous or deleterious and may make the article injurious, and, if so, the article is not taken out of the condemnation of section 7, subdivision Fifth. (e) Again, articles of food including 'proprietary foods' which fall within this condemnation are not saved because they were already on the market when the statute was passed. The Act makes no such distinction; and it is to be observed that the proviso of section 8 explicitly refers to 'mixtures or compounds which may be now or from time to time hereafter known as articles of food.' Nor does the length of the period covered by the traffic, or its extent, affect the question if the article is in fact adulterated within the meaning of the Act."

Whether an added ingredient is poisonous or deleterious is a question for the jury where the evidence is conflicting. *U. S. v. Coca Cola Co.*, (1916) 241 U. S. 265, 36 S. Ct. 573, *reversing* (E. D. Tenn. 1911) 191 Fed. 431, (C. C. A. 6th Cir. 1914) 215 Fed. 535, 132 C. C. A. 47.

Injurious to health.—An added deleterious ingredient does not make an article of food an adulterated product within the meaning of the statute unless it "may render" it "injurious to health." *U. S. v. Lexington Mill, etc., Co.*, (1914) 232 U. S. 399, 34 S. Ct. 337, 58 U. S. (L. ed.) 658, L. R. A. 1915B 774, *affirming* (C. C. A. 8th Cir. 1913) 202 Fed. 615, 121 C. C. A. 23. In this case the petitioner by libel sought the condemnation of sacks of flour on the ground that the flour contained an added deleterious ingredient. The government, which was the petitioner, contended that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health, and the instruction of the trial court permitted the statute to be read without the final

and qualifying words, concerning the effect of the article upon health, but the Circuit Court of Appeals reversed the trial court on this point, and their judgment was affirmed by the Supreme Court which construed the statute as follows: "It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the government in order to make out a case to establish that fact. The Act has placed upon the government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word 'may' is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, 'an auxiliary verb, qualifying the meaning of another verb, by expressing ability, . . . contingency or liability, or possibility or probability.' In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the Act. This is the plain meaning of the words and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131): 'As to the use of the term "poisonous," let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists, as to whether or not it is dangerous to take into the human system.' And such is the view of the English courts construing a similar statute."

The question whether the added ingredient would "reasonably have a tendency to injure health" should be left to the jury. *Weeks v. U. S.*, (C. C. A. 2d Cir. 1915) 224 Fed. 69, 139 C. C. A. 631,

following *U. S. v. Lexington Mill, etc., Co.*, 232 U. S. 399, 34 S. Ct. 337, 58 U. S. (L. ed.) 658, L. R. A. 1915B 774.

An article labeled "*Grain Alcohol Varnish*" consisting of shellac dissolved in alcohol and used for a glazing on cheap candies was held an adulterated article, it appearing that it contained an added ingredient, to wit, arsenic, which the jury considered sufficient in quantity to make it an article which "may be injurious to health." *Weeks v. U. S.*, (C. C. A. 2d Cir. 1915) 224 Fed. 69, 139 C. C. A. 631.

Macaroni, to which a coal tar dye known as "*Martius yellow*" had been added solely as a coloring matter, was held to contain an "added poisonous . . . ingredient which may render it injurious to health," within the fifth clause of this section, and, when shipped in interstate commerce, to be subject to condemnation and destruction under section 10 of the Act, the evidence showing that such coloring matter is a poison which will kill. *U. S. v. One Thousand Nine Hundred and Fifty Boxes Macaroni*, (1910) 181 Fed. 427.

Silver coating on candy.—Since the purpose of this Act was to protect the purchaser of food products from having inferior and different articles passed off on him in place of those he desired, and to protect him from injury by prohibiting the addition to foods of substances poisonous or deleterious to health, the words "other mineral substances," under the doctrine of *ejusdem generis*, includes other mineral substances which are deleterious or detrimental to health of the same nature as those specifically described preceding such words, and hence does not include a thin coating of pure silver covering candy, used principally by confectioners for decorative purposes, and not deleterious or detrimental to health. *French Silver Dragée Co. v. U. S.*, (C. C. A. 1910) 179 Fed. 824, 103 C. C. A. 316.

Macaroons are not adulterated by the addition of glucose. *Washburn v. U. S.*, (C. C. A. 1st Cir. 1915) 224 Fed. 395, 140 C. C. A. 81, wherein the court said: "It seems to us that the trial on the first count proceeded upon a wrong theory, and that the allegations and proofs offered would not warrant a conviction for adulteration within the meaning of the Act. The evidence discloses that a macaroon is a mixed food composed of certain ingredients; that the name by which it is known is distinctive; and that the added ingredient, glucose, which the respondent used in its cakes was not poisonous or deleterious to health. It is provided in section 8, subdivision 4 (1), that a mixture known by a distinctive name shall not be regarded as adulterated if it does not contain any added poisonous or deleterious ingredient. The added ingredient here in question was neither poisonous nor deleterious, and, as the mixture or

compound was known by a distinctive name, it was not adulterated within the meaning of the act."

"*Filthy, decomposed or putrid vegetable substance*"—*Standard of interpretation*.—The words "filthy, decomposed or putrid vegetable substance" are not subject to any arbitrary standard of interpretation. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts, and when it appears that the product is so far decomposed as to be unfit for food, it comes within the letter and spirit of the law. *U. S. v. Two Hundred Cases of Adulterated Tomato Catsup*, (D. C. Ore. 1914) 211 Fed. 780.

Addition by nature.—The ordinary use of "adulteration" implies an actual addition to the original substance, through human agency. But the word as used in the section does not restrict this to addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article to be shipped, it is adulterated in the eyes of the law. *U. S. v. Sprague*, (E. D. N. Y. 1913) 208 Fed. 419.

Meaning of "offal".—In a libel for the condemnation of tomato catsup, the words "as the offal of tomato canning factories" are not of exact signification. They do not charge a violation of the above provision. The indefinite suggestion of the word "offal" cannot be considered as the equivalent of a charge that the tomato pulp was a filthy, decomposed, or putrid vegetable substance. *U. S. v. Six Hundred and Fifty Cases Tomato Catsup*, (1909) 166 Fed. 773, 774.

"*Filthy, as applicable to substance containing bacilli*".—A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is certainly "filthy," under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses. *U. S. v. Sprague*, (E. D. N. Y. 1913) 208 Fed. 419.

Citrus fruits.—The sixth subdivision, if citrus fruits should be held to be within the prohibition against vegetable substances, includes only such as are in whole or in part filthy, decomposed or putrid. Green or immature fruit, equally deleterious to health, does not seem to be within the Federal Act. Therefore, until Congress legislates upon the subject, the state is free to enter the field. *Sligh v. Kirkwood*, (1915) 237 U. S. 52, 35 S. Ct. 501, 59 U. S. (L. ed.) 835, *affirming* (1913) 65 Fla. 123, 61 So. 185.

Adulteration due to vermin.—In *Galt v. U. S.*, (1913) 39 App. Cas. (D. C.) 470, the libel alleged that certain flour was adulterated within the meaning and in-

tent and in violation of this section in that said flour consisted in part of a filthy, decomposed and putrid animal and vegetable substance. The evidence showed that experiments were made by the department of chemistry, showing that the said flour contained a large number of bacteria that were supposed to be injurious to the human body; and, in addition to the worms, insects and beetles that had been sifted out of the flour, the evidence showed that there remained in the same, cases or husks made by the worms, as well as the excreta from them, all of which, it was claimed, rendered the said flour filthy within the meaning of said Act. There were a great many weevils discovered, and they were defined as the grain weevil, or wingless insects, which required a period of some six weeks, in warm weather, for full growth and development, during which time they passed through four distinct stages of existence,—first, in the form of the egg; then, the form of the larva; then, in the pupa form; and, finally, reaching the adult form,—and that after maturing, these insects might live for several months, and possibly for a year. In cold weather a longer time was necessary for their growth. That a beetle known as "flour beetle" comes from a larva or worm, about half an inch long, and it breeds in flour and grain. Several of these beetles, in the larva state or in the adult state, appeared to be in said samples. The evidence was that the flour was injuriously affected by the presence of such worms, insects, and beetles, by reason of their feeding on the gluten, and thereby destroying the strength and value of the flour, and rendering it unfit for making bread or other domestic use, even if the foreign, filthy matter could be bolted or sifted out of it. The court below further found that it is not clear whether weevils may not come into flour while in storage, without any fault of the owner. Speaking of the stacks of flour here involved, the court said: "It appears that the four sacks taken were from different locations in the several piles of sacks; and it is argued on behalf of the government, that all the sacks seized were in a position to become affected by the dirt and filth from a stable near by." The court finally found "as matter of fact from the evidence that the said several sacks of flour are in a filthy condition, under the provisions of said Act, by reason of the presence of the said worms, insects, and beetles in such quantities as shown, and from the condition which they have produced in the said flour." It was contended by the appellant that the Act makes a distinction between adulteration which consists in adding to an article that which is not properly a part of it, and adulteration existing when some part of the article itself is not what it ought

to be; in other words, "when some part of the article, whether animal or vegetable, is filthy, decomposed, or putrid,—not that the article contains a substance of that character foreign to its proper ingredients or constituents." Affirming the decree condemning the flour for violation of this Act, the court said: "In view of the finding of the court that the presence of worms, insects, and beetles in the condemned flour has produced a filthy condition thereof, it is unnecessary to determine whether appellants' contention is well founded. Aside from the fact that the evidence from which this finding was made is not before us, it is matter of common knowledge that the presence of such a large number of worms, insects, and beetles in such a substance as flour would render the flour filthy in the general acceptance of that term. This flour was not to be fed to swine, but was to be sold for human consumption. Even conceding that the worms, insects, and beetles could be separated therefrom, the flour would still be contaminated by reason of its contact with them, and it would still contain more or less husks and excreta from the worms,—that is, it would still be filthy within the meaning of the Act."

Tomato catsup.—In *U. S. v. Two Hundred Cases Adulterated Tomato Catsup*, (D. C. Ore. 1914) 211 Fed. 780, it appeared that the United States filed a libel for the condemnation of two hundred cases of tomato catsup alleging that it was adulterated within the meaning of the Act. The court stated the questions that were involved in the case, as follows: "First, whether the product was in fact decomposed; and, if so, whether it was 'adulterated' as defined by the Pure Food Law. It was manufactured from pulp screened from peelings, cores and by-products of tomatoes, obtained in the course of their preparation for canning. The decay or decomposition of tomatoes or tomato products is commonly the result of the attack upon the fruit in the field, or in process of manufacture, of various forms of plant life, such as yeast, bacteria, and mold. They feed upon certain compounds in the fruit, reducing the food value of the product, and producing a by-product of a more or less offensive character, and are evidences of decay and decomposition. The condiments used in the manufacture of tomato catsup have the effect of concealing decomposition or putrefaction from the senses, and its existence can most readily be determined by a bacteriological analysis of the manufactured product to ascertain whether the organisms referred to are present in sufficient quantities to indicate a decomposed state." Referring to the testimony as sufficient to establish the fact that the product was decomposed, the court said: "Various samples of the product in question have been carefully analyzed under

the microscope, separately, by Dr. Schneider, of the University of California and the Government Laboratory in San Francisco, and Prof. Beckwith, of the Oregon Agricultural College, both of whom are expert bacteriologists, and they agree that it contains bacteria, yeast, and mold in very large and unusual quantities, as high as from 350 millions to 1 billion bacteria and 15 million yeast spores per cubic centimeter (about one-quarter of a teaspoonful) and mold hyphae in abundance, thus indicating, in the opinion of these experts, a largely decomposed condition. Dr. Schneider says from 10 to 15 per cent., and according to their testimony it is unfit for human food. This testimony is not contradicted in any way, although the claimant was permitted to and did take samples of the goods for analysis after their seizure. Nor is there any conflict among the experts as to the scientific deductions to be made therefrom. It would seem conclusive therefore of the fact that the product is decomposed in part or in whole. The examination of the bacteriologists is confirmed by a chemical analysis made by the chemist at the government laboratory, and in my judgment finds support in the method of manufacture. The evidence shows that the fruit from which the product in question was manufactured was brought to the factory in car load lots in boxes containing about 50 pounds each. Without being sorted or examined in any way except the merest visual examination of the outer layer of fruit, the contents of the boxes were emptied for washing into a vat containing about 150 gallons of water, which was only changed once a day, except as it might be affected by a one-inch stream running into the vat and an overflow pipe at the top. While in the water the tomatoes were stirred by a mechanical screw-like agitator, which subsequently carried them to the steaming table, where they were scalded with hot water to loosen the skin, and washed under a spray of cold water. From there they were taken in buckets to the peeling table, where the skins were removed and the tomatoes graded for canning. Then the skins, with such pulp as adhered to them, the stem ends, and like by-products were placed in buckets by the operatives and subsequently taken to another department of the factory, where they were used in the manufacture of the catsup in question. The washing of a large quantity of fruit which necessarily is more or less infected with bacteria, mold, and decay in the manner described, would naturally have a tendency to foul the water and infect the entire lot, and especially the skins and by-product from which the catsup in question was manufactured. Again, the claimant depended on the peelers or sorters to sort out and reject the decayed portions from the trim-

mings before they were sent to the catsup department. The peelers were paid by the piece for the peeled tomatoes only, and it is but natural that they would become careless or indifferent about the removal of the decayed material from that portion of the output for the handling of which they received no direct compensation. It therefore seems to me that the method of manufacture adopted by the claimant was calculated to produce just such a product as the bacteriologists found the one in question to be." Considering the effect and sufficiency of the evidence, the court said: "It is argued for the claimant that since the presence of bacteria, mold, and yeast in any quantity is evidence of decomposition or the process of decomposition, and there is no fixed standard by which it can be determined when a product has reached such a stage of decomposition as to consist in whole or in part of filthy, decomposed, putrid vegetable substance, the government cannot prevail. I infer from the testimony of the experts that it would be difficult, if not impossible, to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts, and when it appears, as in this case, that the product is so far decomposed as to be unfit for food, it comes within the letter and spirit of the law. It was urged that, since there is no proof that the product in question would be injurious to health, a verdict should be ordered in favor of the claimant; but I do not understand that such proof is necessary or required under the provisions of the Food and Drug Act, on which this proceeding is based. The object of the law is to prevent the manufacture or interstate shipment of adulterated food, and, when food is adulterated so as to 'consist in whole or in part of filthy, decomposed, or putrid animal or vegetable substance,' its interstate shipment is prohibited, whether its use would be injurious to health or not."

Adulterated milk.—In *Dade v. U. S.*, (1913) 40 App. Cas. (D. C.) 94, it appeared that the information charged the unlawful offering for sale and the sale of adulterated milk, in that it consisted in whole and in part of a filthy, decomposed and putrid animal and vegetable substance. The facts established by the evidence were stated by the court as follows: "On February 27, 1911, a pint bottle of milk was purchased from one of the defendant's wagons, and taken to the laboratory of the Bacteriological Bureau of the Health Department, where it was analyzed and found to contain four million and five hundred thousand bacteria on ordinary agar, thirty-seven degrees Centigrade, grown for twenty-four hours, and

eighty-nine million and four hundred thousand bacteria per cubic centimeter. On ordinary agar, twenty-five degrees Centigrade, grown forty-eight hours, it contained eighty-three thousand bacteria per cubic centimeter of the colon group. It showed gas fermentation in one ten thousandth of a cubic centimeter, approximately fifteen drops, and one streptococcus to one ten thousandth of a cubic centimeter. . . . It appears that the bacterium known as *B. coli* or colon bacillus originates in and is a normal constituent of the colon of all warm-blooded animals, is discharged in the excreta, and found in milk as the result of fecal contamination. When present in milk it always occurs from either direct or indirect fecal deposit therein;—directly from carelessness in permitting articles of feces to get into the milk during the process of extracting the milk from the cow, or in handling it afterwards; indirectly, from dust, vegetation, water and air, where the bacillus is found,—originally derived, however, from animal feces. The evidence discloses the state of the science to be that colon bacillus is a vegetable formation originating in animal intestines, and nowhere else. It is not found in air, dust, water, or vegetation under conditions indicating different origin, or its original derivation from the substances with which it is thus associated. Under favorable conditions colon bacillus will multiply and develop in milk with great rapidity. The present analysis, in the light of the evidence, reveals the presence of colon bacillus to have resulted from a direct deposit of feces in the milk, due to uncleanly methods in handling the milk. . . . This case was not prosecuted upon the assumption that bacteria as living vegetable organisms are in themselves either filthy, decomposed, or putrid; but upon the theory, as fully sustained by the evidence, that the bacteria constantly develop and die, causing filthy vegetable decomposition; that the colon bacilli and streptococci found in the milk established the presence of fecal matter; that streptococci, especially, are a menace to health; that whether the streptococci came into the milk through fecal deposit, or from a diseased condition of the cow or of those handling the milk, the vice is the same, and that these two groups of bacteria, especially, cause decomposition of the milk."

It was urged that since it is impossible to produce milk entirely free from bacteria, the statute imposes a duty impossible of performance and cannot, therefore, be applied to milk; or if possible of performance, it could only be complied with at so great a cost as to result in the destruction and confiscation of the business. The court said: "It is not clear from the evidence that the enforcement of the Act will produce this result. The

present case does not present this difficulty, except in theory, since the contamination was so great as to place it within the statute beyond the domain of speculation. Not only did the milk in question contain bacteria of the colon group, but, as incident thereto, fecal matter, all of which, it appears, may be eliminated by the adoption of cleanly methods in handling the milk. In fact, it appears that samples from the dairy of plaintiff in error have been analyzed, which were free from bacteria of the colon group. One witness testified that he 'has encountered milk, samples of raw milk, and samples of pasteurized milk, free from bacteria of the colon group; has seen samples of defendant's that did not contain them, milk sold as raw milk and analyzed on that assumption.' We are not dealing with a regulation relating to milk alone, but with an Act generally regulating the sale of food products. Milk is a food product; and if found to be impure, it will be held to be 'adulterated' within the provisions of the Act. There is evidence that it is impossible to produce raw milk which does not contain bacteria; that a limited number of bacteria in milk are practically harmless, and also that certain kinds of bacteria are in fact harmless. It is unnecessary to decide whether, under such circumstances, milk would be held to come within the Act, since in the present case adulteration is clearly established. The dividing line between pure and impure or adulterated food is in each instance a question of fact; but, because of the scientific distinctions involved, and the impossibility of producing raw milk entirely free from bacteria, it may be much more difficult of ascertainment in the case of milk than of other food products. Owing to the great difficulty which may be encountered in justly enforcing the law in the absence of a fixed standard defining what is marketably pure and impure milk, in a case where the adulteration consists alone in the presence of comparatively small numbers of so-called harmless bacteria, it may well be that Congress should give attention to this subject, as has been done in many of the states, and establish a fixed standard for marketable milk, whereby milk found to contain a greater number of bacteria than that fixed by the Act should come within the condemnation of the law. With the fact scientifically demonstrated that contaminated milk is a dominating factor in the propagation of tuberculosis, typhoid fever, scarlet fever, diphtheria, infantile diarrhea, and other diseases, the subject, in importance, is one of the first magnitude."

Cider vinegar.—Where samples of alleged pure cider vinegar showed only from .11 to .16 glycerin, it was held to be adulterated. *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

Confectionery.—The quantity of any of the prohibited adulterants used in confectionery is immaterial. It is not necessary that there be such a degree of adulteration as to show a purpose of deception on the manufacturer's part. A mere chemical trace, only to be detected by a skillful chemist, is adulteration within the meaning of the statute. *U. S. v. Boeckel*, (C. C. A. 1st Cir. 1915) 221 Fed. 885, 137 C. C. A. 455, wherein the court said: "Chrome yellow is a metal which is widely used as a yellow pigment and is an active poison. In declaring that confectionery containing this pigment or any of the liquors named should be deemed adulterated, Congress likewise refrained from making the question of adulteration depend upon the quantity which the confectionery contained, and plainly manifested an intention that confectionery containing any of these things should be deemed to be adulterated. The language of the statute being unambiguous, so far as it relates to the particular adulterants mentioned, its words must be given their ordinary meaning. When so construed, confectionery which contains any of the specific substances or liquors named is adulterated, without regard to the question whether in the particular case the amount of added adulterant indicates an intention to deceive, or is liable to injure health or morals. . . . It is also to be noted that in section 7 the word 'contain,' taken in connection with the words 'terra alba, barytes, talc, chrome yellow,' 'color,' 'flavor,' 'vinous, malt and spirituous liquors,' is used in a general and not in a restricted sense, and that confectionery may be found to contain any of the prohibited substances if they are used as a compound, a filler, a flavor, a pigment to color it internally or externally, a coating, or other similar purpose, and especially if they are purposely used, even in minute quantities, for these or other similar purposes."

Horse and mule feed.—Where a substance sold under the name "Corno Horse and Mule Feed" was contained in a package branded "Corno Horse and Mule Feed, Mixture of ground alfalfa, oats, corn, flax, bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois" — followed by a guaranteed analysis, such substance being a compound and so described on the package, it was held that it was not adulterated because it contained a quantity of oat hulls mixed and packed therewith in excess of the amount normally present in oat feed consisting of whole ground oats. *U. S. v. One Car Load Corno Horse Feed*, (1911) 188 Fed. 453.

Liquors.—Where there is no evidence of how the liquors were branded, and no evidence of their "strength, quality, or purity," except that they were colored and slightly sweetened by burnt sugar, they

cannot be held to be misbranded or adulterated. The court cannot take judicial notice that whisky cannot be colored and sweetened to some slight extent by burnt sugar without exceeding the limits of the standard prescribed by the Pure Food Act. *State v. Intoxicating Liquors*, (1909) 106 Me. 142, 76 Atl. 267.

Whisky, within the purview of this Act, is the product of sound grain, distilled at a low temperature so as to retain in the distillate the congeneric properties of the grain, which give to the liquor, when matured by aging in charred casks, its desirable potable character. Neutral spirits, which are distilled at a high temperature, may be made from different materials and do not contain such properties, and which are not rendered potable by aging, although reduced by water to potable strength, and from which most of the fusel oil has been removed, are not whisky nor a like substance with whisky. *Woolner v. Rennick*, (1908) 170 Fed. 662.

Vanilla.—"Flavor" and "extract" are not synonymous terms, and consequently the contents of a bottle labeled "Flavor of Vanilla" are not adulterated where the liquor does not contain any extract from the "vanilla bean," but does have a vanilla flavor. *U. S. v. St. Louis Coffee, etc., Mills*, (E. D. Mo. 1909) 189 Fed. 191.

Wheat.—In *Hall-Baker Grain Co. v. U. S.*, (C. C. A. 8th Cir. 1912) 198 Fed. 614, 117 C. C. A. 318, the facts were as follows: The H. Company, at Kansas City, Mo., on April 3, 1909, contracted to sell to the W. Company at Ft. Worth, Tex., 5,000 bushels of No. 2 red wheat, according to the Missouri official state grades. On April 29, 1909, the H. Company ordered the operator of a public elevator where it stored its grain to ship to the W. Company in fulfillment of this contract No. 2 red wheat. The operator loaded and sent to the W. Company a car of wheat. After this wheat was loaded, the official inspector of the state of Missouri at Kansas City inspected, adjudged, and certified this wheat to be No. 2 red wheat. An invoice of it was forwarded to the W. Company dated May 3, 1909, showing that it was shipped under the contract of April 3, 1909, and subject to Kansas City weights and grades. The wheat arrived in Texas without change. The Texas inspector, the federal inspector, and other witnesses there found it to be, and it was, wheat of another and less valuable grade. None of the officers or employees of the H. Company had any knowledge of this fact, or anything to do with the grading or shipping, except to order the operator of the public elevator to ship No. 2 red wheat. It was held that the H. Company was not guilty of misbranding or of adulteration within the meaning of sections 7 and 8 of the Pure Food Act. The court said: "The Act

of Congress was not enacted to catch and punish merchants who are conducting their business by customary and approved methods with no intent to deceive purchasers or to injure the public health, for the mistakes of third persons over whom

they have no control, nor for trivial errors of their own, which at first blush may seem to bring their action within the inhibition of the law, but by which in reality they violate neither its letter nor its spirit."

SEC. 8. [Misbranding defined.] That the term "misbranded," as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded.

[Drugs.] In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any substances contained therein.

Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic [*sic*] effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The foregoing "third" paragraph, known as the "Sherley Amendment," was added by an Act of Aug. 23, 1912, ch. 352, 37 Stat. L. 416.

[Food.] In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucane [*sic*], chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.

As originally enacted the third paragraph of this subdivision was as follows:

"Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package."

This was struck out and the paragraph given as "third" in the text inserted in lieu thereof by an Act of March 3, 1913, ch. 117, § 1, 37 Stat. L. 732, the second section of which provided as follows:

"SEC. 2. That this Act shall take effect and be in force from and after its passage: *Provided, however,* That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign products imported prior to eighteen months after its passage."

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided,* That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further,* That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding. [34 Stat. L. 769, as amended by 37 Stat. L. 416, 732.]

Validity of state statutes on subject of misbranding.—The Food and Drugs Act does not require food labels to disclose ingredients and, therefore, state statutes may supply this. *Savage v. Jones*, (1912) 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182, wherein it was held that an Indiana statute providing for the disclosure of ingredients of feeding stuffs coming from another state and sold in the original packages, did not conflict with the United States statutes on the subject of foods and drugs. The court said: "It will be observed that in its enumeration of the acts which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article 'for the purposes of this Act' shall be deemed to be misbranded if the package or label bear any statement, design or device regarding it or the ingredients or substances it contains, which shall be false or

misleading (§ 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal Act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (§ 8). Congress has thus limited the scope of its prohibitions. It has not included that

at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the Act that 'nothing in this Act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding' (§ 8). We have already noticed the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the Act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions." See also *Standard Stock Food Co. v. Wright*, (1912) 225 U. S. 540, 32 S. Ct. 784, 56 U. S. (L. ed.) 1197. Compare *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 49 L. R. A. (N. S.) 984, *reversing* (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315. This case had to do with the validity of the Wisconsin statute of 1907 providing that glucose labels must read "Glucose Flavored with Sugar Syrup," etc., and that the package should bear no other label. At and before the adoption of the law of 1907 the complainant had labeled its goods under the federal Food and Drugs Act as made up of corn syrup and refiners' syrup, and the Wisconsin law therefore required the removal of such labels. This feature was held to interfere with the federal law making labels within the meaning of the Act evidence of branding or misbranding and making a true label complete protection to the dealer from seizure of his goods or criminal process against him.

In *Corn Products Refining Co. v. Weigle*, (W. D. Wis. 1915) 221 Fed. 988, it was held that the Wisconsin statute of 1913 requiring the display of names of ingredients was invalid as applied to sales in interstate commerce, because in direct conflict with this Act, and must be restricted in its operation and applied to purely internal concerns. It was contended that the statute was passed under the authority

to require the display of names, expressly sustained in *Savage v. Jones*, (1914) 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182. In its comprehensive discussion of the question the court said: "Can the purpose of the federal law be accomplished without denying to the state the power to finally decide what shall be a misbranding? Is the repugnance or conflict between the two statutes so great that they cannot possibly be reconciled or stand together? *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92, 47 U. S. (L. ed.) 108; *Savage v. Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182. If so, the Wisconsin law must either be held void as a whole or restricted to purely internal concerns." Making parallel references to the federal and the state statutes, the court continued: "These laws cover the same precise field. Both deal with the rights, duties, and liabilities growing out of food brands. The two statutes operating upon the same subject matter prescribe different rules. There seems to be direct, immediate and irreconcilable conflict. In this field a common sovereignty or co-dominion exists, under which the state may compel the disclosure of ingredients, or exert any other power not already exercised by Congress. The latter having added sanctions for misbranding and adulteration, those prescribed by the former become simply inapplicable to complainant, although in full force as to commerce wholly within the state, probably also to dealers using trade marks or names. While the national law does not compel the disclosure on a label of the ingredients of the article, yet it is obvious that if such disclosure is actually made, either by voluntary act of the seller under Regulation 17 or pursuant to local law, it must be truthful, and that the question whether it is false or misleading in any particular is one of federal law alone."

"Package" or its equivalent expression as used by Congress in this section in defining what shall constitute misbranding within the meaning of the Act, clearly refers to the immediate container of the article which is intended for consumption by the public. *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, *reversing* (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

This section is not void for uncertainty as applied to an indictment for misbranding wines, for not establishing a standard for the various wines enumerated in the indictment. *U. S. v. Sweet Valley Wine Co.*, (N. D. Ohio 1913) 208 Fed. 85, wherein the court said: "Respecting the second ground of the demurrer, the argument as stated in the brief of counsel is as follows: 'Our second ground of demurrer goes to all the five counts of the indictment, and it is

that the said Act of Congress is void as applied to this particular case because it fails to fix standards for the various wines enumerated in said counts. We do not contend by this ground of demurrer that the said Act of Congress is unconstitutional as applied to other cases, but what we maintain is that it is void for uncertainty and indefiniteness as applied to this case.' And to that point are cited a number of cases in which the proposition is urged that a penal act is void for uncertainty in which the offense depends, 'not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be as variable and uncertain as the views of the different juries may suggest, and as to which nothing can be known until after the commission of the crime.' This citation is typical of other authorities depended upon by counsel for defendant. They are cases in which the question of what is a just and reasonable rate or toll of compensation for the transportation of passengers or freight is left open to determination by the various tribunals before which the case comes by the statute which makes an undue charge an offense. Again we say that the words used both in the statute and in this indictment must be given their ordinary and common meaning in the absence of something to demand a special definition. The word 'wine' is, by general acceptance and standard definition, understood to mean the fermented juice of the undried grape. The contention of the defendant would make it practically impossible for Congress to pass an Act to correct the evils at which this statute is aimed, for the reason that it would be necessary not only to amplify the act with very particular and minute definitions of standards, but to be constantly amending it and supplementing it as new devices and compounds were placed upon the market. All that can be done, granting that Congress has the right to strike at the evils in question, is to pass a statute in general terms, using words of ordinary acceptance."

Misbranded at time of seizure.—A drug is not adulterated or misbranded so as to be subject to condemnation unless adulterated or misbranded at the time of seizure, and hence, where *asafoetida* below the prescribed test and misbranded was received in interstate commerce and tested and correctly branded before seizure, it was not subject to forfeiture. *U. S. v. Five Boxes Asafoetida*, (1910) 181 Fed. 561.

Words given ordinary meaning.—The names intended by the pure food law to be used on brands or labels are names readily understood and conveying to the general public definite and familiar ideas as to the character or quality of the

article branded, even though such names may be inaccurate in the view of a chemist, or physicist, or an expert in some particular industrial art. (1908) 26 Op. Atty-Gen. 474.

Labels on drugs—Necessity.—This Act not only requires that drugs shipped in interstate commerce and labeled shall not be misbranded, but also requires that they shall be labeled with labels conforming to its requirements. *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, affirmed *U. S. v. Knowlton Danderine Co.*, (1910) 175 Fed. 1022, 99 C. C. A. 667.

Meaning of "label."—The word "label," as used in this Act, which requires packages of drugs shipped in interstate commerce to bear a statement on the label of the quantity or proportion of any alcohol, etc., means a descriptive paper affixed to the package, which must include the statement of how much alcohol, etc., is contained in the package. *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, affirmed *U. S. v. Knowlton Danderine Co.*, (1910) 175 Fed. 1022, 99 C. C. A. 667.

Labeling of deteriorated drugs.—Where a drug is not sold under a name recognized in the United States Pharmacopoeia, a general statement on the label that its quality has deteriorated and that it has been condemned for sale under R. S. sec. 1241 (see WAR DEPARTMENT AND MILITARY ESTABLISHMENT), would be a sufficient compliance with the Food and Drugs Act, and would show that it was not sold under any professional standard, and could not be deemed either adulterated or misbranded under sections 7 and 8 of that Act. Where a drug is sold under a name recognized by the United States Pharmacopoeia, a mere general statement of the character of the drug, showing only the fact of its deterioration, is insufficient; and in order that it may not be deemed adulterated, its actual strength, quality, or purity should be stated on the label of each bottle, box, or other container in which the goods are intended to reach the consumer. (1908) 26 Op. Atty-Gen. 546.

Derivative of drugs.—This Act requires that the label on drugs bear the name not only of the original substance but its derivative, and therefore a label on anti-kamnia tablets containing acetphenetiden is insufficient although it states that the tablets contain acetphenetiden and the proportion of the substance, if it fails to state that the substance is a derivative of acetanilid. *U. S. v. Antikamnia Chemical Co.*, (1914) 231 U. S. 654, 34 S. Ct. 222, 58 U. S. (L. ed.) 419, Ann. Cas. 1915A 49, reversing (1911) 37 App. Cas. (D. C.) 343.

The word "derivative" in this subsection should be understood in its chemical sense. (1909) 27 Op. Atty-Gen. 143.

Compliance with federal law, by whom determined.—Whether labels comply with the federal law is not for a state to determine, but is for the federal courts on proper proceedings being instituted. *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754 Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, *reversing* (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

Statement of inside circulars.—This Act merely embraces any statement, design, or device regarding an article which appears on the outside of the package in which the article is offered for sale, whether such statement is printed on or otherwise affixed to the package, or impressed on a separate label affixed to the package, but does not include an advertising circular inclosed with an article inside the carton in which it is offered for sale. *U. S. v. American Druggists' Syndicate*, (1911) 186 Fed. 387.

"A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda-water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either 'misleading' or 'false,' as it is in fact distinctive. But unless the name is truly distinctive, the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale 'under the distinctive name of another article.' Thus, that which is not coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called 'X's Coffee.' Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of 'Y's Lemon Extract.' The name so used is not 'distinctive' as it does not appropriately distinguish the product; it is an effort to trade under the name of an article of a different sort. So, with respect to 'mixtures of compounds,' we think that the term 'another article' in the proviso embraces different compounds from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound cannot secure protection as a 'distinctive name.' A 'distinctive name' may also, of course, be purely arbitrary or fanciful, and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive." *U. S. v. Coca Cola Co.*, (1916) 241 U. S. 265, 36 S. Ct. 573, *reversing* (*E. D. Tenn.* 1911) 191 Fed. 431. (*C. C.*

A. 6th Cir. 1914) 215 Fed. 535, 132 C. C. A. 47.

A "distinctive name" within the meaning of this section, is not limited to designations that are purely arbitrary or fanciful and which do not contain the names of the elements of which the compound is composed. "Canadian Club Whisky," which is the name of a whisky composed of two separate and distinct distillates of grain, is such a distinctive name and is so arbitrary and fanciful as clearly to distinguish it from all other whisky or similar product and need not be labeled "a blend of whiskies" under the provisions of this section. (1910) 28 Op. Atty.-Gen. 455.

Offering for sale under distinctive name—principal and agent.—This section defines misbranding as, *inter alia*, "offering an article for sale" under the distinctive name of another article, even though no label describing it as such other article be actually affixed to it, and since intent is not an element of the offense a principal may be held liable for an act of his sales agent although he had told him not to misdescribe the article. *Weeks v. U. S.*, (*C. C. A. 2d Cir.* 1915) 224 Fed. 64, 139 C. C. A. 626.

Misleading statements as to curative effects—Generally.—Prior to the Sherley amendment of 1912, which is the third subdivision under *Drugs*, *supra*, p. 379, it was held that false and misleading statements in the labels on a proprietary medicine as to its curative or remedial effects, but which did not import any statement concerning identity, did not constitute "misbranding," within the meaning of section 8. *U. S. v. Johnson*, (1911) 221 U. S. 488, 31 S. Ct. 627, 55 U. S. (L. ed.) 823, *affirming* (*W. D. Mo.* 1910) 177 Fed. 313; *U. S. v. American Druggists' Syndicate*, (1911) 186 Fed. 387.

Constitutionality.—The Sherley amendment is constitutional. Seven Cases of *Eckman's Alternative v. U. S.*, (1916) 239 U. S. 510, 36 S. Ct. 190, wherein the court said: "The principal question presented on this writ of error is with respect to the validity of the amendment of 1912. So far as it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reversal powers of the states, the objection is not to be distinguished in substance from that which was overruled in sustaining the white slave act, 36 Stat. at L. 825, chap. 395 [see *WHITE SLAVE TRAFFIC*]. *Hoke v. U. S.*, 227 U. S. 398, 57 U. S. (L. ed.) 523, 43 L. R. A. (N. S.) 906, 33 S. Ct. 281, Ann. Cas. 1913L 905. There, after stating that 'if the facility of interstate transportation' can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from 'the

systematic enticement of and the enslavement in prostitution and debauchery of women,' the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations." See to the same effect *United States v. American Laboratories*, (E. D. Pa. 1915) 222 Fed. 104, wherein the court held that it was within the power of Congress to make the act of publishing false and fraudulent statements as to the curative properties of a medicine, a crime.

Circulars contained in a package are affected by the Sherley amendment. Seven Cases of *Eckman's Alterative v. U. S.*, (1916) 239 U. S. 510, 36 S. Ct. 190, wherein the court said: "It is urged that the amendment of 1912 does not embrace circulars contained in the package, but only applies to those statements which appear on the package or on the bottles themselves; that is, it is said that the word 'contain' in the amendment must have the same meaning in the case of both 'package' and 'label.' Reference is made to the original provision in the first sentence of § 8 with respect to the statements, etc., which the package or label shall 'bear.' And it is insisted that if the amendment of 1912 covers statements in circulars which are contained in the package, it is unconstitutional. Such statements, it is said, are not so related to the commodity as to form part of the commerce which is within the regulating power of Congress. But it appears from the legislative history of the act that the word 'contain' was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package, and we think that is the fair import of the provision. Cong. Rec. 62d Cong. 2d Sess. vol. 48, part 11, page 11,322. And the power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is *on* or *in* the package which is transported in interstate commerce."

The phrase "*false and fraudulent*" in the *Sherley amendment* must be taken with its accepted meaning, and then it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive, an intent which may be derived from the facts and circumstances, but which must be established. Seven Cases *Eckman's Alterative v. U. S.*, (1916) 239 U. S. 510, 36 S. Ct. 190, wherein the court said: "That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the

effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge and may be held to good faith in their statements. . . . It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity."

Proof of intention.—Intent not to deceive is immaterial. *U. S. v. Thirty-Six Bottles of London Dry Gin*, (C. C. A. 3d Cir. 1914) 210 Fed. 271, 127 C. C. A. 119, wherein the court said: "The Food and Drugs Act nowhere requires proof of intention by the use of the words 'knowingly,' 'wilfully' or such like words." And quoting the language of the statute relative to the misbranding of food the court continued: "This language clearly means if the label deceives or misleads the purchaser; if the purport of the label be that it is a foreign product when it is not so. This the label, and the label alone, must determine. The intention of the user to deceive is of no consequence. The act strikes at deceiving the public by selling them one thing when they desire to purchase another. As has been frequently said by courts, the purchaser has the right to choose for himself what he will purchase, and, when he has purchased, the right to receive that which he desires and not something else. It would be destructive of the act, nullify it entirely, to allow the intent of the maker to be considered as a defense. We believe the decided cases sustain the principle that the intent is not a necessary ingredient in the determination of the case."

Compounds — Generally.—When the words "compound" or "compounded" are used in this Act, it is ordinarily necessary that two substances at least should be mentioned as entering into the combination described, as, for instance, "sherry compounded with port" or "port compounded with sherry," or "compounded port and sherry." It is not, however, universally true that two substances must follow "compound" or "compounded," although it is true that only one substance can appropriately follow "blend" or "blended." A combination of whisky with ethyl alcohol, supposing, of course, that

there is enough whisky in it to make it a real compound and not a mere semblance of one, may be fairly called "whisky," provided the name is accompanied by the word "compound" or "compounded," and a statement of the presence of another spirit is included in substance in the title; it cannot, however, properly be styled "blended whisky." (1907) 26 Op. Atty-Gen. 216.

Compounds known as articles of food can be sold under their own distinctive name so long as no deleterious matter is put into the product, and the label states where it is manufactured, and it is not an imitation sold under the distinctive name of another article. *U. S. v. One Car Load Corno Horse Feed*, (1911) 188 Fed. 453.

In the case of a "compound" it is not a compliance with the section merely to mark the word "compound" on the package, but the substances composing the compound must be indicated. *Henning v. U. S.*, (C. C. A. 5th Cir. 1912) 193 Fed. 52, 113 C. C. A. 382.

Honey and corn syrup.—A food product labeled, "Compound: Pure Comb and Strained Honey and Corn Syrup," is not "misbranded" within the meaning of this section merely because the percentage of corn syrup in the compound largely exceeds that of honey. *U. S. v. Boeckmann*, (1910) 176 Fed. 382.

Molasses and corn syrup.—An article of food put up and sold in cases bearing principal labels describing the contents as a particular brand of molasses, but plainly stating in three separate places that the product is a compound of molasses and corn syrup, and also giving all the other information required by this Act and the regulations thereunder, and such article being in fact a compound of molasses and commercial glucose, is not adulterated or misbranded, within the meaning of this Act; it being shown that it contains nothing deleterious to health, and that under the rulings of the department it is permissible to describe commercial glucose on labels or brands as made from corn syrup. *U. S. v. Seven Hundred and Seventy-Nine Cases Molasses*, (C. C. A. 1909) 174 Fed. 325, 98 C. C. A. 197.

"Compound" and "blend" distinguished.—The words "compound" or "blend" are substantially synonymous, in ordinary speech, when applied to mixtures or liquids; but the pure food law establishes a distinction of its own between them, based upon the character of the ingredients entering into the mixture. Thus the intent of this Act is that the term "blended sherry," for instance, or "blend of sherries," shall designate a mixture of two or more kinds of sherry; while the titles "compound of port and sherry," or "compounded port and sherry," would appropriately designate a mixture of two substances, unlike in the view of the law, namely, two distinct and different kinds

of wine—"unlike" in the sense that diamonds and coal are unlike. So a mixture of two or more different whiskies, whether their differences arise from the character of the substances from which they are distilled or from the method of distillation used, or even from their several ages and the environment in which they are kept subsequently to distillation, would be appropriately termed a "blend of whisky," or "blended whisky," or "blended whiskies," any one of which would be correct, provided each article entering into the combination, standing alone, could be properly designated as "whisky." While a mixture of a spirit properly designated "whisky" with another spirit, which standing alone could not be properly designated as "whisky," such as ethyl alcohol, must be labeled or branded as a "compound" or as "compounded." (1907) 26 Op. Atty-Gen. 216.

"Blend."—The evident intent of the statute was to confine the use of the word "blend" to one kind of mixture and to forbid its use for another; and since, as to whisky, such mixture must be either composed of two different kinds of whisky, or of whisky with one other substance generally mixed with it, namely, ethyl alcohol, it is clear that Congress intended to deny the designation "blend" to a mixture of whisky and ethyl alcohol. (1907) 26 Op. Atty-Gen. 262.

In what may be termed a "blend" of, or "blended," wines or whiskies, the two articles mixed must be capable of accurate and sufficient description by a single generic term; they must be substances known by the same name and sufficiently distinctive to afford reasonable warning to purchasers. (1907) 26 Op. Atty-Gen. 216.

Vinegar, which was in fact distilled vinegar to which a small quantity of pure boiled apple cider had been added for coloring, which was labeled as "Saratoga Brand vinegar, a blend of pure boiled apple cider and distilled vinegar," was held to be misbranded as misleading the public to believe that it was composed of pure boiled apple cider vinegar and distilled vinegar. *U. S. v. Ten Barrels Vinegar*, (1911) 186 Fed. 399.

In *U. S. v. Sixty-Eight Cases Syrup*, (1909) 172 Fed. 781, it appeared that certain cases containing syrup seized by the United States were branded and labeled "Western Reserve Ohio Blended Maple Syrup, guaranteed absolutely pure, shipped by Western Reserve Syrup Company, Cleveland, Ohio." The bottles were labeled and branded "Western Reserve Ohio Blended Syrup, Western Reserve Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar." It was held that, construing all the words of the bottle labels together, the same meaning was intended as in the labels on the cases, namely, that the bottles and the boxes contained blended maple syrup.

In *U. S. v. Scaplon*, (1908) 180 Fed. 485, it appeared that the defendant manufactured syrup from cane sugar, flavored to represent maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup," the words "Ohio" and "Maple Syrup" being in red, and between them the word "Blended," and then below that, in smaller type, the statement, "This syrup is made from the sugar maple tree and cane sugar." It was held that the label was misleading, in that purchasers would ordinarily understand that the article contained in part maple syrup made from the boiled-down sap drawn from live maple trees, and that defendant was therefore guilty of misbranding. The court said: "It is not a question of chemistry in this case, any more than it is with butter. It is a question of what is the popularly recognized definition of maple syrup; and that undoubtedly is, and we do not need the chemists to testify to it, that it is the syrup produced from boiling down the sap that flows in the spring of the year from the live maple tree. It has a certain consistency, and of course a certain specific gravity, which a chemist can tell us about; but those persons who have used it know in a general way when it has a proper consistency and a proper specific gravity, as they certainly do whether it has the proper flavor."

Misbranding as to terms of weight and measure.—The use of the words "quarts," "half gallon," etc., on cartons or other receptacles which actually contain smaller quantities, is misbranding within the meaning of the third subdivision under *Food*, supra, p. 379, although such label is intended to be merely descriptive and to state approximately the quantity in liquid or solid measure nearest the indicated size of the package. Such labels intended to indicate "commercial" quarts, half-gallons, etc., are clearly within the prohibition of the statute. *U. S. v. Rigney*, (E. D. 1915) 220 Fed. 734, wherein the court said: "There is nothing before the court, and no authority in dictionary, textbook, or statute, to vindicate or uphold the establishment of a different system of liquid and weight measures than those sanctioned by law and general use, even though a lax and vicious reduction in quantity, as a matter of trade practice, is frequently found when no legal prohibition exists."

Illustrations of misbranding — *Salad oil*. — A can containing sesame oil and bearing a label reading "Imported Salad Oil Morel Brand" is not misbranded, as the label does not import that the can contains olive oil. *Von Bremen v. U. S.*, (C. C. A. 2d Cir. 1912) 192 Fed. 904, 113 C. C. A. 296.

Salad oil *prima facie* means olive oil,

and in the absence of evidence that the term has recently acquired a more general meaning to include other oils, its use without further explanation on packages of cotton-seed oil shipped in interstate commerce constitutes a misbranding. *Brina v. U. S.*, (1910) 179 Fed. 373.

The words "*pure pepper*" used on boxes containing a combination of ground black pepper and ground piper longum were held to amount to misbranding. *U. S. v. Seventy-Five Boxes of Alleged Pepper*, (D. C. N. J. 1912) 198 Fed. 934.

"*Hudson's Extract*." — Where there is no proof that the words "Hudson's Extract" have a well-known meaning, an imitation of vanilla marked "Hudson's Extract," without giving any indication as to what the article is composed of, shows a clear case of misbranding under the pure food law. *Hudson Mfg. Co. v. U. S.*, (C. C. A. 5th Cir. 1912) 192 Fed. 920, 113 C. C. A. 625.

Coffee. — The use of the geographical name "Mocha" in connection with the sale of coffee grown in Abyssinia was declared to be a misbranding under a rule adopted by virtue of section 3, in *U. S. v. Thomson, etc., Spice Co.*, (N. D. Ill. 1912) 198 Fed. 565. In this case the defendant company was charged with a violation of the misbranding section of the pure food law, in that there had been the use of the geographical name "Mocha" in connection with the sale of coffee grown in Abyssinia. Against the defendant it was urged the word "Mocha" could lawfully be used only to designate coffee grown in Arabia. The court said: "The facts are that on one side of the Red Sea is Arabia and on the other side is Abyssinia. Coffee is, and for centuries has been, grown in both of these countries. Up to about 200 years ago practically all of the Arabian product and a portion of the Abyssinian product was shipped out through the port of Mocha, located on the Arabian side of the Red Sea. Because of this fact, this coffee was called Mocha. At that time, owing to the formation of a sand bar obstructing the entrance to the harbor of Mocha, that port ceased to be the point of shipment for the coffee product, and since that time it has come out mainly through the port of Aden, in Arabia. This is the case now with respect to both the Arabian and Abyssinian product, as it was up to 200 years ago with respect to both products at the port of Mocha. The pure food regulation adopted under the authority conferred by the pure food law is as follows: '(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when, by reason of long usage, it has come to represent a generic term, and is used to indicate a style, type, or brand; but in such cases the state or territory where any such article is manufactured or produced shall be stated upon

the principal label.' It will be observed that Mocha is not a place where the coffee is manufactured or produced. As above stated, it is merely the port through which originally the coffee referred to found its way to market. This being true, the above regulation plainly requires the use of the word 'Abyssinian' in connection with the word 'Mocha' to cover coffee grown in Abyssinia, as the same law requires the use of the word 'Arabian' in connection with 'Mocha' to cover coffee grown in Arabia. In view of the fact that it was agreed on all sides that this case was brought as a test to determine this question, the minimum penalty of \$1 will be imposed."

Hair tonic.—See *Armour v. Wanamaker*, (C. C. A. 3d Cir. 1913) 202 Fed. 423, 120 C. C. A. 529, wherein the court said: "The proofs on behalf of the plaintiffs, which was the only testimony in the cases, tended to show that Mrs. Armour, the decedent, a few days before her death, bought in defendant's store in Philadelphia, hair tonic contained in a bottle closed with a tight, ground glass stopper. The bottle was labeled as being an 'Extract from Herba, Roots and Flowers,' but in reality about 60 per cent. to 80 per cent. of it was alcohol. Under the legislative definition of section 8 of the federal Food and Drug Act of 1906, this bottle was misbranded, in that said section provides that there is a misbranding, in case of drugs, . . . if the package fail to bear a statement of the quantity or proportion of any alcohol . . . contained therein. The proofs also tended to show that, in further contravention of the provisions of section 2 of said act, which provides that the introduction into any state . . . from any other state . . . of any . . . drugs, . . . which is misbranded, is hereby prohibited, the defendant delivered said misbranded bottle to the purchaser's home in New Jersey. The omission of the defendant to properly brand, as required by statute, this bottle as containing alcohol, and the introduction of the package into an interstate commerce prohibited by the act, clearly afforded competent evidence for submission to a jury on the question of defendant's negligence. The principle is clear that the omission to fulfill a statutory imposed obligation creates statutory negligence."

"*London Dry Gin*" appearing on a label affixed to a bottle containing gin is not a descriptive phrase which points to the place of origin, but describes a well known liquor having certain characteristics that identify it wherever it may be made, and the fact that the liquor is not made in London does not show that the bottle is misbranded. *U. S. v. Thirty-Six Bottles London Dry Gin*, (E. D. Pa. 1913) 205 Fed. 111.

Bottles labeled "Grenadine Syrup" were held on the evidence not to have been misbranded. *U. S. v. Thirty Cases Grena-*

dine Syrup, (D. C. Mass. 1912) 199 Fed. 932.

Champagne.—Bottles with labels thereon representing the contents to be champagne, which representation is false, may be forfeited for misbranding. *U. S. v. Five Cases Champagne*, (N. D. N. Y. 1913) 205 Fed. 817.

Canned fruit.—In *U. S. v. One Hundred Cases Tepee Apples*, (1908) 179 Fed. 985, it appeared that the claimants operated a canning factory in Benton Harbor, Mich., where fruits grown in Michigan, as well as in other states, were canned and prepared for sale. The claimants canned certain "tepee" apples and blackberries grown in Arkansas, sold under a label on which was printed: "Tepee Apples [or Blackberries, as the case might be]. Packed by C. H. Godfrey & Son, Benton Harbor and Water-vliet, Michigan." There was evidence that Michigan apples and blackberries were better than those grown in Arkansas. It was held that the labels indicated that the fruit was grown in Michigan, and that claimants were therefore guilty of misbranding.

Coca Cola.—In *U. S. v. Coca Cola Co.*, (1906) 241 U. S. 265, 36 S. Ct. 573, *reversing* (E. D. Tenn. 1911) 191 Fed. 431, C. C. A. (6th Cir. 1914) 215 Fed. 535, 132 C. C. A. 47, it was held that on the evidence it could not be said as matter of law that the name "Coca Cola" was not primarily descriptive of a compound with coca and cola ingredients and hence not a misbranded article.

Condensed skimmed milk.—Where it was shown that a food product containing forty-two per cent of cane sugar which was not indicated on the label was sold under the name of "Condensed Skimmed Milk" and it appeared that there were on the market many brands of sweetened skimmed milk which were labeled "sweetened," and many other brands containing no sugar labeled "unsweetened," such food product was held to be adulterated and misbranded. *Libby v. U. S.*, (C. C. A. 4th Cir. 1913) 210 Fed. 148, 127 C. C. A. 14.

"Fruit Wild Cherry Compound."—An article of food labeled "Fruit Wild Cherry Compound" is misbranded if it consists chiefly of an imitation wild cherry essence artificially colored, but not if the dominant element is genuine fruit wild cherry, for "compound" indicates that the "fruit wild cherry" is in composition or combination with something else. *U. S. v. Weeks*, (S. D. N. Y. 1912) 225 Fed. 1017, wherein the court said: "Assuming that the article does not contain any added poisonous or deleterious ingredients, there is nothing to prevent the combination of fruit wild cherry with an imitation wild cherry essence, and it is obvious that the purchaser is at once notified by the title that the article in question does not consist wholly of fruit wild cherry, but that fruit wild cherry is only one of the ingredients, in combination with

other ingredients. The government asks me to hold that the ingredients of the compound must be stated on the package. I find no warrant in the statute for any such holding. The statute was carefully drawn after extended discussion, and certainly if Congress had intended that the ingredients of a compound should be set forth upon the label, the statute would have so stated. I have not overlooked the case of *Henning v. U. S.*, (C. C. A. 5th Cir. 1912) 193 Fed. 52, 113 C. C. A. 382. In the report of that case there is nothing to indicate how the label read, and for all I know it may have been subject to the criticism for use of the word 'compound' as in the *Frank* case, or there may have been some other fact which contributed to the decision. The statement under this count that the article had been colored in a manner whereby inferiority is concealed is of no consequence. The coloring may have been the proper and natural result of the combination. There is in this count no allegation of artificial coloring. For the reasons briefly outlined, the demurrer to this count is sustained. The second count refers to the same label, but here it is stated that the article consists chiefly of imitation 'wild cherry essence artificially colored.' This, to my mind, presents an entirely different situation. I think the phrase or name 'Fruit Wild Cherry Compound' conveys to the mind a representation that the dominant element in the combination is genuine fruit wild cherry, and that to this genuine fruit wild cherry has been added something else, for instance, in the nature of an essence or extract, which, in combination with the genuine fruit wild cherry, makes the 'Fruit Wild Cherry Compound.' Of course, the purpose of the statute as to misbranding was to prevent deception of the public, and if it be shown that the dominant element in this compound is the imitation essence, and not the fruit, then it seems to me the statute has been violated. In this count the statement is made that the article consists chiefly of an imitation 'wild cherry essence artificially colored.' When I use the expression 'dominant,' I do not mean that necessarily the fruit wild cherry must be greater in volume than the imitation essence. Sometimes one element of combination, by reason of its character and strength, even if smaller in quantity than another element, may nevertheless control the character of the combination. This, and questions relevant to it, can best be developed on the trial, when the court and jury will have the benefit of expert explanation."

Lemon, etc.—An article labeled "Special Lemon. Lemon Terpene and Citral" was held not misbranded in *Weeks v. U. S.*, (C. C. A. 2d Cir. 1915) 224 Fed. 64, 139 C. C. A. 626, wherein the court said: "The second information deals with a different article, labeled 'Special Lemon. Lemon

Terpene and Citral." The first count charged that the article was misbranded; that the label was misleading, in that the statement would indicate that the article was a product derived from lemon, whereas the product was not a product derived from lemon but was a mixture containing alcohol and citral derived from lemon grass and an imitation of lemon oil. The article seems not to be covered by the proviso, because the word 'compound' is not 'plainly stated on the package in which it is offered for sale.' The question is: Was the label false and misleading? It obviously indicated that the so-called 'Special Lemon' was a compound of which lemon terpene and citral were components. The words 'special Lemon' do not, of course, import that the article was 'lemon,' a word which in ordinary speech denotes the fruit of a well-known citrus tree. There is no testimony that this word, standing by itself, has any distinctive trade meaning; there are lemon oils, lemon extracts, lemon juice, lemon essence, etc. The use of the words 'special lemon' does not import any representation that the article is a variety of lemon oil. The testimony shows that lemon terpenes are the oily part—the hydro-carbon oils of the lemon, of the lemon peels; they are a by-product from the manufacture of lemon flavor. Citral is derived from lemon grass, a grass that grows in the East Indies. Where we have a label which indicates that the contents of the package consists of a compound of lemon terpene and citral, which compound the manufacturer designates as 'Special Lemon,' and the contents agree with the designation, we do not see how it can be held that there has been a misbranding within the meaning of the act."

Liquors.—Where bottles containing intoxicating liquors were labeled as containing Monogram whisky, and were marked "Blend," and the alcoholic content was less, and the residuum from 100 cubic centimeters was more, than the standard test prescribed by sections 6 and 7 of this Act, it was held that they were "misbranded and adulterated." *State v. Intoxicating Liquors*, (1909) 106 Me. 135; 76 Atl. 268.

In *Bonnie v. Bonnie*, (1914) 160 Ky. 487, 169 S. W. 871, it appeared that certain whisky labeled as "whisky" was a blend of two or more straight whiskies of different ages, and the question arose whether there was a misbranding, it being insisted on one side that only whiskies of the same distillation were entitled to be labeled "straight whisky" or "whisky." The question was not answered.

Macaroons.—In *Washburn v. U. S.*, (C. C. A. 1st Cir. 1915) 224 Fed. 395, 140 C. C. A. 81, it was held that whether an article of food labeled "macaroons" was misbranded by the fact that such article

contained glucose depended on whether the jury found that glucose was an ingredient of macaroons. If it was not, then a misbranding occurred.

Macaroni.—In *U. S. v. Two Hundred and Sixty-Seven Boxes of Macaroni*, (W. D. Pa. 1915) 225 Fed. 79, the question involved was whether the labeling of each of many boxes of macaroni was misbranding as conveying the impression that the macaroni, which was in fact a domestic product, was foreign. The label read as follows: "Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg. U. S. A." It was held that a misbranding was shown. The court said: "The answer filed admits the material facts and allegations contained in the libel, except that it is denied that the macaroni is misbranded. The question thus raised is whether the product was misbranded; i. e., labeled so as to mislead the purchaser by conveying the impression that the goods are of foreign manufacture. The language of section 8, subsection 2 [*Food, supra*, p. 379], of the act of Congress, is: 'If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.' Some testimony was offered on behalf of the government, by persons familiar with the trade, to the effect that the label would mislead the average purchaser by conveying the impression that it was a foreign product. Some evidence was also offered by the respondents that it would not convey that impression. The court must determine the issue mainly by an inspection of the label itself. It has been held that it is not important whether the manufacturer did or did not intend to deceive. The purpose of the act is to protect the people from deception by selling him one thing when the purchaser desires to purchase another. The intention of the maker is therefore not an element in the case. . . . Turning to the label itself, we find from its appearance that it is very distinctly Italian. The label proper is of the dimensions of 8½ inches by 6¼ inches, bearing pictorial representations of three persons, a dining scene, etc., with a very narrow white margin, from one-eighth to one-sixteenth of an inch in width. The name of the manufacturer and the place where the macaroni is made do not appear. Nearly all of the wording on the label proper is in the Italian language. The exceptions are in the use of the words 'Vitello Brand' and 'Italy Method.' Between the words 'Vitello' and 'Brand' is the picture of a cow or calf. The testimony shows that the word 'Vitello' is the Italian word for calf. The words 'Torre Annunziata' are the name of a city in Italy where it appears macaroni is extensively manufactured. There is no doubt that the

general purchaser, looking at that label, with its distinctly Italian caste and written in the Italian language, with nothing whatever thereon to indicate that it was of American manufacture, would at once conclude that it represented a foreign, and, in this case, an Italian product. It is claimed that the letters 'Mfg. U. S. A.' in small type within less than an inch of space, on the very narrow white margin on the lower edge of the label, would be notice to the purchaser of the fact that the product was manufactured in America. It seems clear to the court that the makers did not intend *bona fide* to convey such notice to the purchaser by the use of these letters, but rather that they were endeavoring to protect themselves from the charge of violating the act of Congress. If it was intended that the purchaser should be informed as to where the food product was manufactured, certainly some words sufficiently conspicuous would be placed upon the label to strike the eye of the purchaser and convey the desired information. I do not think that the letters on the margin which I have quoted save the label or brand from the charge that it deceives and misleads the purchaser and purports to be a foreign product when not so."

Neutral spirits.—For the purposes of the pure food law, neutral spirit, or ethyl alcohol, if absolutely pure, would be not only like, but identical, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol. (1907) 26 Op. Atty-Gen. 216.

Ethyl alcohol cannot, for the purposes of the pure food law, be considered to be a "like substance" to whisky. The proper definition of the word "whisky," for this purpose, is a question of law, and the term is to be given its ordinary significance as a word of everyday speech, and should not be understood in any commercial or scientific sense. (1907) 26 Op. Atty-Gen. 262.

"Oat feed."—Since the term "oat feed," in its ordinary acceptance, does not mean the whole oat grain, either crushed or ground, but instead means that part of the grain which remains after the miller subtracts the portions useful for human food, consisting of nubbins, middlings, hulls, and oat dust, a compound substance sold in packages under the name "Corno Horse and Mule Feed," and described in the package as a "mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds," with the name of the manufacturer and the place of manufacture, followed by an analysis of its contents, was held not to be misbranded in violation of this section because it contained an excess of oat hulls in compound and not the whole ground oats. *U. S. v. One Car Load Corno Horse Feed*, (1911) 188 Fed. 453.

"Ohio Claret Wine."—Where barrels branded and labeled "Ohio Claret Wine" contain only pomace wine there is a misbranding. *U. S. v. Sixty Barrels Wine*, (W. D. Mo. 1915) 225 Fed. 846.

Spring water.—Ordinary Croton water drawn from the pipes in New York city, filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, is not "spring water," as the term is generally understood, and the labeling of the bottles as spring water constitutes a misbranding within the meaning of the Food and Drugs Act. *U. S. v. Morgan*, (1910) 181 Fed. 587.

Syrup.—A syrup containing approximately ninety per centum of white sugar and not more than ten per centum of maple sugar is not misbranded by a label printed in gold, blue, and red, which at the top has in plain large letters the words "Gold Leaf" in gold, "Syrup" in red, with a blue circular underscoring a trademark consisting of a gold leaf, said to be a maple leaf, with stalks projecting on each side, apparently representing sugar cane, with the name of the company in smaller letters in the middle, the words "composed of" in white on a blue field, being very distinct, and the words "maple and white sugar" in blue on a white field at the bottom, being also very distinct, the very conspicuous features of this being the words "Gold Leaf Sugar,"

"Composed of," and "Maple and White Sugar." *In re Wilson*, (C. C. R. I. 1909) 168 Fed. 566.

Tomato catsup.—In a proceeding for the condemnation of tomato catsup on the ground that it is misbranded, there is no such inconsistency, it seems, between the statement in the label that the catsup is "made from choice ripe tomatoes," and the fact that it is "made in part from tomato pulp, screened from peelings and cores," as will permit the court to proceed at once to enter a decree of condemnation without requiring of the government further proof. *U. S. v. Six Hundred and Fifty Cases Tomato Catsup*, (1909) 166 Fed. 773.

Vanilla.—The words "Cream Vanilla" and "Rose Vanilla" when used with a manufactured product called Puddine, although the article was not flavored with a high grade vanilla extract, are artificial and distinctive names, the use of which is no misbranding. *U. S. v. One Hundred and Fifty Cases Fruit Puddine*, (D. C. Mass. 1914) 211 Fed. 360, which also held that the words "Fruit Flavored" upon cartons containing the Puddine, when in fact the article was not fruit flavored, were a statement regarding such article or the ingredients or substances contained therein, which was false or misleading and constituted misbranding within the statute.

SEC. 9. [Guaranty from manufacturer — contents.] That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act. [34 Stat. L. 771.]

Constitutionality.—In *U. S. v. Charles L. Heinle Specialty Co.*, (1910) 175 Fed. 299, it was held that this section was not invalid as applied to a wholesaler who sold adulterated or misbranded goods within the state to a dealer under a guaranty of conformity to the Food and Drugs Act, with knowledge that such guaranty was exacted to further the sale of the goods in interstate commerce; they having been actually shipped out of the state by the dealer, relying on the guaranty.

Creation of distinct offense.—This section created, in addition to the offense of manufacturing and dealing in adulterated and misbranded foods and drugs, the distinct and substantive offense of guaranteeing such articles, which offense, however, is not complete until the pur-

chaser deals with the article in a manner otherwise punishable by the Act. (1907) 26 Op. Atty.-Gen. 449.

Liability of dealers, etc.—Dealers who sell to their customers a high grade of goods, packed and inspected in accordance with approved methods, and expressly guaranteed under the Pure Food Act, with no defect discoverable by the exercise of the sense of sight, smell, or taste, and hotel keepers and victualers who furnish such goods to their guests for food, are not liable for injuries to such customers or guests caused by eating such food, though it is in fact found to be poisonous. *Trafton v. Davis*, (1913) 110 Me. 318, 86 Atl. 179, following *Bigelow v. Maine Cent. R. Co.*, (1912) 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627.

Dealer as including wholesaler.—The

term "dealer," as used in this section, includes wholesale as well as retail dealers, and both are accordingly protected from prosecution by establishing a guaranty in conformity with the requirements of the Act. (1907) 26 Op. Atty-Gen. 449.

Where a wholesale dealer in Maryland purchased certain food, found afterward to be adulterated, from a Pennsylvania manufacturer, receiving the latter's written guaranty as to the purity of the goods, in conformity with this section, and in turn sold the goods to a retail dealer in the District of Columbia under a similar guaranty, it was held that he was completely protected by the guaranty of the Pennsylvania manufacturer from prosecution under this Act. (1907) 26 Op. Atty-Gen. 449.

Guaranty as relating to identical article only.—The provision that no dealer shall be prosecuted thereunder for shipping in interstate commerce any adulterated or misbranded article of food or drugs when he can establish a guaranty signed by the manufacturer that such article is not adulterated or misbranded, is available to a dealer only when such guaranty relates to the identical article shipped by him, and affords no defense to him where it relates only to a constituent used by him in manufacturing the article shipped. *U. S. v. Mayfield*, (1910) 177 Fed. 765.

Time of obtaining guaranty.—In *Steinhardt v. U. S.*, (C. C. A. 2d Cir. 1911) 191 Fed. 798, 112 C. C. A. 284, it was held that a guaranty obtained by a dealer four days before his trial and more than eighteen months after prosecution was initiated against him was ineffective as a defense. The court said: "Four days before the trial, more than 18 months after prosecution was initiated, defendant obtained the signature of such a guaranty by another corporation, known as Deimel Bros. & Co., doing a similar business in the same building as defendant. There was some testimony as to business relations between the two corporations, and as to the one holding a controlling interest in the other. The trial judge refused to admit the guaranty in evidence on the express ground that it was dated June 6, 1910; whereas the information was filed November 24, 1909. Such refusal is assigned as error. In our opinion his ruling was correct. If Congress had intended that a dealer could avoid conviction by obtaining a guaranty from the manufacturer after his prosecution had begun, it would presumably have evidenced that intention by providing 'no dealer shall be convicted,' instead of providing that 'no dealer shall be prosecuted.' So, too, the section provides that he is to have the guaranty signed by the person 'from whom he purchases the articles,' language which seems to imply that guaranty and pur-

chase are related transactions. Moreover, the guaranty is to be of such a sort and so given that the guarantor can be himself convicted of the offense. He surely could be if his guaranty had been signed before the shipment of a misbranded article; the shipment being the offense. It would seem that he could not be convicted of the offense of shipment when he did not sign the guaranty until long after the offense had been committed. We think the statute should be construed according to its natural interpretation. The judgment is affirmed."

Continuing guaranty.—In *Glaser v. U. S.*, (C. C. A. 7th Cir. 1915) 224 Fed. 84, 139 C. C. A. 566, it was held that this section included continuing guaranties and that a guaranty made by the plaintiff in error, a manufacturer, to a wholesale grocer as follows: "We hereby guarantee that all goods as furnished you hereafter will comply with the Food and Drugs Act of June 30, 1906," etc., was a continuing guaranty. The court said: "It will be seen that this section does not, in terms, seem to comprehend a general continuing guaranty, but seems to apply to the specified article contemplated at the time. Such, indeed, is plaintiff in error's contention. That construction, however, is narrow, and not in accord with the spirit of the act, which should be construed in the light of its purpose, as said by the Supreme Court in *McDermott v. Wisconsin*, (1913) 228 U. S. 116-128, 33 S. Ct. 431, 433 57 U. S. (L. ed.) 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A 39, 'and of the power exerted in its passage.' This purpose the court, in *U. S. v. Antikamnia Co.*, (1914) 231 U. S. 654-665, 34 S. Ct. 222, 225 58 U. S. (L. ed.) 419, Ann. Cas. 1915A 49, declares 'is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.' As between a dealer, to whom the purity of the goods is guaranteed, and the manufacturer, who has the better opportunity of ascertaining the facts, the act aims to throw the ultimate responsibility on the latter, and it should therefore be interpreted, if reasonably possible, so as to carry out this purpose to the fullest extent. In our judgment it is therefore not only a fair, but the most reasonable, construction of the acts to include within the scope of section 9 continuing guaranties, as well as those given at the time of the sale and in reference to specific goods. The belated position of plaintiff in error as to the meaning of the statute with regard to a continuing guaranty comes to us undermined with its earlier construction, contained in the letter wherein it says, 'We hereby guarantee that all goods as furnished you hereafter will comply,' etc., and 'it is expressly understood that the

above shall hold good until notice of revocation be given in writing.' There is no reason in law for the claim that a continuing guaranty is invalid. When by the terms of a written guaranty it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty. 14 Am. & Eng. Enc. of Law (2d ed.) 1139. Letters of guaranty should receive a liberal, fair, and reasonable interpretation, so as to attain the object for which the instrument is designed and the

purpose to which it is applied. *Lawrence v. McCalmont*, (1844) 2 How. 426-449, 11 U. S. (L. ed.) 326. We are clearly of the opinion that the letter of January 15, 1907, constituted a good, valid, and sufficient guaranty under the provision of said section 9, and that said guaranty attached to every item of sale made by plaintiff in error to Steele-Wedeles Company, after the sale thereof, until revoked in accordance with the terms thereof, and that it furnished a basis for the filing of the information against plaintiff in error herein."

SEC. 10. [Seizure of original packages in interstate and foreign commerce — disposal, if condemned — delivery to owner if not to be sold, etc. — proceedings.] That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however*, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States. [34 Stat. L. 771.]

Constitutionality.— In *Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364, it was held that Congress could lawfully enact the provisions of this section, under which adulterated articles of food, the subjects of interstate commerce, may be confiscated by a proceeding *in rem* in the federal courts after such articles have reached their destination, and there remain in the hands of the consignee in the original unbroken packages. The court said: "The question here is whether the articles which are outlaws of commerce may be seized wherever

found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a state. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to

bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution."

"Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act." *Mr. Justice Day in McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984.

"Having been transported."—The words "having been transported" contemplate a transportation in interstate commerce, and not from one point in a given state, territory, district, or insular possession to another point in the same state, territory, district, or possession. *U. S. v. Forty-Six Packages Sugar*, (S. D. Ohio 1910) 183 Fed. 642.

Shipped for consumption and not for sale.—Where adulterated vinegar was proceeded against under the Food and Drugs Act and it appeared that it had been the subject of interstate commerce and was seized while stored in the original unbroken packages, it was held to be immaterial that the evidence showed that it had been shipped in interstate commerce for consumption, and not for sale in such unbroken packages. *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

Shipment for use by consignee as raw material.—The remedy *in rem* in the federal courts provided by this section, where any article of food that is adulterated is being transported from one state to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, may be invoked where adulterated eggs have been shipped into the state, not for sale, but intended solely for use by the consignee in the bakery business. *Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364; *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Shipments from manufacturing agent to owner.—In *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, *affirmed* *U. S. v. Knowlton Danderine Co.*, (C. C. A. 4th Cir. 1910) 175 Fed. 1022,

99 C. C. A. 667, it appeared that the claimant was the owner of a secret formula for a proprietary drug preparation, and conducted its business at Wheeling, W. Va., from which place it sold and shipped its preparation in bottles properly labeled. It had the preparation made, however, at Detroit, Mich., from which point it was shipped to the claimant in casks by car lots, and, when received, was bottled and labeled by claimant in Wheeling before being offered for sale. It was held that such shipments were not made in interstate commerce, but only from the manufacturing agents to the owner, and that the casks after their receipt by claimant were not subject to seizure and forfeiture because not labeled.

Seizure as of what time.—To make the provisions of the Act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection *en route* may be very inadequate. The real opportunity of government inspection may only arise when the goods as packed have been removed from the outside box in which they were shipped and remain, as the Act provides, "unsold." It is enough, by the terms of the Act, if the articles are unsold, whether in original packages or not. *McDermott v. Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, Ann. Cas. 1915A 39, 47 L. R. A. (N. S.) 984, *reversing* (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

The jurisdiction of the federal government over interstate shipments of adulterated food continues while the food remains in the original unbroken packages at the point of destination. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Original packages.—Where, after an adulterated or misbranded drug had been transported in interstate commerce and received by the consignee who was the owner, the packages were opened and samples taken that the strength, quality, and purity might be tested, it was held that such sampling did not constitute a breaking of the original packages. *U. S. v. Five Boxes Asafetida*, (1910) 181 Fed. 561.

Where a liquid in casks is shipped in interstate commerce in carload lots, the cask and not the car is the "original package" within the meaning of this section. *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, *affirmed* (1910) 175 Fed. 1022, 99 C. C. A. 667.

Forfeiture as dependent upon liability under section 2.—Section 2 makes it a misdemeanor for any person having

received, adulterated or misbranded drugs from another state to ship the same from one state to another or to deliver the same in unbroken packages for pay or otherwise, or offer to deliver the same to another person so adulterated or misbranded, and this section declares that such articles shall be liable to seizure and forfeiture when in the course of being transported from state to state, or when having been transported they remain unloaded, or unsold, or in the original packages. It has been held that such sections are independent of each other, and hence that it is not essential to the forfeiture of adulterated or misbranded drugs, under this section, that the owner should have been guilty of violating section 2. *U. S. v. Five Boxes Asa-fœtida*, (1910) 181 Fed. 561.

Liability of misbranded goods in transit to seizure under state statutes.—By this Act misbranded and adulterated intoxicating liquors are forbidden transportation into any state from another state or foreign country, and hence are removed from the protection of the "commerce clause" of the Federal Constitution. Such liquors, brought into the state in violation of the Act, become subject to the police power of the state immediately upon arrival within its territory, and may be seized under such power before delivery to a consignee. *State v. Intoxicating Liquors*, (1908) 104 Me. 502, 71 Atl. 758, wherein the court said: "The claimant urges that only the United States can enforce the Act of Congress; that the Act does not confer upon the states the power to seize and confiscate such liquors. This process is not to enforce the Act of Congress, but only to enforce the laws of the state. The proceeding is not under the Act of Congress, but under the statutes of the state. Granting that the Act of Congress does not confer any new power upon the state, it removes the federal barriers to the exercise of the powers conferred upon the state by its own people." See to the same effect, *State v. Intoxicating Liquors*, (1909) 106 Me. 135, 76 Atl. 268.

Conformity to proceedings in admiralty.—It was not intended to liken the proceedings to those in admiralty beyond the seizure of the property by process *in rem*. *Four Hundred and Forty-Three Cans Frozen Egg Product v. U. S.*, (1912) 226 U. S. 172, 33 S. Ct. 50, 57 U. S. (L. ed.) 174, *reversing* on other grounds, (C. C. A. 3d Cir. 1912) 193 Fed. 589, 113 C. C. A. 457.

The provision of this section that proceedings in cases to forfeit adulterated food shall conform as near as may be to proceedings in admiralty does not render such proceedings within the admiralty or maritime jurisdiction of federal courts; the jurisdiction in such proceedings being conferred by the Act itself. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 303.

Jurisdiction.—Section 10 provides for the seizure of goods within any district where the same may be found. But that relates to a civil proceeding against the goods themselves, and does not in any way determine in what jurisdiction a criminal proceeding can be brought. The provision of the Constitution, that the trial of all crimes shall be by jury, and such trial held in the state where the crime shall have been committed, does not in any way affect prosecution under this statute, for the state in which prosecution is to be had is clearly defined by the statute itself. *U. S. v. Hopkins*, (E. D. N. Y. 1912) 199 Fed. 649.

Summary character of proceedings.—These proceedings for the seizure and condemnation of property which is impure or adulterated are intended to be in a sense summary, and yet the statute is construed to give the owner a right to a hearing in a court of record with a right of review upon questions of law by writ of error in the Circuit Court of Appeals, and, where more than one thousand dollars is involved, finally in the Supreme Court. *Four Hundred and Forty-Three Cans Frozen Egg Product v. U. S.*, (1912) 226 U. S. 172, 33 S. Ct. 50, 57 U. S. (L. ed.) 174 *reversing* (C. C. A. 3d Cir. 1912) 193 Fed. 589, 113 C. C. A. 457.

Conditions precedent.—The preliminary examination of an article by the Department of Agriculture, and notice to the party from whom the sample is obtained of its adulteration or misbranding, as provided for in section 4, are not conditions precedent to a libel *in rem* for the forfeiture of articles seized for adulteration or misbranding of articles so shipped while remaining in "original unbroken packages." *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, *affirmed* (1910) 175 Fed. 1022, 99 C. C. A. 667; *U. S. v. Nine Barrels Olives*, (1910) 179 Fed. 983; *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

When a proceeding is instituted by a United States attorney under this section solely upon the report and certificate of the Secretary of Agriculture to him of a violation of this Act, and not upon his own initiative, or upon information furnished to him by the local authorities, such proceedings can be sustained, although the Secretary of Agriculture has not, prior to the commencement of such proceedings, in fact given the notice and afforded to the person from whom the sample was obtained an opportunity to be heard, as provided in section 4. *U. S. v. Seventy-Five Barrels Vinegar*, (N. D. Ia. 1911) 192 Fed. 350, refusing to follow *U. S. v. Twenty Cases Grape Juice*, (C. C. A. 2d Cir. 1911) 189 Fed. 331, 111 C. C. A. 63, to the contrary.

Necessity for seizure before forfeiture proceedings.—Since this Act providing for proceedings against adulterated and misbranded food transported in interstate

commerce for sale or found in the original packages, etc., does not declare the goods *ipso facto* forfeited by an infraction of the Act, nor expressly authorize an executive seizure before proceedings for forfeiture are instituted, but on the contrary in section 5 requires the district attorney on receiving a certificate of the facts from the Secretary of Agriculture to commence proceedings without delay for the enforcement of the penalties of the Act, prior executive seizure is not required to sustain forfeiture proceedings by the provision that the proceedings shall conform as near as may be to the proceedings in admiralty. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302; *U. S. v. Spraul*, (C. C. A. 1911) 185 Fed. 405; *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

This section does not authorize seizure by a private person. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Libel—Allegations.—In a condemnation proceeding where the charge is of misbranding, it is essential that the libel should set forth the branding and facts inconsistent therewith. *U. S. v. Six Hundred and Fifty Cases Tomato Catsup*, (1909) 186 Fed. 773.

The court has jurisdiction of a proceeding for the forfeiture of an article alleged to be misbranded, although there has been no examination as provided by the fourth section of the Act, and a libel for such forfeiture need not contain an allegation to this effect. *U. S. v. Fifty Barrels Whiskey*, (D. C. Md. 1908) 165 Fed. 966.

Verification.—Want of a sufficient verification of a libel to forfeit food is not ground for exception or demurrer to the substance of the libel. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Sufficiency.—This section provides that any article of food that is adulterated or misbranded within the meaning of the Act, and is being transported from one state, territory, district, or insular possession to another "for sale," shall be subject to forfeiture, and that any article of food that is adulterated or misbranded, having been transported and remaining unloaded, unsold, or in the original unbroken packages, shall be liable to be proceeded against in like manner. It has been held that a libel for forfeiture of certain bags of sugar under the latter subdivision of the section, failing to charge that the sugar seized had been transported "for sale," was fatally defective. *U. S. v. Forty-Six Packages, etc., Sugar*, (S. D. Ohio 1910) 183 Fed. 642.

A libel to forfeit a shipment of desiccated eggs for violation of this Act is not fatally defective for failure to allege the date when they were shipped in interstate commerce on the theory that the shipment might have been made before the Act took effect or because the property was not sufficiently identified; such

objections being available by answer. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302. See also *U. S. v. Certain Cans Syrup*, (E. D. Pa. 1911) 192 Fed. 79.

Trial by jury.—It is probable that Congress inserted the provision for a trial by jury with a view to removing any question as to the constitutionality of the Act. *Four Hundred and Forty-Three Cans Frozen Egg Product v. U. S.*, (1912) 226 U. S. 172, 33 S. Ct. 50, 57 U. S. (L. ed.) 174, *reversing* on other grounds (C. C. A. 3d Cir. 1912) 193 Fed. 589, 113 C. C. A. 457.

Burden of proof.—Where a state sought to have liquors that were brought into the state forfeited before delivery to the consignee upon the ground that they were misbranded or adulterated within this Act, it was held that the burden was on the state to prove such misbranding or adulteration. *State v. Intoxicating Liquors*, (1909) 106 Me. 142, 76 Atl. 267.

Intervention.—Where on a libel by the government to enforce a forfeiture of certain sugar, for violation of this Act, the court permitted the G. Company to interplead or file a brief, and thereafter permitted the withdrawal of the answer and filing of exceptions, to which the district attorney assented, it was held that he could not thereafter object to the G. Company's right to interplead and file a brief in the case, unless further evidence was offered that it was a party in interest, or the *bona fide* owner of the sugar seized. *U. S. v. Forty-Six Packages, etc., Sugar*, (S. D. Ohio 1910) 183 Fed. 642.

Defense to forfeiture.—That the misbranding was done by an agent of the United States, constitutes no defense to a proceeding for forfeiture of the goods misbranded. *U. S. v. Fifty Barrels Whiskey*, 165 Fed. 966. See also notes to section 8, *supra*, p. 379.

Mode of review.—A writ of error is the only method of reviewing a condemnation proceeding under this section. *Four Hundred and Forty-Three Cans Frozen Egg Product v. U. S.*, (1912) 226 U. S. 172, 33 S. Ct. 50, 57 U. S. (L. ed.) 174, *reversing* (C. C. A. 3d Cir. 1912) 193 Fed. 589, 113 C. C. A. 457; *Lexington Mill, etc., Co. v. U. S.*, (C. C. A. 8th Cir. 1913) 202 Fed. 615, 121 C. C. A. 23, *affirmed* on other grounds in (1914) 232 U. S. 399, 34 S. Ct. 337, 58 U. S. (L. ed.) 658, L. R. A. 1915B 774.

A proceeding for the condemnation and forfeiture of an article alleged to be adulterated or misbranded, in which either party is given the right to demand a trial by jury of any issue of fact, where such trial is demanded and had, is reviewable only on writ of error. *U. S. v. Seven Hundred and Seventy-Nine Cases Molasses*, (C. C. A. 1909) 174 Fed. 325, 98 C. C. A. 197.

In seizures under this Act the proceedings in the District Court are at law,

and the Circuit Courts of Appeals are without jurisdiction to review the same on appeal. *U. S. v. Hudson Mfg. Co.*, (C. C. A. 5th Cir. 1912) 200 Fed. 956, 119 C. C. A. 293.

Where review of a judgment in the District Court is sought by an appeal to the Circuit Court of Appeals the court has no jurisdiction, and neither the action of the court nor the consent of the parties can give it. And if such court assumes jurisdiction and reverses the judgment below and the case then goes to the Supreme Court both by writ of error and appeal it will be the duty of the Supreme Court, having acquired jurisdiction, to reverse the judgment of the Circuit Court of Appeals and remand the case to that court

with instructions to dismiss the appeal for want of jurisdiction. *Four Hundred and Forty-Three Cans Frozen Egg Product v. U. S.*, (1912) 226 U. S. 172, 33 S. Ct. 50, 57 U. S. (L. ed.) 174, *reversing* (C. C. A. 3d Cir. 1912) 193 Fed. 589, 113 C. C. A. 457.

Costs in personam may be assessed against the claimant in a proceeding *in rem* under this section to confiscate adulterated articles of food, the subject of interstate commerce, even if the principles of the admiralty law are made applicable by the provision that the proceedings shall conform as near as may be to the proceedings in admiralty. *Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364.

SEC. 11. Examination of imported foods and drugs — admission denied adulterated or misbranded goods — destruction, etc.— delivery pending examination — bond required — charges.] The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee. [34 Stat. L. 772.]

The Agricultural Appropriation Act of June 30, 1906, ch. 3913, contained the following provision: "And the Secretary of Agriculture, whenever he has reason to believe that any articles are being imported from foreign countries which are dangerous to the health of the people of the United States, or which shall be falsely labeled or branded either as to their contents or as to the place of their manufacture or production, shall make a request upon the Secretary of the Treasury for samples from original packages of such articles for inspection and analysis, and the Secretary of the Treasury is hereby authorized to open such original packages and deliver specimens to the Secretary of Agriculture for the purpose mentioned, giving notice to the owner or consignee of

the sampling of such articles, who may be present and have the right to introduce testimony before the Secretary of Agriculture, or his representative, either in person or by agent, concerning the suitability of such articles for entry; and the Secretary of the Treasury shall refuse delivery to the consignee of any such goods which the Secretary of Agriculture reports to him have been inspected and analyzed and found to be dangerous to health or falsely labeled or branded, either as to their contents or as to the place of their manufacture or production, or which are forbidden entry or to be sold, or are restricted in sale in the countries in which they are made or from which they are exported." [34 Stat. L. 685.]

Similar provisions were made in Appropriation Acts of like character for prior years, but these were evidently intended to be superseded by the provisions of section 11 given in the text.

Effect of bond.—Where proceedings were instituted for the examination and exclusion of certain alleged adulterated or misbranded olives, it was held that the importer's execution of a bond for possession under this section did not amount to an official declaration that the olives had been found to comply with the Act. *U. S. v. Nine Barrels Olives*, (1910) 179 Fed. 983.

Effect of Drug and Medicine Act of 1848.—Drugs imported from Italy, although meeting the standard required by the Drug and Medicine Act of 1848 (embodied in R. S. secs. 2933-2937, see **IMPORTS AND EXPORTS**), are still subject to the provisions of the Food and Drugs Act of 1906 regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture

in accordance with this section. (1907) 26 Op. Atty-Gen. 311.

The charges for storage of imported foods, etc., detained by order of the Secretary of the Treasury pending examination under the Agricultural Appropriation Act of March 3, 1903, ch. 1008, 32 Stat. L. 1157 (superseded by this section), cannot be imposed upon the importer. *U. S. v. Acker*, (1904) 133 Fed. 842.

After delivery to importer.—The department of Agriculture and the Treasury Department have no jurisdiction or power under the Agricultural Appropriation Act of March 3, 1903, ch. 1008, 32 Stat. L. 1157 (superseded by this section), to prevent or punish the false labeling or branding of dairy or food products after they have passed the custom house and are delivered to the owner or consignee. (1903) 24 Op. Atty-Gen. 675.

SEC. 12. [Insular possessions included — "person" defined — liability of corporations, etc.] That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person. [34 Stat. L. 772.]

SEC. 13. [Effect.] That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven. [34 Stat. L. 772.]

[**SEC. 1.] [Report of payments to state officials, etc.]** That hereafter any sum used for compensation of or payment of expenses to any officer or other person employed by any State, county, or municipal government, shall be reported to Congress in detail, on the first Monday of December of each year. [35 Stat. L. 261]

This is from the Agricultural Appropriation Act of May 23, 1908, ch. 192, and follows a provision making an appropriation for expenses necessary to carry into effect the Act of June 30, 1906, ch. 3915, *supra*, pp. 358-397.

[SEC. 1.] **[Sanitary regulation of renovated butter factories.]** * * * That the sanitary provisions for slaughtering, meat canning, or similar establishments, as set forth in the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes, page six hundred and seventy-six), are hereby extended to cover renovated butter factories as defined in the Act of May ninth, nineteen hundred and two (Thirty-second Statutes, page one hundred and ninety-six), under such regulations as the Secretary of Agriculture may prescribe. [37 Stat. L. 273.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

The Act of June 30, 1906, ch. 3913, mentioned in the text was re-enacted in the Act of March 4, 1907, ch. 2907, given under the title *ANIMALS*, vol. 1, p. 397.

The part of the Act of May 9, 1902, ch. 784, to which the text refers is given *supra*, p. 353.

II. VIRUSES, SERUMS AND ANALOGOUS PRODUCTS

An Act To regulate the sale of viruses, serums, toxins, and analogous products in the District of Columbia, to regulate interstate traffic in said articles, and for other purposes.

[Act of July 1, 1902, ch. 1378, 32 Stat. L. 728.]

[SEC. 1.] **[Regulation of sale of and interstate traffic in viruses, serums, etc.]** That from and after six months after the promulgation of the regulations authorized by section four of this Act no person shall sell, barter, or exchange, or offer for sale, barter, or exchange in the District of Columbia, or send, carry, or bring for sale, barter, or exchange from any State, Territory, or the District of Columbia into any State, Territory, or the District of Columbia, or from any foreign country into the United States, or from the United States into any foreign country, any virus, therapeutic serum, toxin, antitoxin, or analogous product applicable to the prevention and cure of diseases of man, unless (a) such virus, serum, toxin, antitoxin, or product has been propagated and prepared at an establishment holding an unsuspended and unrevoked license, issued by the Secretary of the Treasury as hereinafter authorized, to propagate and prepare such virus, serum, toxin, antitoxin, or product for sale in the District of Columbia, or for sending, bringing, or carrying from place to place aforesaid; nor (b) unless each package of such virus, serum, toxin, antitoxin, or product is plainly marked with the proper name of the article contained therein, the name, address, and license number of the manufacturer, and the date beyond which the contents can not be expected beyond reasonable doubt to yield their specific results: *Provided*, That the suspension or revocation of any license shall not prevent the sale, barter, or exchange of any virus, serum, toxin, antitoxin, or product aforesaid which has been sold and delivered by the licentiate prior to such suspension or revocation, unless the owner or custodian of such virus, serum, toxin, antitoxin, or product aforesaid has been notified by the Secretary of the Treasury not to sell, barter, or exchange the same. [32 Stat. L. 728.]

Purpose of Act.—The Department of Agriculture, realizing the losses that were resulting to the hog raisers of the country

from the promiscuous manufacture and distribution of anti-hog cholera serum, secured the enactment of the above law

intended to regulate the preparation, sale, and distribution of such serum. *Hall v. State*, (Neb. 1916) 158 N. W. 362.

Construction.—The prohibition of this statute is directed against persons who send, carry or bring viruses, etc., into the United States or into a state for sale, barter or exchange and against such persons only. As this is a penal statute, the natural meaning of the words defining the offense and the class of offenders cannot be enlarged by construction because of any supposed underlying intent of the Act or because, to limit the offense as the Act itself has limited it, will lead to evasion of its provisions, or will exclude offenses which are within the evil the Act was meant to remedy. (1912) 29 Op. Atty.-Gen. 340.

Importation of viruses, serums and analogous products not for sale.—The importation or admission into the United States of viruses, serums, toxins and analogous products referred to in this section,

that are prepared by and sold or given away by a foreign establishment to individuals or institutions in the United States for their use and not for sale, barter or exchange by such individuals or institutions is not contrary to the provisions of this section. (1912) 29 Op. Atty.-Gen. 340.

Validity of state statute giving licensed manufacturers exclusive right to sell serum.—This Act provides that plants manufacturing serum shall be licensed and that they may not prepare it for shipment unless they are licensed. A United States veterinary license does not appear to have been provided for the use of a person, but for manufacturers of the serum. The license is to the plant, and therefore a state statute seeking to give to those manufacturers the exclusive right to sell the serum denies to the citizens of the state the right to sell it. *Hall v. State* (Neb. 1916) 158 N. W. 362.

SEC. 2. [False labels, etc.] That no person shall falsely label or mark any package or container of any virus, serum, toxin, antitoxin, or product aforesaid; nor alter any label or mark on any package or container of any virus, serum, toxin, antitoxin, or product aforesaid so as to falsify such label or mark. [32 Stat. L. 729.]

SEC. 3. [Inspection.] That any officer, agent, or employee of the Treasury Department, duly detailed by the Secretary of the Treasury for that purpose, may during all reasonable hours enter and inspect any establishment for the propagation and preparation of any virus, serum, toxin, antitoxin, or product aforesaid for sale, barter, or exchange in the District of Columbia, or to be sent, carried, or brought from any State, Territory, or the District of Columbia into any other State or Territory or the District of Columbia, or from the United States into any foreign country, or from any foreign country into the United States. [32 Stat. L. 729.]

SEC. 4. [Board to prescribe regulations for licenses.] That the Surgeon-General of the Army, the Surgeon-General of the Navy, and the supervising Surgeon-General of the Marine-Hospital Service, be, and they are hereby, constituted a board with authority, subject to the approval of the Secretary of the Treasury, to promulgate from time to time such rules as may be necessary in the judgment of said board to govern the issue, suspension, and revocation of licenses for the maintenance of establishments for the propagation and preparation of viruses, serums, toxins, antitoxins, and analogous products, applicable to the prevention and cure of diseases of man, intended for sale in the District of Columbia, or to be sent, carried, or brought for sale from any State, Territory, or the District of Columbia, into any other State, Territory, or the District of Columbia, or from the United States into any foreign country, or from any foreign country into the United States: *Provided*, That all licenses issued for the maintenance of establishments for the propagation and preparation in any foreign country of any virus, serum,

toxin, antitoxin, or product aforesaid, for sale, barter, or exchange in the United States, shall be issued upon condition that the licentiates will permit the inspection of the establishments where said articles are propagated and prepared, in accordance with section three of this Act. [32 Stat. L. 729.]

The Marine-Hospital Service is now known as the Public Health Service by virtue of the Act of Aug. 14, 1912, ch. 288, § 1, 37 Stat. L. 309. The supervising Surgeon-General thereof was designated the Surgeon-General by the Act of July 1, 1902, ch. 1370, § 1, 32 Stat. L. 712. See the title HEALTH AND QUARANTINE.

SEC. 5. [Enforcement of regulations, etc.] That the Secretary of the Treasury be, and he is hereby, authorized and directed to enforce the provisions of this Act and of such rules and regulations as may be made by authority thereof; to issue, suspend, and revoke licenses for the maintenance of establishments aforesaid, and to detail for the discharge of such duties such officers, agents, and employees of the Treasury Department as may in his judgment be necessary. [32 Stat. L. 729.]

SEC. 6. [Interference with officers, etc., prohibited.] That no person shall interfere with any officer, agent, or employee of the Treasury Department in the performance of any duty imposed upon him by this Act or by regulations made by authority thereof. [32 Stat. L. 729.]

SEC. 7. [Punishment for violation.] That any person who shall violate, or aid or abet in violating, any of the provisions of this Act shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court. [32 Stat. L. 729.]

SEC. 8. [Repeal.] That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed. [32 Stat. L. 729.]

[SEC. 1.] **[Viruses, serums, etc., for domestic animals — preparation — sale — importation — inspection — licenses.]** * * * That from and after July first, nineteen hundred and thirteen, it shall be unlawful for any person, firm, or corporation to prepare, sell, barter, or exchange in the District of Columbia, or in the Territories, or in any place under the jurisdiction of the United States, or to ship or deliver for shipment from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in the treatment of domestic animals, and no person, firm, or corporation shall prepare, sell, barter, exchange, or ship as aforesaid any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals, unless and until the said virus, serum, toxin, or analogous product shall have been prepared, under and in compliance with regulations prescribed by the Secretary of Agriculture, at an establishment holding an unsuspended and unrevoked license issued by the Secretary of Agriculture as hereinafter authorized. That the importation into the United States, without a permit from the Secretary of Agriculture, of any

virus, serum, toxin, or analogous product for use in the treatment of domestic animals, and the importation of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals, are hereby prohibited. The Secretary of Agriculture is hereby authorized to cause the Bureau of Animal Industry to examine and inspect all viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, which are being imported or offered for importation into the United States, to determine whether such viruses, serums, toxins, and analogous products are worthless, contaminated, dangerous, or harmful, and if it shall appear that any such virus, serum, toxin, or analogous product, for use in the treatment of domestic animals, is worthless, contaminated, dangerous, or harmful, the same shall be denied entry and shall be destroyed or returned at the expense of the owner or importer. That the Secretary of Agriculture be, and hereby is, authorized to make and promulgate from time to time such rules and regulations as may be necessary to prevent the preparation, sale, barter, exchange, or shipment as aforesaid of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals, and to issue, suspend, and revoke licenses for the maintenance of establishments for the preparation of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, intended for sale, barter, exchange, or shipment as aforesaid. The Secretary of Agriculture is hereby authorized to issue permits for the importation into the United States of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, which are not worthless, contaminated, dangerous, or harmful. All licenses issued under authority of this Act to establishments where such viruses, serums, toxins, or analogous products are prepared for sale, barter, exchange, or shipment as aforesaid, shall be issued on condition that the licensee shall permit the inspection of such establishments and of such products and their preparation; and the Secretary of Agriculture may suspend or revoke any permit or license issued under authority of this Act, after opportunity for hearing has been granted the licensee or importer, when the Secretary of Agriculture is satisfied that such license or permit is being used to facilitate or affect the preparation, sale, barter, exchange, or shipment as aforesaid, or the importation into the United States of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals. That any officer, agent, or employee of the Department of Agriculture duly authorized by the Secretary of Agriculture for the purpose may, at any hour during the daytime or nighttime, enter and inspect any establishment licensed under this Act where any virus, serum, toxin, or analogous product for use in the treatment of domestic animals is prepared for sale, barter, exchange, or shipment as aforesaid. That any person, firm, or corporation who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not exceeding \$1,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court. That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be expended as the Secretary of Agriculture may direct, for the purposes and objects of this Act, the sum of \$25,000, which

appropriation shall become available on July first, nineteen hundred and thirteen, and may be expended at any time before July first, nineteen hundred and fourteen. [37 Stat. L. 832.]

This is from the Agricultural Appropriation Act of March 4, 1913, ch. 145.

For provisions relating to the Bureau of Animal Industry mentioned in the text see the title ANIMALS.

III. SALE OF DRUGS IN CHINA

An Act To regulate the practice of pharmacy and the sale of poison in the consular districts of the United States in China.

[Act of March 3, 1915, ch. 74, 38 Stat. L. 817.]

[SEC. 1.] [Practice of pharmacy in China—regulation—unlicensed American pharmacists prohibited from doing business.] That on and after the first day of January, nineteen hundred and sixteen, it shall be unlawful in the consular districts of the United States in China for any person whose permanent allegiance is due to the United States not licensed as a pharmacist within the meaning of this Act to conduct or manage any pharmacy, drug or chemical store, apothecary shop, or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail, any drugs, chemicals, or poisons, except as hereinafter provided, or, except as hereinafter provided, for any person whose permanent allegiance is due to the United States not licensed as a pharmacist within the meaning of this Act to compound, dispense, or sell, at retail, any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to and under the proper supervision of a pharmacist licensed under this Act. And it shall be unlawful for any person, firm, or corporation owing permanent allegiance to the United States owning partly or wholly or managing a pharmacy, drug store, or other place of business to cause or permit any person other than a licensed pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison, except as an aid to and under the proper supervision of a licensed pharmacist: *Provided*, That where it is necessary for a person, firm, or corporation whose permanent allegiance is due to the United States and owning partly or wholly or managing a pharmacy, drug store, or other place of business to employ Chinese subjects to compound, dispense, or sell at retail any drug, medicine, or poison, such person, firm, corporation, owner, part owner, or manager of a pharmacy, drug store, or other place of business may employ such Chinese subjects when their character, ability, and age of twenty-one years or over have been certified to by at least two recognized and reputable practitioners of medicine, or two pharmacists licensed under this Act whose permanent allegiance is due to the United States: *Provided further*, That nothing in this section shall be construed to interfere with any recognized and reputable practitioner of medicine, dentistry, or veterinary surgery in the compounding of his own prescriptions, or to prevent him from supplying to his patients such medicines as he may deem proper, except as hereinafter provided; nor with the exclusively wholesale business of any person, firm, or corporation whose

permanent allegiance is due to the United States dealing and licensed as pharmacists, or having in their employ at least one person who is so licensed, except as hereinafter provided; nor with the sale by persons, firms, or corporations whose permanent allegiance is due to the United States other than pharmacists of poisonous substances sold exclusively for use in the arts, or as insecticides, when such substances are sold in unbroken packages bearing labels having plainly printed upon them the name of the contents, the word "poison," when practicable the name of at least one suitable antidote, and the name and address of the vender. [38 Stat. L. 817.]

SEC. 2. [Licenses to practice — application — qualification of applicants.] That every person whose permanent allegiance is due to the United States now practicing as a pharmacist or desiring to practice as a pharmacist in the consular districts in China shall file with the consul an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which he pursued and the time spent in the study of pharmacy, the experience which the applicant has had in compounding physicians' prescriptions under the direction of a licensed pharmacist, and the name and location of the school or college of pharmacy, if any, of which he is a graduate, and shall submit evidence sufficient to show to the satisfaction of said consul that he is of good moral character and not addicted to the use of alcoholic liquors or narcotic drugs so as to render him unfit to practice pharmacy: *Provided*, That applicants shall not be less than twenty-one years of age and shall have had at least four years' experience in the practice of pharmacy or shall have served three years under the instruction of a regularly licensed pharmacist, and any applicant who has been graduated from a school or college of pharmacy recognized by the proper board of his State, Territory, District of Columbia, or other possession of the United States as in good standing shall be entitled to practice upon presentation of his diploma. [38 Stat. L. 818.]

SEC. 3. [Issuance of license.] That if the applicant for license as a pharmacist has complied with the requirements of the preceding section, the consul shall issue to him a license which shall entitle him to practice pharmacy in the consular districts of the United States in China, subject to the provisions of this Act. [38 Stat. L. 819.]

SEC. 4. [Revocation of license — grounds.] That the license of any person whose permanent allegiance is due to the United States to practice pharmacy in the consular districts of the United States in China may be revoked by the consul if such person be found to have obtained such license by fraud, or be addicted to the use of any narcotic or stimulant, or to be suffering from physical or mental disease, in such manner and to such extent as to render it expedient that in the interests of the public his license be canceled; or to be of an immoral character; or if such person be convicted in any court of competent jurisdiction of any offense involving moral turpitude. It shall be the duty of the consul to investigate any case in which it is discovered by him or made to appear to his satisfaction that any license issued under the provisions of this Act is revocable and shall, after full hearing, if in his judgment the facts warrant it, revoke such license. [38 Stat. L. 819.]

SEC. 5. [License displayed in place of business.] That every license to practice pharmacy shall be conspicuously displayed by the person to whom the same has been issued in the pharmacy, drug store, or place of business, if any, of which the said person is the owner or part owner or manager. [38 Stat. L. 819.]

SEC. 6. [Sale, etc., of certain poisons — necessity of written order or prescription — preservation of order.] That it shall be unlawful for any person, firm, or corporation whose permanent allegiance is due to the United States, either personally or by servant or agent or as the servant or agent of any other person or of any firm or corporation, to sell, furnish, or give away any cocaine, salts of cocaine, or preparation containing cocaine or salts of cocaine, or morphine or preparation containing morphine or salts of morphine, or any opium or preparation containing opium, or any chloral hydrate or preparation containing chloral hydrate, except upon the original written order or prescription of a recognized and reputable practitioner of medicine, dentistry, or veterinary medicine, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, or, if ordered by a practitioner of veterinary medicine, shall state the kind of animal for which ordered and shall be signed by the person giving the order or prescription. Such order or prescription shall be, for a period of three years, retained on file by the person, firm, or corporation who compounds or dispenses the article ordered or prescribed, and it shall not be compounded or dispensed after the first time except upon the written order of the original prescriber: *Provided*, That the above provisions shall not apply to preparations containing not more than two grains of opium, or not more than one-quarter grain of morphine, or not more than one-quarter grain of cocaine, or not more than two grains of chloral hydrate in the fluid ounce, or, if a solid preparation, in one avoirdupois ounce. The above provisions shall not apply to preparations sold in good faith for diarrhea and cholera, each bottle or package of which is accompanied by specific directions for use and caution against habitual use, nor to liniments or ointments sold in good faith as such when plainly labeled "for external use only," nor to powder of ipecac and opium, commonly known as Dover's powder, when sold in quantities not exceeding twenty grains: *Provided further*, That the provisions of this section shall not be construed to permit the selling, furnishing, giving away, or prescribing for the use of any habitual users of the same any cocaine, salts of cocaine, or preparation containing cocaine or salts of cocaine, or morphine or salts of morphine, or preparations containing morphine or salts of morphine, or any opium or preparation containing opium, or any chloral hydrate or preparation containing chloral hydrate. But this proviso shall not be construed to prevent any recognized or reputable practitioner of medicine whose permanent allegiance is due to the United States from furnishing in good faith for the use of any habitual user of narcotic drugs who is under his professional care such substances as he may deem necessary for their treatment, when such prescriptions are not given or substances furnished for the purpose of evading the provisions of this section. But the provisions of this section shall not apply to sales at wholesale between jobbers, manufacturers, and retail druggists, hospitals, and scientific or public institutions. [38 Stat. L. 819.]

SEC. 7. [Sale, etc., of certain other poisons — regulations governing — packages labeled — record kept of sales, etc.] That it shall be unlawful for any person, firm, or corporation whose permanent allegiance is due to the United States to sell or deliver to any other person any of the following-described substances, or any poisonous compound, combination, or preparation thereof, to wit: The compounds of and salts of antimony, arsenic, barium, chromium, copper, gold, lead, mercury, silver, and zinc, the caustic hydrates of sodium and potassium, solution or water of ammonia, methyl alcohol, paregoric, the concentrated mineral acids, oxalic and hydrocyanic acids and their salts, yellow phosphorus, Paris green, carbolic acid, the essential oils of almonds, pennyroyal, tansy, rue, and savin; croton oil, creosote, chloroform, cantharides, or aconite, belladonna, bitter almonds, colchicum, cotton root, cocculus indicus, conium, cannibis indica, digitalis, ergot, hyoscyamus, ignatia, lobelia, nux vomica, physostigma, phytolacca, strophanthus, stramonium, veratrum viride, or any of the poisonous alkaloids or alkaloidal salts derived from the foregoing, or any other poisonous alkaloids or their salts, or any other virulent poison, except in the manner following, and, moreover, if the applicant be less than eighteen years of age, except upon the written order of a person known or believed to be an adult.

It shall first be learned, by due inquiry, that the person to whom delivery is about to be made is aware of the poisonous character of the substance and that it is desired for a lawful purpose, and the box, bottle, or other package shall be plainly labeled with the name of the substance, the word "Poison," the name of at least one suitable antidote, when practicable, and the name and address of the person, firm, or corporation dispensing the substance. And before delivery be made of any of the foregoing substances, excepting solution or water of ammonia and sulphate of copper, there shall be recorded in a book kept for that purpose the name of the article, the quantity delivered, the purpose for which it is to be used, the date of delivery, the name and address of the person for whom it is procured, and the name of the individual personally dispensing the same; and said book shall be preserved by the owner thereof for at least three years after the date of the last entry therein. The foregoing provisions shall not apply to articles dispensed upon the order of persons believed by the dispenser to be recognized and reputable practitioners of medicine, dentistry, or veterinary surgery: *Provided*, That when a physician writes upon his prescription a request that it be marked or labeled "Poison" the pharmacist shall, in the case of liquids, place the same in a colored glass, roughened bottle, of the kind commonly known in trade as a "poison bottle," and, in the case of dry substances, he shall place a poison label upon the container. The record of sale and delivery above mentioned shall not be required of manufacturers and wholesalers who shall sell any of the foregoing substances at wholesale to licensed pharmacists, but the box, bottle, or other package containing such substance, when sold at wholesale, shall be properly labeled with the name of the substance, the word "Poison," and the name and address of the manufacturer or wholesaler: *Provided further*, That it shall not be necessary, in sales either at wholesale or at retail, to place a poison label upon, nor to record the delivery of, the sulphide of antimony, or the oxide or carbonate of zinc, or of colors ground in oil and intended for use as paints, or calomel; nor in the case of preparations containing any of the substances

named in this section, when a single box, bottle, or other package, or when the bulk of one-half fluid ounce or the weight of one-half avoirdupois ounce does not contain more than an adult medicinal dose of such substance; nor, in the case of liniments or ointments sold in good faith as such, when plainly labeled "For external use only"; nor, in the case of preparations put up and sold in the form of pills, tablets, or lozenges, containing any of the substances enumerated in this section and intended for internal use, when the dose recommended does not contain more than one-fourth of an adult medicinal dose of such substance.

For the purpose of this and of every other section of this Act no box, bottle, or other package shall be regarded as having been labeled "Poison" unless the word "Poison" appears conspicuously thereon, printed in plain, uncondensed gothic letters in red ink. [38 Stat. L. 820.]

SEC. 8. [Fraudulent representations.] That no person, firm, or corporation whose permanent allegiance is due to the United States seeking to procure in the consular districts of the United States in China any substance the sale of which is regulated by the provisions of this Act shall make any fraudulent representations so as to evade or defeat the restrictions herein imposed. [38 Stat. L. 821.]

SEC. 9. [Preservation of prescriptions — copies supplied — inspection permitted — container of drugs labeled.] That every person, firm, or corporation whose permanent allegiance is due to the United States owning, partly owning, or managing a drug store or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than three years the original of every prescription compounded or dispensed at such store or pharmacy, or a copy of such prescription, except when the preservation of the original is required by section six of this Act. Upon request the owner, part owner, or manager of such store shall furnish to the prescribing physician, or to the person for whom such prescription was compounded or dispensed, a true and correct copy thereof. Any prescription required by section six of this Act, and any prescription for, or register of sales of, substances mentioned in section six of this Act shall at all times be open to inspection by duly authorized consular officers in the consular districts of the United States in China. No person, firm, or corporation whose permanent allegiance is due to the United States shall, in a consular district, compound or dispense any drug or drugs or deliver the same to any other person without marking on the container thereof the name of the drug or drugs contained therein and directions for using the same. [38 Stat. L. 821.]

SEC. 10. [Unlicensed pharmacists — use of title prohibited.] That it shall be unlawful for any person whose permanent allegiance is due to the United States, not legally licensed as a pharmacist, to take, use, or exhibit the title of pharmacist, or licensed or registered pharmacist, or the title of druggist or apothecary, or any other title or description of like import. [38 Stat. L. 821.]

SEC. 11. [Penalties — enforcement.] That any person, firm, or corporation, whose permanent allegiance is due to the United States, violating

any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$50 and not more than \$100 or by imprisonment for not less than one month and not more than sixty days, or by both such fine and imprisonment, in the discretion of the court, and if the offense be continuing in its character each week or part of a week during which it continues shall constitute a separate and distinct offense. And it shall be the duty of the consular and judicial officers of the United States in China to enforce the provisions of this act. [38 Stat. L. 821.]

SEC. 12. [“**Consul**” defined.] That the word “**Consul**” as used in this Act shall mean the consular officer in charge of the district concerned. [38 Stat. L. 822.]

For general provisions relating to consuls and other diplomatic officers see DIPLOMATIC AND CONSULAR OFFICERS.

SEC. 13. [Effect of Act as modifying or revoking former Act.] That nothing in this Act shall be construed as modifying or revoking any of the provisions of the Act of Congress of February twenty-third, eighteen hundred and eighty-seven, entitled “An Act to provide for the execution of the provisions of article second of the treaty concluded between the United States of America and the Emperor of China on the seventeenth day of November, eighteen hundred and eighty, and proclaimed by the President of the United States the fifth day of October, eighteen hundred and eighty-one.” [38 Stat. L. 821.]

For the Act of Feb. 23, 1887, ch. 210, mentioned in the text, see IMPORTS AND EXPORTS.

FORAKER ACT

See PORTO RICO

FORCE ACT

See JUDICIARY

FOREIGN COINS

See COINAGE, MINTS AND ASSAY OFFICES; PENAL LAWS

FOREIGN RELATIONS

See CHINESE EXCLUSION; DIPLOMATIC AND CONSULAR OFFICERS; EXTRADITION; IMMIGRATION; NEUTRALITY; PASSPORTS; PENAL LAWS

FOREST RESERVATIONS

See TIMBER LANDS AND FOREST RESERVES

FOREST TRANSFER ACT

See TIMBER LANDS AND FOREST RESERVES

**FORFEITURE ACT
(RAILROAD LAND GRANTS)**

See PUBLIC LANDS

FORGERY

See PENAL LAWS

FRAUD

For fraud in connection with the various departments of the government,
consult the General Index

FREE COINAGE OF GOLD ACT

See COINAGE, MINTS, AND ASSAY OFFICES

FREEDMEN

R. S. 2032. *Certain Acts Continued in Force*, 409.

R. S. 2033. *Such Laws to Be Enforced by Secretary of War*, 409.

R. S. 2034. *Accounts for Expenditures, etc., to Be Paid from What Fund, and How*, 409.

R. S. 2037. *Who to Be Deemed Wife and Children of Colored Soldiers*, 410.

Act of March 3, 1879, ch. 182, 410.

Sec. 2. Bounty to Colored Soldiers, How Paid, etc., 410.

Act of July 1, 1902, ch. 1351, 411.

Sec. 1. Retained Bounty Fund — Disposition, 411.

CROSS-REFERENCES

Howard University, see **EDUCATION**.

Freedmen's Hospital, see **HOSPITALS AND ASYLUMS**.

Sec. 2032. [Certain acts continued in force.] All laws and parts of laws pertaining to the collection and payment of bounty, prize-money, and other legitimate claims of colored soldiers, sailors, and marines, or their heirs, shall remain in force until otherwise ordered by Congress. [*R. S.*]

Act of June 10, 1872, ch. 415, 17 Stat. L. 366.

Sections 2032 to 2038, inclusive, constitute title XXVII of the Revised Statutes, "The Freedmen."

R. S. sec. 2038 relating to the Freedmen's Hospital in the District of Columbia is given under HOSPITALS AND ASYLUMS.

Refund of money exacted by customs officers.—This section did not preclude the refunding of moneys improperly exacted from and paid by vessels proceeding to unlade at places other than a port of entry, by the Secretary of the Treasury, without formal protest by the applicant,

in cases where application had been made within one year from such payment. (1890) 19 Op. Atty-Gen. 646.

As to government grant of land to "heads of families" of freedmen, see *Green v. Niver*, (1894) 43 S. C. 359, 21 S. E. 263.

Sec. 2033. [Such laws to be enforced by Secretary of War.] The Secretary of War is authorized to carry into effect all laws and parts of laws referred to in the preceding section, and to this end he may employ such clerical force as he deems necessary. [*R. S.*]

Act of June 10, 1872, ch. 415, 17 Stat. L. 366.

Sec. 2034. [Accounts for expenditures, etc., to be paid from what fund, and how.] Where accounts have been rendered for necessary expenditures incurred for refugees or freedmen, under the sanction of the proper officers, but which cannot be settled for want of specific appropriations, the

same may be paid out of the fund for the relief of refugees and freedmen, on the approval of the Secretary of War. [R. S.]

Act of June 15, 1866, ch. 123, 14 Stat. L. 65.

The word "of" between the words "secretary" and "war" in this section, as above given, was inserted by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244.

This section may be regarded as obsolete.

R. S. sec. 2035. This section was as follows:

"SEC. 2035. The Secretary of War is constituted the lawful custodian of a retained bounty fund, which has been derived from a portion of the State bounties of certain colored soldiers enlisted in Virginia and North Carolina, during the years 1864 and 1865, and which, by virtue of General Orders No. 90, Department of Virginia and North Carolina, was held by the Superintendent of Freedmen's Affairs, but was turned over to the Bureau upon its organization; and the Secretary of War shall hold the fund as trustee for the benefit of such colored soldiers or their legal representatives, to whom the same shall be paid upon their application or discovery." Act of March 2, 1867, ch. 186, 14 Stat. L. 545.

It was expressly repealed by a provision contained in the Deficiencies Appropriation Act of July 1, 1902, ch. 1351, 32 Stat. L. 556, given *infra*, p. 411.

R. S. sec. 2036. This section was as follows:

"SEC. 2036. The Secretary of War is empowered to invest the fund, or any portion thereof, in bonds of the United States, for the exclusive benefit of such colored soldiers or their legal representatives; but a sufficient amount of the same in cash may be retained uninvested to meet all lawful claims thereupon that will probably be presented for payment."

Act of March 2, 1867, ch. 186, 14 Stat. L. 545.

It was superseded by the repeal of R. S. sec. 2035 and the transfer of the fund mentioned to the Treasury by a provision of the Act of July 1, 1902, ch. 1351, § 1, *infra*, p. 411.

Sec. 2037. [Who to be deemed wife and children of colored soldiers.]

In determining who is the wife or child of any colored soldier, within the meaning of this Title, evidence that the soldier and the woman claimed to be his wife cohabited or associated as husband and wife, and so continued to cohabit or associate at the time of enlistment, or evidence that a form of marriage, whether such marriage was authorized or recognized by law or not, was entered into by them, and that the parties thereafter lived together as husband and wife, and so continued to live together at the time of the enlistment, shall be deemed sufficient proof of marriage; and the children born of any such marriage shall be taken to be the children embraced within the provisions of this Title, whether such marriage was or was not dissolved at the time of the enlistment. [R. S.]

Res. No. 29 of March 3, 1865, 13 Stat. L. 571.

Proof of marriage.—The distinction made by statute between colored and other soldiers in pension cases, etc., in regard to proof of marriage (R. S. sec. 2037 here given and R. S. sec. 4705, see PENSIONS),

extends only to the marriage of the soldier, and does not affect that of his parents or other relatives. (1879) 16 Op. Atty.-Gen. 630.

SEC. 2. [Bounty to colored soldiers, how paid, etc.] That all sums due upon certificates issued, or which may be issued by the accounting officers of the Treasury in settlement of claims for pay, bounty, prize money, or other moneys due to colored soldiers, sailors or marines, or their legal representatives, shall be paid by the officers of the Pay Department of the Army, under the direction of the Paymaster General, who is already charged with the payment of like dues to white soldiers: *Provided, first*, That no such certificate shall be issued until it shall have been ascertained that the

application is made by the original claimant, or, if he be dead, by his true living legal representative, nor until the identity of such claimant or representative as the case may be, shall have been duly established: *Provided*, That if an agent or attorney be employed, the allowance for his services shall not in any case exceed that contemplated in the scale of fees and allowances fixed by the second section of a joint resolution approved July twenty sixth, eighteen hundred and sixty six, entitled "Joint resolution amendatory of a joint resolution respecting bounties to colored soldiers, and the pensions, bounties, and allowances to their heirs", approved June fifteenth, eighteen hundred and sixty six, * * * An[d] no power of attorney, transfer or assignment of the amount of such claims, or any part thereof, shall in any case be recognized. [20 Stat. L. 402, 403.]

This is from the Sundry Civil Appropriation Act of March 3, 1879, ch. 182.

The omitted part (preceding the last sentence) reads as follows: "and such allowance shall be stated in a separate certificate in favor of the agent or attorney simultaneously with the issue of a certificate for the amount due the claimant: *Provided further*, That the amount due the claimant, or his living representative, or the balance due after deducting the attorney's fee, if any, shall be paid only to the party named in the certificate, and in current funds or by post office money order, and not by checks or drafts;"

This part is repealed by provisions contained in the Deficiencies Appropriation Act of Feb. 1, 1888, ch. 4, and the Sundry Civil Appropriation Act of July 1, 1898, ch. 546. These repealing provisions read as follows:

"That so much of section two of the sundry civil appropriation act, approved March third, eighteen hundred and seventy-nine, as provides that amounts due upon certificates issued, or which may be issued, by the accounting officers of the Treasury, in settlement of claims for pay, bounty, prize-money, or other moneys due to colored soldiers, sailors, or marines, or their legal representatives, shall be paid only to the party named in the certificate, and in current funds or by post-office money-order, and not by check or drafts, be, and the same is hereby, repealed; and hereafter the said claims of colored soldiers, sailors, and marines shall be paid in the same manner as similar claims are paid to white soldiers, sailors, and marines." [25 Stat. L. 9.]

"That so much of the sundry civil appropriation Act of March third, eighteen hundred and seventy-nine, as requires in the settlement of claims for pay, bounty, prize money or other moneys due to colored soldiers, sailors, or marines, or their legal representatives, that the amount allowed as attorneys' fees be stated in a separate certificate in favor of the agent or attorney, be, and the same is hereby, repealed." [30 Stat. L. 640.]

The fees allowed by the resolution above referred to (Res. No. 86 of July 26, 1866, 14 Stat. L. 368), are "for the preparation and prosecution of claims for, and the collection and remittances of all sums not exceeding fifty dollars, five dollars; for sums exceeding fifty and less than one hundred dollars, seven dollars and fifty cents; and for all sums exceeding one hundred dollars, the sum of ten dollars."

[SEC. 1.] **[Retained bounty fund — disposition.]** RETAINED BOUNTY FUND: That section two thousand and thirty-five of the Revised Statutes is hereby repealed, and the unexpended balance of the fund formerly in the custody of the Freedmen's Bureau and referred to in said section is hereby covered into the Treasury as "Miscellaneous receipts": *Provided*, That upon application by parties entitled to any portion of the moneys so covered in, the Secretary of the Treasury is authorized and directed to pay the amount found due in the same manner and from the same appropriation as claims for bounty to volunteer soldiers are now paid. [32 Stat. L. 556.]

This is from the Deficiencies Appropriation Act of July 1, 1902, ch. 1351.

For the provisions of R. S. sec. 2035, which was repealed by the above provision, see *supra*, p. 410.

FREE HOMESTEAD ACT

See PUBLIC LANDS

FRENCH SPOILIATION CLAIMS ACT

See CLAIMS

GAME ANIMALS AND BIRDS

Act of May 25, 1900, ch. 553 ("Lacey Law"), 412.

Sec. 1. Preservation, etc., of Game and Wild Birds, 412.

5. Animals, etc., Subject to Laws of State into Which Transported, 413.

Act of June 3, 1902, ch. 983, 413.

Eggs of Game Birds — Importation for Propagation, 413.

Act of March 4, 1913, ch. 145, 414.

Sec. 1. Protection of Migratory Birds, 414.

CROSS-REFERENCES

In Alaska, see ALASKA.

Importation of Eggs of Game Birds, see CUSTOMS DUTIES.

In Indian Lands, see INDIANS.

Importation or Transportation, see PENAL LAWS.

In Public Parks and Timber Reserves, see PUBLIC PARKS; TIMBER LANDS AND FOREST RESERVES.

An Act To enlarge the powers of the Department of Agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes.

[*Act of May 25, 1900, ch. 553, 31 Stat. L. 187.*]

[SEC. 1.] [Preservation, etc., of game and wild birds.] That the duties and powers of the Department of Agriculture are hereby enlarged so as to include the preservation, distribution, introduction, and restoration of game birds and other wild birds. The Secretary of Agriculture is hereby authorized to adopt such measures as may be necessary to carry out the purposes of this Act and to purchase such game birds and other wild birds as may be required therefor, subject, however, to the laws of the various States and Territories. The object and purpose of this Act is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not

heretofore existed. The Secretary of Agriculture shall from time to time collect and publish useful information as to the propagation, uses, and preservation of such birds. And the Secretary of Agriculture shall make and publish all needful rules and regulations for carrying out the purposes of this Act, and shall expend for said purposes such sums as Congress may appropriate therefor. [31 Stat. L. 187.]

This and the following section 5 are from the Act known as the "Lacey Law." The other sections of this Act, sections 2, 3, and 4 were incorporated in the Penal Laws of 1909, ch. 9, §§ 241-244, and repealed by section 341 thereof. See PENAL LAWS.

SEC. 5. [Animals, etc., subject to laws of State into which transported.] That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. * * * [31 Stat. L. 188.]

See the note to the preceding section 5 of this Act.

A further provision of this section that "this Act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowl," was incorporated in the Penal Laws of 1909, ch. 9, § 242. See PENAL LAWS.

Dead bodies or parts thereof.—The expression "that all dead bodies or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited," etc., refers to the animals and birds the importation of which, if living, is prohibited by the second section of this Act, and does not prohibit the importation of "all dead bodies of any foreign game animals," etc. (1900) 23 Op. Atty.-Gen. 213.

Imported game subject to police power of state.—This section places the game imported into any state under the police power of that state, and makes it lawful for the state to legislate with reference thereto. Jonesboro, etc., R. Co. v. Adams, (1915) 117 Ark. 54, 174 S. W. 527.

Validity of state laws as to interstate

shipments.—This section confers on any state the right to enact laws prohibiting the possession of dead game within certain periods, whether taken within or without the state. *People v. Hesterberg*, (1906) 184 N. Y. 126, 76 N. E. 1032, 6 Ann. Cas. 353, 3 L. R. A. (N. S.) 163.

In *State v. Heger*, (1905) 194 Mo. 707, 93 S. W. 252, it was held that the Missouri statute (Laws of 1905, p. 162, § 18) prohibiting the sale of game, whether taken within or without the state, is not invalid as a regulation of interstate commerce, in view of this section providing that dead bodies of foreign game animals transported into any state shall, on arrival in the state, be subject to the operation of the laws of the state, enacted in the exercise of its police power.

An Act To regulate the introduction of eggs of game birds for propagation.

[Act of June 3, 1902, ch. 983, 32 Stat. L. 285.]

[Eggs of game birds — importation for propagation.] That from and after the passage of this Act the Secretary of Agriculture shall have the power to authorize the importation of eggs of game birds for purposes of propagation, and he shall prescribe all necessary rules and regulations governing the importation of eggs of said birds for such purposes. [32 Stat. L. 285.]

[SEC. 1.] [Protection of migratory birds.] * * * All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons, and any person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than \$100 or imprisoned not more than ninety days, or both, in the discretion of the court.

The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of three months in which said regulations may be examined and considered before final adoption, permitting, when deemed proper, public hearings thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval: *Provided, however,* That nothing herein contained shall be deemed to affect or interfere with the local laws of the States and Territories for the protection of nonmigratory game or other birds resident and breeding within their borders, nor to prevent the States and Territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute. [37 Stat. L. 847.]

This is from the Agricultural Appropriation Act of March 4, 1913, ch. 145.

Constitutionality.—This Act has been declared unconstitutional by state and federal courts. Thus in *U. S. v. McCullagh*, (D. C. Kan. 1915) 221 Fed. 288, wherein the court, adverting to the fact that it is indisputably established that the title and exclusive power over wild game coming within the borders of a state resides in the state and not in the nation, said: "The act challenged is believed to be the single instance in the entire legislative or judicial history of this nation, or the composing states, in which a contrary view has been expressed. Unless a departure, as radical in theory as it is important in its effects, is to be made from fundamental principles long established by our laws, and long acquiesced in by our people, the act in question must be held incapable of support by any provision of the organic law of our country. If the act in question shall, on any ground, or for any reason, be upheld and enforced, it must surely follow that many laws of

the separate states of this Union must hereafter be held inoperative, for there can be no divided authority of the nation and the several states over the single subject matter in issue, with either safety to the nation or security to the citizen. And this for the reason, although a power of control be delegated by the Constitution to the national government, still such power may be exercised by the states until Congress acts. But so soon as Congress, in pursuance of its delegated power, occupies the field, all state laws become automatically suspended and inoperative. Not only is this true, but the argument of necessity, so strongly urged on the part of the government at the hearing, to preserve the migratory bird life of the country from extinction, would seem to the thoughtful mind more fanciful than real, and for this reason: The several states, as has been seen, possess the most absolute and plenary power of control over the subject-matter of wild

animal and wild bird life within their territorial domains it is possible to either conceive or to grant. In the exercise of this unlimited power the states acting together may beyond all question prohibit absolutely and unconditionally the taking of any such wild life in any part of this country, either temporarily or for all time. Hence, it turns out, the argument of necessity for action on the part of the government arises, not so much from any want of power to control on the part of the several states as from dissatisfaction as to the manner in which such plenary power possessed by the several states is exercised. It is quite obvious differences of opinion and difficulties of the nature involved are inherent in the very form and structure of this government, subject to change or correction, however, only in the manner prescribed by its founders." See to the same effect *State v. McCullagh*, (1915) 96 Kan. 786, 153 Pac. 557.

In *State v. Sawyer*, (1915) 113 Me. 458, 94 Atl. 886, L. R. A. 1915F 1031, which also held that this Act was unconstitutional, the court said: "In *State v. Snowman*, [1900] 94 Me. 99, 111, 46 Atl. 815, 818, 80 A. S. R. 380, 50 L. R. A. 544, our court said: 'The fish in the waters of the state and the game in its forests belong to the people of the state in their sovereign capacity, who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking.' This doctrine is recognized by all the American courts and has had the uniform approval of the Supreme Court of the United States whenever the question has been considered by it. In *Geer v. Connecticut*, (1896) 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793, the leading case perhaps on the subject, Mr. Justice White (now the Chief Justice) learnedly analyzed the principles upon which this doctrine rests and exhaustively reviewed the precedents in which it is securely established. And it would be needless, indeed, to cite here the many authorities supporting this unquestioned principle that the states, prior to the formation of the national legislature, had the power to make laws and regulations for the protection and preservation of the wild game within their borders. Has that power been granted to the federal government? If so, it must be found in either what is called the commerce clause or the general welfare clause of the Federal Constitution. The commerce clause authorizes Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' Const. art. 1, § 8. Certainly the passage of wild birds in their flight from one state to another is not commerce between the states. However difficult it may be to define with precision the term 'commerce,' as used

in that clause of the national Constitution, it is undoubtedly limited to the acts of man, and does not include the natural and uncontrolled movements of wild game. Nor can we perceive any reasonable ground for a contention that the commerce clause confers on Congress power to regulate the taking of wild game within the states. Indeed, it would seem that all possible contention on this score has been already held untenable by the Supreme Court of the United States in several cases where the question has been exhaustively considered. In the case of *Geer v. Connecticut*, *supra*, the validity of a statute of that state, which prohibited the transportation of game out of the state, was involved. The case was carried to the Supreme Court of the United States on the sole ground that, as the game in question was killed in the state lawfully, the statute prohibiting its transportation out of the state was in violation of the commerce clause of the national Constitution. But the court decided otherwise, holding that the wild animal and bird life within a state belongs to the state in trust for the people of the state, and that the state has the authority to legislate for its protection and preservation for the common good, and that such power of legislation embraces game that has been reduced to the possession of an individual by lawfully killing it in the state; or, in other words, that, in view of the peculiar nature of such property and its ownership by the state for the benefit of all its citizens, the state may prohibit its transportation out of the state, although lawfully killed within the state, because such a prohibition may tend to restrict its lawful killing within the state, and the better preserve it for its own people. And it was there held that while game, taken lawfully, might be considered a subject of commerce within the state where taken, it did not become the subject of interstate commerce, within the commerce clause of the federal Constitution. See, also, *New York v. Hesterberg*, (1908) 211 U. S. 34, 29 S. Ct. 10, 53 U. S. (L. ed.) 75, where it is held that a statute of New York prohibiting the possession of certain game during closed time did not violate the commerce clause of the federal Constitution. In *Judson on Interstate Commerce*, § 11, the author says: 'Thus the wild game within a state, at common law, belongs to the sovereign, and in this country to the people, in their collective capacity, and the state therefore has a right to say that it shall not become the subject of commerce.' Our conclusion, therefore, is that the power to legislate respecting the protection and preservation of wild game within the states was not conferred upon Congress through the commerce clause of the Constitution. Nor do we find such power in the general welfare clause. We have already hereinbefore pointed out, as

the universally accepted doctrine, that the ownership of wild game, so far as it is capable of ownership, is in the states for the benefit of all their people in common. It follows, therefore, that Congress acquired no power under the general welfare clause to make regulations concerning wild game, because wild game is not 'property belonging' to the United States. And we need here only repeat what has been before said in substance, that the basic principle on which all the decisions of both the state and federal courts upholding the state game laws rest is that the state is the owner of the wild game within its borders, and that principle has been consistently adhered to. The question of the constitutionality of the act of March 4, 1913, and the regulations thereunder, has been directly considered in two recent cases in the federal courts, viz., *U. S. v. Shauver*, (E. D. Ark. 1914) 214 Fed. 154, decided by the District Court for the Eastern District of Arkansas, and *U. S. v. McCullagh*, (D. C. Kan. 1915) 221 Fed. 288, decided by the District Court for the District of Kansas. In each of those cases, in an exhaustive opinion, the court reaches the same conclusion here reached, that Congress has not the power to regulate the taking of migratory game birds within the states, and that therefore the act of March 4, 1913, is unconstitutional. In each of those cases the respondent was prosecuted in the federal court for a specific violation of the federal regulations."

See also *U. S. v. Shauver*, (E. D. Ark. 1914) 214 Fed. 154, wherein the court said: "Are migratory birds, when in a state on their usual migration, the prop-

erty of the United States or of the states where they are found? If they are the property of the nation, the states would have no power to regulate, control, or prohibit the hunting or killing of them. But the rule of law which all the American courts have recognized is that animals *feræ naturæ*, denominated as game, are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common. This principle has not only been maintained by all the highest courts of the states in which the question has arisen, but has had the approval of the Supreme Court of the United States in every case which has come before it. It may be, as contended on behalf of the government, that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the people who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary. All the courts are authorized to do when the constitutionality of a legislative act is questioned is to determine whether Congress, under the Constitution as it is, possesses the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the act void. The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional."

GARNISHMENT

- R. S. 935. *Garnishees in Suits by United States, on Notes etc.*, 417.
R. S. 936. *Issue Tendered When Garnishee Denies Indebtedness*, 417.
R. S. 937. *Garnishee Failing to Appear*, 417.

CROSS-REFERENCE

See *ATTACHMENT*.

Sec. 935. [Garnishees in suits by the United States, on notes, etc.] In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States: *Provided*, That no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, nor until the sum in which the garnishee stands indebted is actually due. [R. S.]

Act of April 20, 1818, ch. 83, 3 Stat. L. 443.

Sec. 936. [Issue tendered when garnishee denies indebtedness.] When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit. [R. S.]

Act of April 20, 1818, ch. 83, 3 Stat. L. 443.

Sec. 937. [Garnishee failing to appear.] If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court. [R. S.]

Act of April 20, 1818, ch. 83, 3 Stat. L. 444.

GEARY ACT

See *CHINESE EXCLUSION*

GENERAL ALLOTMENT ACT

See *INDIANS*

[417]

GENERAL LAND OFFICE

See PUBLIC LANDS

GEODETIC SURVEY

See COAST AND GEODETIC SURVEY

GEOLOGICAL SURVEY

Act of March 3, 1879, ch. 182, 419.

Sec. 1. Director of Geological Survey, Appointment, Duties, etc.— Collections from Surveys, 419.

Publication of Geological Survey, 419.

Act of June 16, 1880, ch. 235, 419.

Sec. 1. Detail of Officers for Survey, 419.

Act of July 7, 1884, ch. 332, 420.

Sec. 1. Scientific Employees, 420.

Act of March 3, 1887, ch. 362, 420.

Sec. 1. Estimates to Be Itemized, 420.

Act of July 31, 1894, ch. 174, 420.

Sec. 1. Acting Director, 420.

Act of Jan. 12, 1895, ch. 23, 420.

Sec. 79. Estimates for Monographs and Bulletins of Geological Survey, 420.

Act of June 11, 1896, ch. 420, 420.

Sec. 1. Topographic Surveys, How to Be Marked, 420.

Act of June 28, 1902, ch. 1301, 421.

Sec. 1. Estimates for Survey to Note Number of Persons Employed, etc., 421.

Act of June 28, 1902, ch. 1301, 421.

Sec. 1. Purchase of Books, etc., 421.

Act of June 30, 1906, ch. 3914, 421.

Sec. 1. Assignment of Pay by Employees — Reimbursement of Expenses, 421.

Sale of Cartographic, etc., Data, 421.

Act of March 4, 1909, ch. 299, 422.

Sec. 1. Sale of Copies of Photograph Slides — Proceeds, 422.

CROSS-REFERENCES

Reports and Bulletins, see PUBLIC DOCUMENTS; PUBLIC PRINTING.

Surveys of Forest Reserves, see TIMBER LANDS AND FOREST RESERVES.

Investigations as to Irrigation, see WATERS.

See also COAST AND GEODETIC SURVEY.

[SEC. 1.] [Director of Geological Survey, appointment, duties, etc.—collections from surveys.] For the salary of the Director of the Geological Survey, which office is hereby established, under the Interior Department, who shall be appointed by the President by and with the advice and consent of the Senate, six thousand dollars: *Provided*, That this officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the Geological Structure, mineral resources and products of the national domain and that the Director and members of the Geological Survey shall have no personal or private interests in the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations; and the Geological and Geographical Survey of the Territories, and the Geographical and Geological Survey of the Rocky Mountain Region, under the Department of the Interior, and the Geographical Surveys West of the One hundredth Meridian, under the War Department, are hereby discontinued, to take effect on thirtieth day of June, eighteen hundred and seventy-nine. And all collections of rocks, minerals, soils, fossils, and objects of natural history, Archaeology, and ethnology, made by the Coast and Interior Survey, the Geological Survey, or by any other parties for the Government of the United States, when no longer needed for investigations in progress shall be deposited in the National Museum. [20 Stat. L. 394.]

The provisions of this and the following paragraph are from the Sundry Civil Appropriation Act of March 3, 1879, ch. 182.

R. S. sec. 2406 given under the title PUBLIC LANDS provided that "there shall be no further geological survey by the government, unless hereafter authorized by law," but that provision is apparently superseded by the subsequent provisions of the text.

[Publications of Geological Survey.] The publications of the Geological Survey shall consist of the annual report of operations, geological and economic maps illustrating the resources and classification of the lands, and reports upon general and economic geology and paleontology. The annual report of operations of the Geological Survey shall accompany the annual report of the Secretary of the Interior. All special memoirs and reports of said survey shall be issued in uniform quarto series if deemed necessary by the Director, but otherwise in ordinary octavos. Three thousand copies of each shall be published for scientific exchanges and for sale at the price of publication; and all literary and cartographic materials, received in exchange shall be the property of the United States and form a part of the library of the organization: and the money resulting from the sale of such publications shall be covered into the Treasury of the United States, under the direction of the Secretary of the Interior. [20 Stat. L. 394.]

See the note to the preceding paragraph of this section.

See the title PUBLIC DOCUMENTS wherein are given provisions which in effect supersede those of the text relating to the form and number of publications.

[SEC. 1.] [Detail of officers for survey.] * * * And the Secretary of War is hereby authorized to detail not exceeding two officers of the Ordnance Corps to serve with the Geological Survey: *Provided*, That in his judgment it can be done without injury to the service. [21 Stat. L. 274.]

This is from the Sundry Civil Appropriation Act of June 16, 1880, ch. 235.

[SEC. 1.] **[Scientific employees.]** * * * And the scientific employees of the Geological Survey shall be selected by the Director, subject to the approval of the Secretary of the Interior exclusively for their qualifications as professional experts. [23 Stat. L. 212.]

This is from the Sundry Civil Appropriation Act of July 7, 1884, ch. 332.

See the first paragraph of section 1 of the Act of June 30, 1906, ch. 3914, *infra*, p. 421.

[SEC. 1.] **[Estimates to be itemized.]** * * * Hereafter the estimates for the Geological Survey shall be itemized. [24 Stat. L. 527.]

This is from the Sundry Civil Appropriation Act of March 3, 1887, ch. 362.

By a provision of the Sundry Civil Appropriation Act of Aug. 4, 1886, ch. 902, § 1, 24 Stat. L. 255, all printing and engraving for the Geological Survey together with that for other Bureaus was to be estimated for in detail and appropriated for separately for each of the Bureaus mentioned in the Act.

[SEC. 1.] **[Acting Director.]** * * * The Secretary of the Interior may hereafter authorize one of the geologists to act as Director of the Geological Survey in the absence of that officer. [28 Stat. L. 197.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 31, 1894, ch. 174.

SEC. 79. **[Estimates for monographs and bulletins of Geological Survey.]** The scientific reports known as the monographs and bulletins of the Geological Survey shall not be published until specific and detailed estimates are made therefor and specific appropriations made in pursuance of such estimates; and no engravings for the annual reports for such monographs and bulletins, or of illustrations, sections, and maps, shall be done until specific estimates are submitted therefor and specific appropriations made based on such estimates. [28 Stat. L. 621.]

This is part of section 79 of the Act of Jan. 12, 1895, ch. 23, to provide for the public printing and binding and the distribution of public documents.

The following provision, nearly identical with the above, is from the Sundry Civil Appropriation Act of Aug. 4, 1886, ch. 902, 24 Stat. L. 255: "And hereafter the scientific reports known as the monographs and bulletins of the Geological Survey shall not be published until specific and detailed estimates are made therefor, and specific appropriations made in pursuance of such estimates; and no engraving for the annual reports or for such monographs and bulletins, or of illustrations, sections, and maps, shall be done until specific estimates are submitted therefor and specific appropriations made based on such estimates."

[SEC. 1.] **[Topographic surveys, how to be marked.]** United States Geological Survey. * * * For topographic surveys in various portions of the United States, * * * *Provided*, That hereafter in such surveys west of the ninety-fifth meridian elevations above a base level located in each area under survey shall be determined and marked on the ground by iron or stone posts or permanent bench marks, at least two such posts or bench marks to be established in each township or equivalent area, except in the forest-clad and mountain areas, where at least one shall be established,

and these shall be placed, whenever practicable, near the township corners of the public-land surveys; and in the areas east of the ninety-fifth meridian at least one such post or bench mark shall be similarly established in each area equivalent to the area of a township of the public land surveys. [29 Stat. L. 435.]

This is from the Sundry Civil Appropriation Act of June 11, 1896, ch. 420.

[SEC. 1.] **[Estimates for Survey to note number of persons employed, etc.]** Hereafter, in lieu of the specific estimates for personal services now required by law, there shall be submitted in the Annual Book of Estimates, under each item of appropriation under "General expenses of the Geological Survey," notes showing the number of persons employed and the rate of compensation paid to each from each of said appropriations during the fiscal year next preceding the fiscal year for which estimates are submitted. [32 Stat. L. 455.]

This is from the Sundry Civil Appropriation Act of June 28, 1902, ch. 1301, and follows an appropriation for scientific assistants of the Geological Survey. The specific estimates for personal services to which the text refers as "now required by law" are those named by the following provision in the Sundry Civil Appropriation Act of March 3, 1901, ch. 853, 31 Stat. L. 1161, which follows an appropriation for scientific assistants: "Hereafter specific estimates shall be annually submitted to Congress for all personal services, including those of a technical or scientific character, necessary to be employed in the office of the Geological Survey at Washington, District of Columbia."

[SEC. 1.] **[Purchase of books, etc.]** That the purchase of professional and scientific books and periodicals needed for statistical purposes hereafter by the scientific divisions of the United States Geological Survey is hereby authorized to be made and paid for out of appropriations made for the said Survey. [32 Stat. L. 455.]

This is from the Sundry Civil Appropriation Act of June 28, 1902, ch. 1301.

[SEC. 1.] **[Assignment of pay by employees — reimbursement of expenses.]** * * * The Secretary of the Interior is hereby authorized to permit scientific and other employees of the United States Geological Survey, employed in the field, to make assignments of their pay, under such regulations as he may prescribe, during such time as they may be in the employ of the United States Geological Survey. And the Secretary of the Interior is further authorized, in his discretion, under such regulations as he may prescribe, to reimburse the scientific and other employees for expenses incurred by them in the discharge of their duties in the field and paid from their personal funds. [34 Stat. L. 727.]

This and the following paragraph of this section are from the Sundry Civil Appropriation Act of June 30, 1906, ch. 3914.

[Sale of cartographic, etc., data.] * * * The Director of the Geological Survey shall, if the regular map work of the Survey is in no wise interfered with thereby, hereafter furnish to any person, concern, institution,

State or foreign government, that shall pay in advance the whole cost thereof with ten per centum added, transfers or copies of any cartographic or other engraved or lithographic data in the division of engraving and printing of the Survey, and the moneys received by the Director for such transfers or copies shall be deposited in the Treasury. [34 Stat. L. 727.]

See the note to the preceding paragraph of this section.

[SEC. 1.] [Sale of copies of photograph slides — proceeds.] * * *
The Director of the Geological Survey shall hereafter furnish to any person, concern, or institution, in the interest of education and the dissemination of knowledge, that shall pay in advance the whole cost of material and services thereof, copies of any photographs or lantern slides in the possession of the United States Geological Survey; and the moneys received by the director for the same shall be deposited in the United States Treasury. [35 Stat. L. 989.]

This is from the Sundry Civil Appropriation Act of March 4, 1909, ch. 299.

GLACIER NATIONAL PARK ACT

See PUBLIC PARKS

GOVERNMENT EMPLOYERS' LIABILITY ACT

See LABOR

GOVERNMENT HOSPITAL FOR THE INSANE

See HOSPITALS AND ASYLUMS

GOVERNMENT PRINTING OFFICE

See PUBLIC PRINTING

GUANO ISLANDS

- R. S. 5570. *Claim of United States to Islands*, 423.
R. S. 5571. *Notice of Discovery, and Proofs to Be Furnished*, 424.
R. S. 5572. *Completion of Proof in Case of Death of Discoverer*, 424.
R. S. 5573. *Exclusive Privileges of Discoverer*, 424.
R. S. 5574. *Restrictions upon Exportation*, 425.
R. S. 5575. *Regulation of Guano Trade*, 425.
R. S. 5576. *Criminal Jurisdiction*, 425.
R. S. 5577. *Employment of Land and Naval Forces*, 426.
R. S. 5578. *Right to Abandon Islands*, 426.

Sec. 5570. [Claim of United States to islands.] Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States. [R. S.]

Act of Aug. 18, 1856, ch. 164, 11 Stat. L. 119.

Sections 5570 to 5578 constitute title LXII of the Revised Statutes, "Guano Islands."

Act constitutional.—The legislation of Congress concerning guano islands is constitutional and valid. *Jones v. U. S.* (1890) 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691. See also *Downes v. Bidwell*, (1901) 182 U. S. 244, 21 S. Ct. 770, 45 U. S. (L. ed.) 1088.

Under the Guano Islands Act, the United States government now holds and protects American citizens in the occupation of many islands. See *Downes v. Bidwell*, (1901) 182 U. S. 244, 21 S. Ct. 770, 45 U. S. (L. ed.) 1088.

"An actual taking of possession and actual occupation of the island whereon guano has been discovered are express conditions of the Act of Congress, which are not complied with by a mere symbolical possession or occupancy, as by the planting of a flag, the erection of a tablet, an inscription, or other like acts." (1859) 9 Op. Atty-Gen. 367.

President's declaration.—"The President is not bound, against his own conviction of public policy, to declare any particular island as appertaining to the United States. The law forbids him to do so before the prerequisites above mentioned are complied with, and leaves it to his discretion afterwards. But he may do it

without waiting for an adverse claim to be set up." (1857) 9 Op. Atty-Gen. 32.

Declaration made through Department of State.—The power conferred on the President by this section to determine that a guano island shall be considered as appertaining to the United States being a strictly executive power, affecting foreign relations, and the manner in which his determination is to be made known not being prescribed by statute, it may be declared through the Department of State, whose acts are in legal contemplation the acts of the President. *Jones v. U. S.*, (1890) 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

Not territorial domain.—"The provisions of the law entirely negative any idea that such islands were in any sense to become part of the territorial domain of the United States" *Graffin v. Navassa Phosphate Co.*, (1888) 35 Fed. 474, *affirmed* (1891) 137 U. S. 647, 11 S. Ct. 242, 34 U. S. (L. ed.) 825.

The Island of Navassa, in the Caribbean Sea, was held to be considered as appertaining to the United States, under this section. *Jones v. U. S.*, (1890) 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

Sec. 5571. [Notice of discovery, and proofs to be furnished.] The discoverer shall, as soon as practicable, give notice, verified by affidavit, to the Department of State, of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other government or of the citizens of any other government, before the same shall be considered as appertaining to the United States. [R. S.]

Act of Aug. 18, 1856, ch. 164, 11 Stat. L. 119.

Sec. 5572. [Completion of proof in case of death of discoverer.] If the discoverer dies before perfecting proof of discovery or fully complying with the provisions of the preceding section, his widow, heir, executor, or administrator, shall be entitled to the benefits of such discovery, upon complying with the provisions of this Title; but nothing herein shall be held to impair any rights of discovery or any assignment by a discoverer heretofore recognized by the United States. [R. S.]

Act of April 2, 1872, ch. 81, 17 Stat. L. 48.

Dower.—"It is impossible to find in this Act any manifestation of an intention of Congress that the interest of the discoverer should be subject to dower, or even that it should be considered as real estate rather than as personal property." *Duncan v. Navassa Phosphate Co.*, (1891) 137 U. S. 647, 11 S. Ct. 242, 34 U. S. (L. ed.) 825, *affirming* *Graffin v. Navassa Phosphate Co.*, (1888) 35 Fed. 474.

Upon examination of the claim of the widow of Wm. Parker, under the Acts of Aug. 18, 1856, and April 2, 1872, to certain guano islands in the Pacific, it was advised that she had no derivative title to the islands from her husband, and that she was not in a position to set up an original title thereto for herself. (1873) 14 Op. Atty-Gen. 608.

Sec. 5573. [Exclusive privileges of discoverer.] The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding eight dollars per ton for the best quality, or four dollars for every ton taken while in its native place of deposit. [R. S.]

Act of Aug. 18, 1856, ch. 164, 11 Stat. L. 119.

Extent of discoverer's rights.—The discoverer obtains no title to, or ownership in, the island under the Act, but is simply protected in the exclusive occupancy thereof for the purpose of obtaining and shipping guano therefrom. *Graffin v. Navassa Phosphate Co.*, (1888) 35 Fed. 474, *affirmed* (1891) 137 U. S. 647, 11 S. Ct. 242, 34 U. S. (L. ed.) 825.

Inspection of claim.—No claim, under the Act of Congress, can have any earlier inception than the actual discovery of

guano deposit, possession taken, and actual occupation of the island, rock, or key whereon it is found. (1859) 9 Op. Atty-Gen. 364.

Revocation of proclamation.—The Secretary of State should not, upon the application of the American Guano Company, revoke the proclamation issued Aug. 7, 1860, relative to Howland's Island, in the Pacific Ocean, in favor of the United States Guano Company. (1865) 11 Op. Atty-Gen. 397.

The expression, "at the pleasure of Congress," means that Congress may terminate the possession when it pleases, the discoverer being, under the Act, the nation's tenant at will. (1857) 9 Op. Atty.-Gen. 30.

Sec. 5574. [Restrictions upon exportation.] No guano shall be taken from any such island, rock, or key, except for the use of the citizens of the United States or of persons resident therein. The discoverer, or his widow, heir, executor, administrator, or assigns, shall enter into bond, in such penalty and with such sureties as may be required by the President, to deliver the guano to citizens of the United States, for the purpose of being used therein, and to none others, and at the price prescribed, and to provide all necessary facilities for that purpose within a time to be fixed in the bond; and any breach of the provisions thereof shall be deemed a forfeiture of all rights accruing under and by virtue of this Title. This section shall, however, be suspended in relation to all persons who have complied with the provisions of this Title, for five years from and after the fourteenth day of July, eighteen hundred and seventy-two. [R. S.]

Act of Aug. 18, 1856, ch. 164, 11 Stat. L. 119; Act of July 28, 1866, ch. 298, 14 Stat. L. 328; Act of April 2, 1872, ch. 81, 17 Stat. L. 48.

By the Act of March 15, 1878, ch. 34, 20 Stat. L. 30, this section was "further suspended, as therein set forth, for the period of five years next from and after the passage of this Act." And by the Act of April 18, 1884, ch. 24, 23 Stat. L. 11, a still further suspension of five years from the passage of such Act was made.

The United States may exercise such authority and for such time as it deems best, over an unappropriated guano island first occupied by its citizens. *Jones v. U. S.*, (1890) 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

Bond.—In determining the proper party to give the bond required by the Act of Congress, the political department of the government can only look to the party complying with the conditions of the statute, without considering the legal or equitable rights of other parties to share in the profits of the speculation, which are to be left for the determination of the proper judicial tribunals. (1859) 9 Op. Atty.-Gen. 364.

Effect of breach of bond.—A breach of the provisions of the bond given by the discoverer of a guano island under this section affects the private rights only of the delinquent, and does not impair the dominion of the United States or the jurisdiction of their courts. *Jones v. U. S.*, (1890) 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

Application of sureties for release.—The bond having been broken, it was advised that the President had no duty to perform upon an application by the sureties to be released from their obligation by reason of the breach. *Delano's Case*, (1863) 11 Op. Atty.-Gen. 30.

Sec. 5575. [Regulation of guano trade.] The introduction of guano from such islands, rocks, or keys, shall be regulated as in the coasting-trade between different parts of the United States, and the same laws shall govern the vessels concerned therein. [R. S.]

Act of Aug. 18, 1856, ch. 64, 11 Stat. L. 120.

Sec. 5576. [Criminal jurisdiction.] All acts done, and offenses or crimes committed, on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant-ship or vessel belonging to the United States; and shall be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks, and keys. [R. S.]

Act of Aug. 18, 1856, ch. 64, 11 Stat. L. 120.

This section is in part superseded by the Penal Laws of 1909, ch. 11, § 272, 35 Stat. L. 1142. See PENAL LAWS.

Punishment of crime.—This section does not assume to extend the admiralty jurisdiction over the land; “but, in the exercise of the power of the United States to preserve peace and punish crime in regions over which they exercise jurisdiction, it unequivocally extends the provisions of the statutes of the United States for the punishment of offenses committed upon the high seas to like offenses committed upon guano islands which have been determined by the President to appertain to the United States.” *Jones v. U. S.*, (1890) 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

Place of trial.—Where a murder has been committed upon a guano island declared as appertaining to the United States, the trial may, under R. S. secs. 730 (now Judicial Code, sec. 41; see JUDICIARY), 5339, and 5376 (now embodied in Penal Laws, secs. 273 and 274; see PENAL LAWS), be held in the United States court for the district where the offender is found or into which he is first brought. *Jones v. U. S.*, (1890) 137 U. S. 202, 11 S. Ct. 80, 34 U. S. (L. ed.) 691.

Sec. 5577. [Employment of land and naval forces.] The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns. [R. S.]

Act of Aug. 18, 1856, ch. 64, 11 Stat. L. 120.

Sec. 5578. [Right to abandon islands.] Nothing in this Title contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys, after the guano shall have been removed from the same. [R. S.]

Act of Aug. 18, 1856, ch. 64, 11 Stat. L. 120.

HABEAS CORPUS

- R. S. 751. *Power of Courts to Issue Writs of Habeas Corpus*, 427.
R. S. 752. *Power of Judges to Grant Writs of Habeas Corpus*, 448.
R. S. 753. *Writ of Habeas Corpus when Prisoner Is in Jail*, 449.
R. S. 754. *Application for the Writ of Habeas Corpus*, 462.
R. S. 755. *Allowance and Direction of the Writ*, 464.
R. S. 756. *Time of Return*, 467.
R. S. 757. *Form of Return*, 468.
R. S. 758. *Body of the Party to Be Produced*, 468.
R. S. 759. *Day for Hearing*, 469.
R. S. 760. *Denial of Return, Counter-allegations, Amendments*, 469.
R. S. 761. *Summary Hearing; Disposition of Party*, 469.
R. S. 762. *In Cases Involving the Law of Nations, Notice to Be Served on State Attorney-General*, 474.
R. S. 763. *Appeals in Cases of Habeas Corpus to Circuit Court — Superseded*, 475.
R. S. 764. *Appeal to Supreme Court — Superseded*, 476.
R. S. 765. *Appeals, How Taken*, 479.
R. S. 766. *Pending Proceedings in Certain Cases, Action by State Authority Void*, 480.
Act of March 10, 1908, ch. 76, 481.
Appeals to Supreme Court, 481.

CROSS-REFERENCES

Under Chinese Exclusion Acts, see **CHINESE EXCLUSION**.
In the Philippines, see **PHILIPPINE ISLANDS**.
In Porto Rico, see **PORTO RICO**.
See generally, **JUDICIARY**.
Suspension of Writ of Habeas Corpus under Constitution, see the Constitution, given at the close of this work,

Sec. 751. [Power of courts to issue writs of habeas corpus.] The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus. [*R. S.*]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 81; Act of April 10, 1869, ch. 22, 16 Stat. L. 44; Act of March 2, 1833, ch. 57, 4 Stat. L. 634; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385; Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

Sections 751 to 766, inclusive, constitute chapter 13 of title XIII of the Revised Statutes, "Habeas Corpus."

The Circuit Courts were abolished and their powers and duties conferred on the District Courts by the Judicial Code of March 3, 1911, ch. 13, §§ 289-291, 36 Stat. L. 1167. See the title **JUDICIARY**.

- I. Introductory, 428.
 1. Definition and nature, 428.
 2. History of writ, 428.
- II. Courts authorized to issue writ, 428.
 1. Generally, 428.
 2. Supreme Court, 428.
 3. Circuit Court of Appeals, 430.
 4. District Court, 430.
- III. Scope of writ, 430.
 1. Generally, 430.
 2. Arrest under civil process, 431.
- IV. As substitute for writ of error, 431.
 1. Rule stated, 431.
 2. Reason for rule, 433.
 3. When used with certiorari, 433.
 4. Disregard by court of rule of comity, 434.
 5. Arrest, 434.
 6. Grand jury, 434.
 7. Indictment, 434.
 8. Defenses, 436.
 9. Rulings of trial court, 436.
 10. Sufficiency of evidence, 436.
 11. Submission of case to jury, 436.
 12. Sentence, 436.
 13. Order, 437.
- V. Time for suing out writ, 437.
- VI. Federal interference with custody of state court, 438.
 1. Rule stated, 438.
 2. Exceptional circumstances, 441.
- VII. Restraint of personal liberty, 442.
 1. Rule stated, 442.
 2. Petitioner at large on bail, 443.
 3. Formal commitment, 443.
- VIII. Review of proceedings of special tribunals, 443.
 1. In general, 443.
 2. Court-martial, 443.
 3. Immigration, 443.
- IX. Contempt proceedings, 444.
- X. Extradition proceedings, 445.
 1. Under treaty, 445.
 2. Interstate, 445.
- XI. Enlistment of minors in army and navy, 448.

I. INTRODUCTORY

1. Definition and Nature

Enforcement of civil right of personal liberty.—The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary because of what is done to enforce laws for the punishment of crimes; but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. *Ex p. Tom Tong*, (1883) 108 U. S. 556, 2 S. Ct. 871, 27 U. S. (L. ed.) 826. It is the usual remedy for unlawful imprisonment, *Chin Yow v. U. S.*, (1908) 208 U. S. 8, 28 S. Ct. 201, 52 U. S. (L. ed.) 369; and is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal pro-

ceeding, *In re Frederick*, (1893) 149 U. S. 70, 13 S. Ct. 793, 37 U. S. (L. ed.) 653.

High prerogative writ of right.—This writ, especially provided for in the statutes of the United States, is the high prerogative writ of right granted upon the application of a person illegally imprisoned or in any way restrained of his liberty. *U. S. v. Harden*, (W. D. N. C. 1881) 10 Fed. 802.

2. History of Writ

Origin in England.—The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom. In England after a long struggle it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679, "for the better securing of the liberty of the subject," which as Blackstone says, "is frequently considered as another Magna Charta." It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors. Naturally, therefore, when the confederated colonies became united states, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words: "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." *Ex p. Yerger*, (1868) 8 Wall. 85, 19 U. S. (L. ed.) 332.

II. COURTS AUTHORIZED TO ISSUE WRIT

1. Generally

Authority as dependent on statute.—For the meaning of the term "habeas corpus," resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States must be given by the written law. *Ex p. Bollman*, (1807) 4 Cranch 75, 2 U. S. (L. ed.) 554; *Matter of Keeler*, (1843) Hempst. 306, 14 Fed. Cas. No. 7,637.

2. Supreme Court

Generally.—This section expressly gives the Supreme Court power to issue writs of habeas corpus.

But in *Ex p. Terry*, (1888) 128 U. S. 289, 9 S. Ct. 77, 32 U. S. (L. ed.) 405, the court said: "Since the passage of the Act of March 3, 1885, c. 353, 23 Stat. 437, amending § 764 of the Revised Statutes [*infra*, p. 476] so as to give this court jurisdiction, upon appeal, to review the final decisions of the Circuit Courts of the United States in cases of habeas corpus, when the petitioner alleges that he is restrained of his liberty in violation of the Constitution or laws of the United States, the right to the writ, upon original application to this court,

is not, in every case, an absolute one." See further *Ex p. Mirzan*, (1887) 119 U. S. 584, 7 S. Ct. 341, 30 U. S. (L. ed.) 513, wherein the court said: "As since the Act of March 3, 1885, 23 Stat. 437, an appeal lies to this court from the judgments of the Circuit Courts in habeas corpus cases, this court will not issue such a writ, even if it has the power . . . in cases where it may as well be done in the proper Circuit Court, if there are no special circumstances in the case making direct action or intervention by this court necessary or expedient. In this case there are no such special circumstances, and the application may as well be made to the Circuit Court for the Northern District of New York as here. Our right to exercise this discretion is shown by principles on which the decisions in *Ex p. Royall*, Nos. 1 and 2, [1886] 117 U. S. 241 [6 S. Ct. 734, 29 U. S. (L. ed.) 868], and *Ex p. Royall*, [1886] 117 U. S. 254 [6 S. Ct. 742, 29 U. S. (L. ed.) 872], rest. This practice was suggested by us and followed in *Wales v. Whitney*, [1885] 114 U. S. 564 [5 S. Ct. 1050, 29 U. S. (L. ed.) 277]." See to the same effect *In re Huntington*, (1890) 137 U. S. 63, 11 S. Ct. 4, 34 U. S. (L. ed.) 567; *In re Chapman*, (1895) 156 U. S. 211, 15 S. Ct. 331, 39 U. S. (L. ed.) 401; *In re Lincoln*, (1906) 202 U. S. 178, 26 S. Ct. 602, 50 U. S. (L. ed.) 984.

The Supreme Court can be asked to issue a writ of habeas corpus as within its original jurisdiction, only when the inferior court has acted without jurisdiction, or has exceeded its powers to the prejudice of the party seeking relief. *In re Lane*, (1890) 135 U. S. 443, 10 S. Ct. 760, 34 U. S. (L. ed.) 219. See also *Ex p. Terry*, (1888) 128 U. S. 289, 9 S. Ct. 77, 32 U. S. (L. ed.) 405; *Ex p. Parks*, (1876) 93 U. S. 18, 23 U. S. (L. ed.) 787; *Ex p. Siebold*, (1879) 100 U. S. 375, 25 U. S. (L. ed.) 717; *Ex p. Wilson*, (1885) 114 U. S. 417, 5 S. Ct. 935, 29 U. S. (L. ed.) 89; *Ex p. Harding*, (1887) 120 U. S. 782, 7 S. Ct. 780, 30 U. S. (L. ed.) 824.

In the case of *In re Sawyer*, (1888) 124 U. S. 200, 8 S. Ct. 482, 31 U. S. (L. ed.) 402, the Supreme Court entertained an original application for a writ of habeas corpus without requiring the petitioner to apply, in the first instance, to the proper Circuit Court; but in that case the application proceeded upon the ground that the Circuit Court itself had made the order by which he was alleged to have been deprived of his liberty in violation of the Constitution of the United States. This practice was approved in *Ex p. Terry*, (1888) 128 U. S. 289, 9 S. Ct. 77, 32 U. S. (L. ed.) 405.

Ordinarily the Supreme Court cannot issue a writ of habeas corpus except under its appellate jurisdiction. The above section, which re-enacts a similar provision

in the Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. L. 81, gives the Supreme Court authority to issue the writ, but except in cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party, it can only be done for a review of the judicial decision of some inferior officer or court. *Ex p. Watkins*, (1833) 7 Pet. 568, 8 U. S. (L. ed.) 786; *Ex p. Yerger*, (1868) 8 Wall. 85, 19 U. S. (L. ed.) 332; *Ex p. Lange*, (1873) 18 Wall. 163, 21 U. S. (L. ed.) 872; *Ex p. Parks*, (1876) 93 U. S. 18, 23 U. S. (L. ed.) 787; *Ex p. Virginia*, (1879) 100 U. S. 339, 25 U. S. (L. ed.) 676; *Ex p. Siebold*, (1879) 100 U. S. 371, 25 U. S. (L. ed.) 717; *Ex p. Hung Hang*, (1883) 108 U. S. 552, 2 S. Ct. 863, 27 U. S. (L. ed.) 811, citing *Ex p. Bollman*, (1807) 4 Cranch 75, 2 U. S. (L. ed.) 554.

Power as appellate in nature.—The decision that the petitioner shall be imprisoned must always precede the application to the Supreme Court for a writ of habeas corpus, and the writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature. *Ex p. Bollman*, (1807) 4 Cranch 75, 2 U. S. (L. ed.) 554. See also *Ex p. Milburn*, (1835) 9 Pet. 704, 9 U. S. (L. ed.) 280; *Ex p. Clarke*, (1879) 100 U. S. 399, 25 U. S. (L. ed.) 715.

While the Supreme Court has no general power of review over the judgments of the inferior courts in criminal cases by the use of the writ of habeas corpus, it may examine the case as disclosed by the record of the court below and the return of the marshal to ascertain whether it shows that the court had any power to render the judgment by which the prisoner is held. *Ex p. Lange*, (1873) 18 Wall. 163, 21 U. S. (L. ed.) 872. See also *Ex p. Burford*, (1806) 3 Cranch 448, 2 U. S. (L. ed.) 495; *Ex p. Kearney*, (1822) 7 Wheat. 38, 5 U. S. (L. ed.) 391; *Ex p. Watkins*, (1830) 3 Pet. 193, 7 U. S. (L. ed.) 650; *Ex p. Carll*, (1882) 106 U. S. 521, 1 S. Ct. 535, 27 U. S. (L. ed.) 288; *Ex p. Farley*, (W. D. Ark. 1889) 40 Fed. 66.

"It may be admitted that there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of habeas corpus. In this form nothing more can be examined into than the legality of the commitment. However erroneous the judgment of the court may be, either in a civil or criminal case, if it had jurisdiction, and the defendant has been duly committed, under an execution or sentence, he cannot be discharged by this writ. In criminal cases, this court has no revisory power over the decisions of the Circuit Court; and yet, as appears from the cases cited, 'the cause of commitment' in that court may be examined in this, on a writ of habeas corpus. And

this is done by the exercise of an appellate power,—a power to inquire merely into the legality of the imprisonment, but not to correct the errors of the judgment of the Circuit Court.” *Matter of Metzger*, (1847) 5 How. 176, 12 U. S. (L. ed.) 104. See also *In re Kaine*, (1852) 14 How. 103, 14 U. S. (L. ed.) 345; *Ex p. Kaine*, (1853) 3 Blatchf. 1, 14 Fed. Cas. No. 7,597; *Arkansas Industrial Co. v. Neel*, (1886) 48 Ark. 283, 3 S. W. 631.

The Supreme Court, in the exercise of its appellate jurisdiction, may, by writ of habeas corpus, aided by the writ of certiorari, revise the decision of the Circuit Court remanding the petitioner to the custody from which he was taken, and if it be found unwarranted by law, relieve him from the unlawful restraint to which he has been remanded, not only in a case which must have resulted in a commitment for trial in a civil court, but to give relief from imprisonment under military authority to which the petitioner may have been remanded by such court. *Ex p. Yerger*, (1868) 8 Wall. 85, 19 U. S. (L. ed.) 332. See *Kurtz v. Moffitt*, (1885) 115 U. S. 487, 6 S. Ct. 148, 29 U. S. (L. ed.) 458.

On certified cases.—The writ of habeas corpus is a civil remedy which the law gives for the enforcement of the civil right of personal liberty. On a certificate of division of opinion under R. S. sec. 652 (repealed by the Judicial Code, see JUDICIARY), on the hearing of a writ of habeas corpus brought up from a Circuit Court, the Supreme Court could not take jurisdiction when no final judgment had been entered in the Circuit Court. *Ex p. Tom Tong*, (1883) 108 U. S. 556, 2 S. Ct. 871, 27 U. S. (L. ed.) 826. But see *Ex p. Milligan*, (1866) 4 Wall. 2, 18 U. S. (L. ed.) 281.

3. Circuit Court of Appeals

Authority to issue as original proceeding.—A Circuit Court of Appeals cannot issue a writ of habeas corpus as an original and independent proceeding, although under R. S. sec. 716, and section 12 of the Circuit Court of Appeals Act of 1891, which sections are consolidated in Judicial Code, § 262, title JUDICIARY, it may issue such writ in cases when necessary for the exercise of a jurisdiction already existing. *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963. Prior to that decision it was held that the power of the Circuit Court of Appeals was thus restricted in *Ex p. Moran*, (1906) 144 Fed. 594, 75 C. C. A. 396.

4. District Court

Authority expressly given.—By express provision of this section the District Court has jurisdiction to issue the writ of habeas corpus, but the duty of the court to grant or refuse it must depend upon the

facts of each case. *Filer v. Steele*, (W. D. Pa. 1915) 228 Fed. 242.

III. SCOPE OF WRIT

1. Generally

Common-law rule as controlling scope.

—The federal courts and judges have jurisdiction to issue writs of habeas corpus in all cases which it would reach at common law, except as expressly restricted by statute. *In re Barry*, (1844) 42 Fed. 113; *Ex p. Davis*, (1851) 14 Law Rep. 301, 7 Fed. Cas. No. 3,613; *Bennett v. Bennett*, (1867) Deady 299, 3 Fed. Cas. No. 1,318; *Ex p. Des Rocherss*, (1856) McAll. 68, 7 Fed. Cas. No. 3,824.

The power granted by R. S. secs. 751, 752, 761 is not coextensive with the judicial power of the national government as defined by the Constitution, so as to comprehend all cases within the jurisdiction conferrable upon the federal courts, but it is a jurisdiction to be exercised only in cases within the limited jurisdiction conferred upon the courts by other Acts of Congress. *In re Burrus*, (1890) 136 U. S. 591, 10 S. Ct. 850, 34 U. S. (L. ed.) 502; *Clifford v. Williams*, (C. C. Wash. 1904) 131 Fed. 100.

“The general principles upon which the writ of habeas corpus is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. These principles, subject to the limitations imposed by the Federal Constitution and laws, are to be referred to for our guidance on the subject. A brief reference to the principal authorities will suffice on this occasion. Lord Coke, before the Habeas Corpus Act was passed, excepted from the privilege of the writ persons imprisoned upon conviction for crime, or in execution. 2 Inst. 52; Com. Dig., Hab. Corp. B. The Habeas Corpus Act itself excepts those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process. Com. Dig., Hab. Corp. B. Lord Hale says: ‘If it appear by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed.’ 2 Hale’s H. P. C. 144. Chief Baron Gilbert says: ‘If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.’ Bac. Abr., Hab. Corp. B, 10. These extracts are sufficient to show, that, when a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of

course, a superior court will interfere if the inferior court had exceeded its jurisdiction or was not competent to act." *Ex p. Parks*, (1876) 93 U. S. 18, 23 U. S. (L. ed.) 787.

Restriction to territorial jurisdiction.—The power to issue writs of habeas corpus is restricted to the territorial jurisdiction of the court to which the application is made. The general holding is that the federal courts have no power or authority to issue a writ of habeas corpus to be sent out of their respective jurisdictions. *Ex p. Gouyet*, (D. C. Mont. 1909) 175 Fed. 230. And see to the same effect *In re Boles*, (C. C. A. 8th Cir. 1891) 48 Fed. 75, 4 U. S. App. 1, 1 C. C. A. 48; *Ex p. Kenyon*, (1878) 5 Dill. 385, 14 Fed. Cas. No. 7,720; *In re Bickley*, (1885) 3 Fed. Cas. No. 1,387. It appears, however, that the District Court for the Northern District of Illinois has discharged prisoners confined in Leavenworth prison, apparently on the theory that the court imposing the sentence had jurisdiction to inquire on habeas corpus into the validity thereof. See *Ex p. Gouyet*, (D. C. Mont. 1909) 175 Fed. 230.

Inclusion of every species of writ.—Every species of the writ is included in the grant of authority to the courts to issue "writs of habeas corpus." *North Carolina v. Sullivan*, (1892) 50 Fed. 593.

Inquiry as confined to jurisdiction.—Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions. *In re Gregory*, (1911) 219 U. S. 210, 31 S. Ct. 143, 55 U. S. (L. ed.) 184; *Glasgow v. Moyer*, (1912) 225 U. S. 420, 32 S. Ct. 753, 56 U. S. (L. ed.) 1147.

"No court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void." *Kaizo v. Henry*, (1908) 211 U. S. 146, 29 S. Ct. 41, 53 U. S. (L. ed.) 125.

"If an inferior court or magistrate of the United States has jurisdiction, a Superior Court of the United States will not interfere by habeas corpus." *Horner v. U. S.*, (1892) 143 U. S. 570, 12 S. Ct. 522, 36 U. S. (L. ed.) 266. But the jurisdiction of a court can be inquired into under the laws of the United States by any judge or court that has the right to issue the writ, for if there is no jurisdiction to try, the party is held in custody contrary to the Constitution and laws of the United States. *U. S. v. Rogers*, (W. D. Ark. 1885) 23 Fed. 658. See to the same effect *U. S. v. Brawner*, (W. D. Tenn. 1881) 7 Fed. 86; *In re James*, (W. D. Mo. 1884) 18 Fed. 853; *In re Buell*, (1875) 3 Dill. 116, 4 Fed. Cas. No. 2,102.

"Neither *Hyde v. Shine*, [(1905) 199 U. S. 84, 25 S. Ct. 764, 50 U. S. (L. ed.) 97] nor *Tinsley v. Treat*, [(1907) 205

U. S. 20, 27 S. Ct. 430, 51 U. S. (L. ed.) 689] is authority for the proposition that a writ of habeas corpus can be made the basis of a review of the judgment of a court of competent jurisdiction where proceedings were had under a constitutional statute giving the court authority to examine into the charges, and to convict or acquit the accused, when the proceedings show no attempt to exert the jurisdiction of the court in excess of its authority." *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101, 21 Ann. Cas. 849, *affirming* (N. D. Fla. 1909) 180 Fed. 119.

The business of issuing and redeeming trading stamps is not so manifestly outside the range of judicial consideration, under District of Columbia R. S. sec. 1177, making it a crime to engage in any manner in any gift enterprise business in the district, as to justify relief by habeas corpus to a person convicted of that offense, on the theory that the trial court was without jurisdiction. *Matter of Gregory*, (1911) 219 U. S. 210, 31 S. Ct. 143, 55 U. S. (L. ed.) 184.

2. Arrest Under Civil Process

Rule stated.—Arrest under a civil process is not a case for remedy by habeas corpus. *Ex p. Wilson*, (1810) 6 Cranch 52, 3 U. S. (L. ed.) 149. But see *In re Mineau*, (1891) 45 Fed. 188; *Ex p. Randolph*, (1833) 2 Brock. 447, 20 Fed. Cas. No. 11,558.

IV. AS SUBSTITUTE FOR WRIT OF ERROR

1. Rule Stated

Rule against use as substitute.—It is the settled doctrine of the Supreme Court of the United States that the writ of habeas corpus cannot be used for the purpose of proceedings in error, and that the jurisdiction under that writ is confined to an examination of the record, with a view to determining whether the person restrained of his liberty is detained without authority of law. *Ex p. Parks*, (1876) 93 U. S. 18, 23 U. S. (L. ed.) 787; *Ex p. Reed*, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538; *Ex p. Siebold*, (1879) 100 U. S. 371, 25 U. S. (L. ed.) 717; *Wales v. Whitney*, (1885) 114 U. S. 564, 5 S. Ct. 1050, 29 U. S. (L. ed.) 277; *Ex p. Terry*, (1888) 128 U. S. 289, 9 S. Ct. 77, 32 U. S. (L. ed.) 405; *Nielsen, Petitioner*, (1889) 131 U. S. 176, 9 S. Ct. 672, 33 U. S. (L. ed.) 118; *In re Luis Oteiza y Cortes*, (1890) 136 U. S. 330, 10 S. Ct. 1931, 34 U. S. (L. ed.) 464; *Stevens v. Fuller*, (1890) 136 U. S. 468, 10 S. Ct. 911, 34 U. S. (L. ed.) 461; *In re Tyler*, (1893) 149 U. S. 164, 13 S. Ct. 785, 37 U. S. (L. ed.) 689; *U. S. v. Pridgeon*, (1894) 153 U. S. 48, 14 S. Ct. 746, 38 U. S. (L. ed.) 631; *In re Chapman*, (1895) 156 U. S. 211, 15 S. Ct. 331, 39 U. S. (L. ed.) 401; *Ornelas v. Ruiz*, (1896) 161 U. S. 502, 16

S. Ct. 689, 40 U. S. (L. ed.) 787; *In re Lennon*, (1897) 166 U. S. 548, 17 S. Ct. 658, 41 U. S. (L. ed.) 1110; *Andersen v. Treat*, (1898) 172 U. S. 24, 19 S. Ct. 67, 43 U. S. (L. ed.) 351; *In re McKenzie*, (1901) 180 U. S. 536, 21 S. Ct. 468, 45 U. S. (L. ed.) 657; *Terlinden v. Ames*, (1902) 184 U. S. 270, 22 S. Ct. 484, 46 U. S. (L. ed.) 534; *Felts v. Murphy*, (1906) 201 U. S. 123, 26 S. Ct. 366, 50 U. S. (L. ed.) 689; *Valentina v. Mercer*, (1906) 201 U. S. 131, 26 S. Ct. 368, 50 U. S. (L. ed.) 693; *Kaizo v. Henry*, (1908) 211 U. S. 146, 29 S. Ct. 41, 53 U. S. (L. ed.) 125; *In re Gregory*, (1911) 219 U. S. 210, 31 S. Ct. 143, 55 U. S. (L. ed.) 184; *Glasgow v. Moyer*, (1912) 225 U. S. 420, 32 S. Ct. 753, 56 U. S. (L. ed.) 1147; *Johnson v. Hoy*, (1913) 227 U. S. 245, 33 S. Ct. 240, 57 U. S. (L. ed.) 497; *Ex p. Spencer*, (1913) 228 U. S. 652, 33 S. Ct. 709, 57 U. S. (L. ed.) 1010; *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L. R. A. (N. S.) 397; *Frank v. Mangum*, (1915) 237 U. S. 309, 35 S. Ct. 582, 59 U. S. (L. ed.) 969; *Collins v. Johnston*, (1915) 237 U. S. 502, 35 S. Ct. 649, 59 U. S. (L. ed.) 1071; *Ex p. Ulrich*, (W. D. Mo. 1890) 43 Fed. 661, *reversing* (W. D. Mo. 1890) 42 Fed. 587; *In re Johnson*, (C. C. Mass. 1891) 46 Fed. 477; *Ex p. Skiles*, (C. C. Minn. 1892) 50 Fed. 524; *In re Blackbird*, (E. D. Wis. 1895) 66 Fed. 541; *In re Nelson*, (D. C. Wash. 1895) 69 Fed. 712; *Price v. McCarty*, (C. C. A. 2d Cir. 1898) 89 Fed. 84, 59 U. S. App. 578, 32 C. C. A. 162; *In re Reese*, (C. C. Kan. 1900) 98 Fed. 984; *De Bara v. U. S.*, (C. C. A. 6th Cir. 1900) 99 Fed. 942, 40 C. C. A. 194; *In re Stone*, (N. D. Ga. 1902) 120 Fed. 101; *Iowa v. Jones*, (S. D. Ia. 1904) 128 Fed. 626; *Ex p. Powers*, (W. D. Ky. 1904) 129 Fed. 985; *In re Terrill*, (C. C. A. 8th Cir. 1906) 144 Fed. 616, 75 C. C. A. 418; *Connella v. Haskell*, (C. C. A. 8th Cir. 1907) 158 Fed. 285, 87 C. C. A. 111; *Ex p. Chadwick*, (N. D. Cal. 1908) 159 Fed. 576; *Peters v. U. S.*, (C. C. A. 7th Cir. 1910) 177 Fed. 885, 101 C. C. A. 99, *reversing* (E. D. Ill. 1909) 166 Fed. 613, writ of certiorari denied (1910) 217 U. S. 606, 30 S. Ct. 696, 54 U. S. (L. ed.) 900; *Ex p. Blodgett*, (N. D. Ia. 1911) 192 Fed. 77; *U. S. v. Lair*, (C. C. A. 8th Cir. 1912) 195 Fed. 47, 115 C. C. A. 49; *Ex p. Glasgow*, (N. D. Ga. 1912) 195 Fed. 780; *Moyer v. Anderson*, (C. C. A. 5th Cir. 1913) 203 Fed. 881, 122 C. C. A. 175; *Blake v. Moyer*, (N. D. Ga. 1913) 206 Fed. 559, *affirmed* (C. C. A. 5th Cir. 1913) 208 Fed. 678, 125 C. C. A. 576; *Howard v. Moyer*, (N. D. Ga. 1913) 206 Fed. 555; *Stevens v. McClaughry*, (C. C. A. 8th Cir. 1913) 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390; *Ex p. Jim Hong*, (C. C. A. 9th Cir. 1914) 211 Fed. 73, 127 C. C. A. 569; *Cooley v. Morgan*, (C. C. A. 8th Cir. 1915) 221 Fed. 252, 136 C. C. A.

210; *Morgan v. Ward*, (C. C. A. 8th Cir. 1915) 224 Fed. 698, 140 C. C. A. 238; *Harrison v. Moyer*, (N. D. Ga. 1915) 224 Fed. 224; *U. S. v. McCarthy*, (S. D. N. Y. 1916) 228 Fed. 398; *In re Burkell*, (1903) 2 Alaska 108; *Arkansas Industrial Co. v. Neel*, (1886) 48 Ark. 283, 3 S. W. 631; *In re Tyson*, (1895) 21 Colo. 78, 39 Pac. 1093; *Ex p. Patman*, (1908) 1 Okla. Crim. 141, 95 Pac. 622.

Neither irregularities nor error, so far as they are within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the function of a writ of error in relation to proceedings of a court within its jurisdiction. "Under a writ of habeas corpus the inquiry is addressed not to errors, but to the question whether the proceedings and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge." *U. S. v. Pridgeon*, (1894) 153 U. S. 48, 14 S. Ct. 746, 38 U. S. (L. ed.) 631, in effect *affirming* (S. D. Ohio 1893) 57 Fed. 200. See to the same effect *Ex p. Yarbrough*, (1884) 110 U. S. 651, 4 S. Ct. 152, 28 U. S. (L. ed.) 274; *Ex p. Bigelow*, (1885) 113 U. S. 328, 5 S. Ct. 542, 28 U. S. (L. ed.) 1005; *Benson v. McMahon*, (1888) 127 U. S. 457, 8 S. Ct. 1240, 32 U. S. (L. ed.) 234; *Savin, Petitioner*, (1889) 131 U. S. 267, 9 S. Ct. 699, 33 U. S. (L. ed.) 150; *In re Wight*, (1890) 134 U. S. 136, 10 S. Ct. 487, 33 U. S. (L. ed.) 865; *Stevens v. Fuller*, (1890) 136 U. S. 468, 10 S. Ct. 911, 34 U. S. (L. ed.) 461; *Andrews v. Swartz*, (1895) 156 U. S. 272, 15 S. Ct. 389, 39 U. S. (L. ed.) 422; *In re Debs*, (1895) 158 U. S. 564, 15 S. Ct. 900, 39 U. S. (L. ed.) 1092; *In re Belt*, (1895) 159 U. S. 95, 15 S. Ct. 987, 40 U. S. (L. ed.) 88; *In re Eckart*, (1897) 166 U. S. 481, 17 S. Ct. 638, 41 U. S. (L. ed.) 1085; *Ex p. Peters*, (1880) 12 Fed. 461; *In re Morris*, (1889) 40 Fed. 824; *In re Leo Hem Bow*, (1891) 47 Fed. 302; *In re Boyd*, (C. C. A. 1892) 49 Fed. 48, 4 U. S. App. 73, 1 C. C. A. 156; *U. S. v. Don On*, (1891) 49 Fed. 569; *In re McKnight*, (S. D. Ohio 1892) 52 Fed. 799; *Ex p. Rickelt*, (1894) 61 Fed. 203; *Sternaman v. Peck*, (C. C. A. 1897) 80 Fed. 883, 51 U. S. App. 312, 26 C. C. A. 214; *Ex p. Jones*, (1899) 96 Fed. 200.

Unquestionably if the trial court has exceeded its jurisdiction a prisoner held under its judgment may be discharged from custody upon a writ of habeas corpus by another court having the authority to entertain the writ, though even in a case of this kind a court will sometimes refrain from releasing a prisoner upon writ of habeas corpus, and will remit him to his remedy by writ of error. But no court may properly release a prisoner under conviction and sentence of another

court unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of habeas corpus, which may not in this manner usurp the functions of a writ of error. *Kaizo v. Henry*, (1908) 211 U. S. 146, 29 S. Ct. 41, 53 U. S. (L. ed.) 125, *affirming* (1906) 18 Hawaii 28, 658.

But one who, having been restrained of his liberty for many years by virtue of the judgment of a federal court which is beyond its jurisdiction and void, is not barred from a release therefrom, by writ of habeas corpus, by the fact that he might have secured such relief by a writ of error but failed to apply for it until it was too late. *Stevens v. McClaughry*, (C. C. A. 8th Cir. 1913) 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390.

When the court had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, relief may be accorded if no writ of error or appeal will lie. *Nielsen, Petitioner*, (1889) 131 U. S. 176, 9 S. Ct. 672, 33 U. S. (L. ed.) 118; *Cuddy, Petitioner*, (1889) 131 U. S. 280, 9 S. Ct. 703, 33 U. S. (L. ed.) 154; *In re Mills*, (1890) 135 U. S. 263, 10 S. Ct. 762, 34 U. S. (L. ed.) 107; *In re Swan*, (1893) 150 U. S. 637, 14 S. Ct. 225, 37 U. S. (L. ed.) 1207; *Gonzales v. Cunningham*, (1896) 164 U. S. 612, 17 S. Ct. 182, 41 U. S. (L. ed.) 572; *In re Tsu Tse Mee*, (1897) 81 Fed. 702; *In re Reese*, (1900) 98 Fed. 984.

Where the petition itself shows that the petitioner is restrained of his liberty under and by the judgment of a court competent to try the offenses charged, and is based on his conviction of such offenses, if, for any reason, the judgment, or any part of it, under which the petitioner is held, is void, or the petitioner has served out the sentence imposed thereby, it is incumbent upon him to go further and show that condition of things. *In re Greenwald*, (1896) 77 Fed. 590.

"While a federal court will not, on habeas corpus, re-examine a mere erroneous decision of a court having jurisdiction of the offense, yet it will go through the whole case, if necessary, to see if such court had jurisdiction both of the subject-matter and of the person." *Ex p. Kenyon*, (1878) 5 Dill. 385, 14 Fed. Cas. No. 7,720. See also *In re Morris*, (1889) 40 Fed. 824; *Ex p. Irvine*, (1896) 74 Fed. 954.

Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. *McMicking v. Shields*, (1915) 238 U. S. 99, 35 S. Ct. 665, 59

U. S. (L. ed.) 1220, *reversing* 23 P. I. 526.

Jurisdiction dependent on ascertainment of facts involving merits.—In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review and cannot therefore be attacked in habeas corpus proceedings. *Toy Toy v. Hopkins*, (1909) 212 U. S. 542, 29 S. Ct. 416, 53 U. S. (L. ed.) 644.

While the writ of habeas corpus cannot be used to perform the function of a writ of error, the doctrine is well established that if it appear that the court which rendered the judgment had not jurisdiction to render it, either because the proceedings under which they were taken were unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the person who is imprisoned thereunder may be discharged from custody on habeas corpus. *Ex p. Lange*, (1873) 18 Wall. 163, 21 U. S. (L. ed.) 872; *Ex p. Siebold*, (1879) 100 U. S. 371, 25 U. S. (L. ed.) 717; *Nielsen, Petitioner*, (1889) 131 U. S. 176, 9 S. Ct. 672, 33 U. S. (L. ed.) 118; *Ex p. Mackey v. Miller*, (C. C. A. 9th Cir. 1903) 126 Fed. 161, 62 C. C. A. 139.

2. Reason for Rule

Reason as given by Supreme Court.—In *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101, 21 Ann. Cas. 849, *affirming* (N. D. Fla. 1909) 180 Fed. 119, it was said that if the writ of habeas corpus could be made to perform the office of a writ of error then the Supreme Court could readily be converted into an appellate court in criminal proceedings, a jurisdiction at that time denied to it by statute.

3. When Used with Certiorari

Effect of such use.—The writ of habeas corpus is not a writ of error, though in some cases in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of certiorari for that purpose. In such case, however, it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner. *Ex p. Bollman*, (1807) 4 Cranch 75, 2 U. S. (L. ed.) 554; *In re Kaine*, (1852) 14 How. 103, 14 U. S. (L. ed.) 345; *Ex p. Lange*,

(1873) 18 Wall. 163, 21 U. S. (L. ed.) 872; *Ex p. Royall*, (1884) 112 U. S. 181, 5 S. Ct. 93, 28 U. S. (L. ed.) 690; *Wales v. Whitney*, (1885) 114 U. S. 564, 5 S. Ct. 1050, 29 U. S. (L. ed.) 277; *In re Byron*, (S. D. N. Y. 1883) 18 Fed. 722; *Ex p. Bennett*, (1825) 2 Cranch C. C. 612, 3 Fed. Cas. No. 1,311; *In re Martin*, (1866) 5 Blatchf. 303, 16 Fed. Cas. No. 9,151; *In re Van Campen*, (1868) 2 Ben. 419, 28 Fed. Cas. No. 16,835.

4. Disregard by Court of Rule of Comity

Habeas corpus inapplicable.—Disregard by courts of a rule of comity is an error which is not reversible in habeas corpus, as no constitutional right of the petitioner is invaded and a petition for a writ of habeas corpus is not a writ of error. *Peckham v. Henkel*, (1910) 216 U. S. 483, 30 S. Ct. 255, 54 U. S. (L. ed.) 579, *affirming* (S. D. N. Y. 1909) 166 Fed. 627.

5. Arrest

In general.—Irregularities in the arrest of a person are not grounds for the issuance of a writ of habeas corpus. *Price v. McCarty*, (C. C. A. 1898) 89 Fed. 84, 59 U. S. App. 578, 32 C. C. A. 162. See also *Chow Loy v. U. S.*, (C. C. A. 1901) 112 Fed. 354, 50 C. C. A. 279.

The arrest of a seaman by a local chief of police, instead of by a United States marshal as required by statute, the arrest being at the instance of a French consul acting under a treaty with France, does not entitle the seaman to be discharged on writ of habeas corpus where it appears that he came within the terms of the treaty although the arrest was irregular. *Dallemagne v. Moisan*, (1905) 197 U. S. 169, 25 S. Ct. 422, 49 U. S. (L. ed.) 709.

6. Grand Jury

Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court had jurisdiction of the cause and of the person, and the indictment, though voidable if the objection is seasonably taken, is not void. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualifications of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can be corrected by writ of error. *Kaizo v. Henry*, (1908) 211 U. S. 146, 29 S. Ct. 41, 53 U. S. (L. ed.) 125, *affirming* (1906) 18 Hawaii 28, 658.

Disobeying the law governing the selection of grand jurors does not affect the

jurisdiction of the court so as to justify the release by habeas corpus of a person convicted under an indictment found by such jurors. *Ex p. Moran*, (1906) 203 U. S. 96, 27 S. Ct. 25, 51 U. S. (L. ed.) 105.

Insufficient number.—In the case of *In re Wilson*, (1891) 140 U. S. 575, 11 S. Ct. 870, 35 U. S. (L. ed.) 513, a petitioner for habeas corpus contended that the grand jury, which indicted him, was not a legally constituted tribunal, in that it was composed of only fifteen members, whereas by an Act of the legislature of the territory of Arizona, passed on March 12, 1889, a day before that upon which the offense is charged to have been committed, it was required that grand juries should be composed of not less than seventeen nor more than twenty-three members. But the court said: "The response thereto is, that no such act was passed; and that, even if it were, the defect in the number of grand jurors did not vitiate the entire proceedings; so that they could be challenged collaterally on habeas corpus, but it was only a matter of error, to be corrected by proceedings in error."

Order for impaneling made by wrong judge.—Objection that the order for the impaneling of the grand jury was made by a judge of a federal Circuit Court, who although within his circuit was not within the district where the court was located when the trial was had, cannot be raised by habeas corpus. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101, 21 Ann. Cas. 849.

7. Indictment

"Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of habeas corpus, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment. It having been held that the regulation of the appellate power of this court was conferred upon Congress, and Congress having given an appeal or writ of error in only certain specified cases, the implication is irresistible, that those errors and irregularities, which can only be reviewed by appeal or writ of error, cannot be reviewed in this court in any other cases than those in

which those processes are given. Now, it has always been held that a mere error in point of law, committed by a court in a case properly subject to its cognizance, can only be reviewed by the ordinary methods of appeal or writ of error; but that where the proceedings are not only erroneous, but entirely void—as where the court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence—the Superior Court, or judge invested with the prerogative power of issuing a habeas corpus, may review the proceedings by that writ, and discharge from illegal imprisonment. This is one of the modes in which this court exercises supervisory power over inferior courts and tribunals; but it is a special mode, and confined to a limited class of cases.” *Ex p. Parks*, (1876) 93 U. S. 18, 23 U. S. (L. ed.) 787. See to the same effect *Ex p. Siebold*, (1879) 100 U. S. 371, 25 U. S. (L. ed.) 717; *In re Coy*, (1888) 127 U. S. 731, 8 S. Ct. 1263, 32 U. S. (L. ed.) 274.

The fact that the law which was the foundation of an indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense is not ground for a writ of habeas corpus where the court had jurisdiction of the case. *Glasgow v. Moyer*, (1912) 225 U. S. 420, 32 S. Ct. 753, 56 U. S. (L. ed.) 1147, wherein the court said: “Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.”

On habeas corpus to inquire into a detention on an information filed in the police court of the District of Columbia, “we are not concerned with the question whether the information was sufficient, or whether the acts set forth . . . constituted a crime; that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment.” *Matter of Gregory*, (1911) 219 U. S. 210, 31 S. Ct. 44, 143, 55 U. S. (L. ed.) 184.

Having jurisdiction of the offense charged and of the accused, it is for the state courts to determine whether an indictment sufficiently charges the crime of murder in the first degree. *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 40 U. S. (L. ed.) 432.

In the case of *In re Lancaster*, (1890) 137 U. S. 393, 11 S. Ct. 117, 34 U. S. (L. ed.) 713, the petitioners were under indictment in the Circuit Court of the United States and were in custody. They applied for a writ of habeas corpus, stating as a ground the insufficiency of the

indictment, but the court said: “They have not invoked the action of the Circuit Court upon the sufficiency of the indictment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of habeas corpus, upon the ground that the matters and things set forth and charged do not constitute any offense or offenses under the laws of the United States, or cognizable in the Circuit Court, and that for other reasons the indictment cannot be sustained. In this posture of the case we must decline to interfere.”

But in proceedings for the removal of a prisoner to another district for trial, it has been held to be both the right and the duty of a federal court upon an application for a writ of habeas corpus to consider and determine whether an indictment, pending in another district against a prisoner held for removal to such district, charges a criminal offense or one that comes within the jurisdiction of that court. *In re Greene*, (S. D. Ohio 1892) 52 Fed. 104.

Indictment not properly presented.—An objection that the indictment in a federal Circuit Court was not properly presented by the grand jury, based on testimony that after the presentation of the original indictment the grand jury were informed by the district attorney that the indictment needed amendment in some particulars, that this amendment was read over in the presence of the grand jury and was incorporated into an indictment which was regularly returned to the court, where it was produced, with the consent of all the grand jurors, if ever available, cannot be first raised on habeas corpus after conviction. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101, 21 Ann. Cas. 849.

Technical sufficiency generally.—Upon habeas corpus the sufficiency of the indictment as a matter of technical pleading will not be inquired into. *Reed v. U. S.*, (C. C. A. 9th Cir. 1915) 224 Fed. 378, 140 C. C. A. 64.

Errors of a federal District Court in sustaining an indictment which fails to charge with sufficient fulness some particular fact cannot be reviewed on habeas corpus to inquire into the legality of an imprisonment under the sentence imposed after a conviction on such indictment. *Dimmick v. Tompkins*, (1904) 194 U. S. 540, 24 S. Ct. 780, 48 U. S. (L. ed.) 1110.

That an indictment charged more than one offense, in violation of the laws of the territory where petitioner was convicted, was a mere error of procedure, which did not divest the trial court of its power to render judgment, and was, therefore, not ground for petitioner's discharge on habeas corpus. *Connella v. Haskell*, (C. C. A. 8th Cir. 1907) 158 Fed. 285, 87 C. C. A. 111.

Error in consolidating indictments is not ground for habeas corpus proceedings. *Howard v. U. S.*, (C. C. A. 1896) 75 Fed. 986, 43 U. S. App. 678, 21 C. C. A. 586, 34 L. R. A. 509; *De Bara v. U. S.*, (C. C. A. 1900) 99 Fed. 942, 40 C. C. A. 194.

8. Defenses

Matter available in the trial court as a defense to an indictment and afterward, if necessary, by writ of error cannot be the foundation of an application for writ of habeas corpus. *Morgan v. Sylvester*, (C. C. A. 8th Cir. 1916) 231 Fed. 886, 146 C. C. A. 82.

9. Rulings of Trial Court

In general.—On habeas corpus errors in the rulings on the trial of the petitioner cannot be reviewed but only questions affecting the jurisdiction. *Davis v. Beason*, (1890) 133 U. S. 333, 10 S. Ct. 299, 33 U. S. (L. ed.) 637.

Exclusion of evidence in removal proceedings.—On removal proceedings under R. S. sec. 1014 (see CRIMINAL LAW), the indictment is on the question of probable cause only prima facie evidence, and the refusal of the district judge to permit the defendant to introduce evidence showing that he had committed no offense triable in the district to which removal was sought deprives the defendant of a right which may be enforced by habeas corpus. *Tinsley v. Treat*, (1907) 205 U. S. 20, 27 S. Ct. 430, 51 U. S. (L. ed.) 689, wherein the court said: "Appellant was entitled to the judgment of the district judge as to the existence of probable cause on the evidence that might have been adduced, and even if the district judge had thereupon determined that probable cause existed, and such determination could not be revised on habeas corpus, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the constitution."

10. Sufficiency of Evidence

Rule stated.—When an indictment charges a crime within the jurisdiction of a court, and the record of the court shows a trial and conviction and a judgment, properly founded on the indictment and within the lawful jurisdiction, it is conclusively presumed, in a collateral attack, by habeas corpus that the evidence adduced was sufficient to sustain the indictment and judgment. *In re Haskell* (S. D. Ohio 1892) 52 Fed. 795. See to the same effect *Ex p. Terry*, (1888) 128 U. S. 289, 9 S. Ct. 77, 32 U. S. (L. ed.) 405; *Davis v. Beason*, (1890) 133 U. S. 333, 10 S. Ct. 299, 33 U. S. (L. ed.) 637; *Crossley v.*

California, (1898) 168 U. S. 640, 18 S. Ct. 242, 42 U. S. (L. ed.) 610; *In re Byron*, (S. D. N. Y. 1883) 18 Fed. 722; *In re Reese*, (C. C. Kan. 1900) 98 Fed. 984; *Ex p. Jones*, (N. D. Ala. 1899) 96 Fed. 200.

11. Submission of Case to Jury

Degree of murder.—In *Crossley v. California*, (1898) 168 U. S. 640, 18 S. Ct. 242, 42 U. S. (L. ed.) 610, the petitioner who was in custody awaiting execution for murder in the first degree claimed to be entitled to habeas corpus on the ground that there was no evidence that he was guilty of murder in the first degree; that the evidence showed, or tended to show, that he was guilty, at most, of murder in the second degree; and that the trial court only submitted to the jury the question whether or not he was guilty of murder in the first degree. But the court said: "This was matter of error, and with its disposition by the highest tribunal of the state, it was not within the province of the Circuit Court to interfere."

12. Sentence

Excess in sentence.—"Many well-considered authorities, in England as well as in this country, hold that where there is jurisdiction of the person and of the offense, the excess in the sentence of the court beyond the provisions of law is only voidable in proceeding upon a writ of error. . . . Under a writ of habeas corpus the inquiry is addressed not to errors, but to the question whether the proceedings and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge. It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion. R. S. sec. 761 [*infra*, p. 469], 'the court, or justice, or judge, shall proceed in a summary way to determine the facts of the case [in habeas corpus] by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void." *U. S. v. Pridgeon*, (1893) 153 U. S. 48, 14 S. Ct. 746, 38 U. S. (L. ed.) 631.

The objection that the original sentence in a federal Circuit Court, before modification on motion of the government's counsel, exceeded the authority of the court, in that it required service at hard labor, is not available on habeas corpus, since, at most, only that part of the

sentence of the law is void. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101, 21 Ann. Cas. 849.

But a judgment of a District Court sentencing a person to imprisonment in a penitentiary when the statutes of the United States did not authorize such imprisonment for so short a term as that imposed on such person, is void and a habeas corpus lies, as the case is not one of mere error, but one in which the court transcended its powers. *In re Mills*, (1890) 135 U. S. 263, 10 S. Ct. 762, 34 U. S. (L. ed.) 107.

The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess only is entitled to his release by writ of habeas corpus. *Stevens v. McCloughry*, (C. C. A. 8th Cir. 1913) 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390.

Where a sentence imposed on petitioner was excessive, he cannot obtain his discharge on habeas corpus while serving the portion which the court had power to impose. *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

Where the petitioner was convicted of two offenses, for each of which he could have been sentenced to seven years' imprisonment, but was sentenced to five years' imprisonment for each offense, the terms to run concurrently, the sentence could not be held void on habeas corpus, because the statute of the territory in which petitioner was convicted required such a sentence to be cumulative. *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

Cumulative sentences when collaterally attacked are not wholly void. *Ex p. Peters*, (1877) 4 Dill. 169, 19 Fed. Cas. No. 11,027, *distinguishing* U. S. v. Maguire, (1876) 3 Cent. L. J. 273, 26 Fed. Cas. No. 15,708.

For other cases on irregular sentences see *In re Burns*, (W. D. Ark. 1902) 113 Fed. 987 (sentence unauthorized by verdict or by statute); *Cuyler v. Atlantic, etc., R. Co.*, (E. D. N. C. 1904) 131 Fed. 95 (void judgment and sentence); *U. S. v. Peeke*, (C. C. A. 3d Cir. 1907) 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314, *affirming* (D. C. N. J. 1906) 144 Fed. 1016 (excessive sentence); *Ex p. Schlaffer*, (S. D. Fla. 1907) 154 Fed. 921 (excessive sentence); *Munson v. McCloughry*, (C. C. A. 8th Cir. 1912) 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302 (excessive sentence); *Ex p. Hewitt*, (1869) 3 Am. L. Rev. 382, 12 Fed. Cas. No. 6,442 (excessive sentence).

13. Order

The failure to specify a building in the order of the Supreme Court of the territory of Oklahoma fixing Lawton as the

place where the District Court should be held in and for the county of Comanche, there being at the time of making the order and at the time of trial no county or court buildings in such county, did not go to the jurisdiction of such District Court so as to justify relief by habeas corpus in favor of a person convicted of crime therein who made no showing of any opportunities lost because no building was named. *Ex p. Moran*, (1906) 203 U. S. 96, 27 S. Ct. 25, 51 U. S. (L. ed.) 105.

V. TIME FOR SUING OUT WRIT

Rule stated.—If a speedy and efficacious remedy in the federal court in the usual and orderly course of criminal procedure is open to a petitioner for habeas corpus, as in the case of imprisonment under an indictment alleged to be defective, the court will not interfere with and confuse such procedure by undertaking to grant relief in habeas corpus in advance of a regular trial or hearing upon demurrer, unless it be shown affirmatively that because of special circumstances suitable relief cannot be had through the procedure above indicated. *In re Barber*, 75 Fed. 980.

A prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released, by alleging want of jurisdiction and petitioning for a writ of habeas corpus. *Ex p. Simon*, (1908) 208 U. S. 144, 28 S. Ct. 238, 52 U. S. (L. ed.) 429, wherein the petitioner for habeas corpus was in custody for contempt, he having violated a preliminary injunction issued by the Circuit Court of the United States. He brought the petition on the ground that the Circuit Court had no jurisdiction, and that therefore its decree might be disobeyed.

On imprisonment upon commitment by a United States commissioner, if there can be no inquiry whether the charge constitutes an offense against the statute until the meeting of the grand jury, the court may, by habeas corpus, hear the case and determine that question. *In re Barber*, (1896) 75 Fed. 980.

Legality of sale of liquor to Indians.—In the case of *Ex p. Lincoln*, (1906) 202 U. S. 178, 26 S. Ct. 602, 50 U. S. (L. ed.) 984, it appeared the petitioner was convicted in the District Court for the district of Nebraska on an indictment charging that he did "wrongfully and unlawfully introduce into Indian country, to wit, into and upon the Winnebago Indian Reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the Winnebago Indians, certain spirituous, vinous, malt and other intoxicating liquors." Upon this conviction he was sentenced to pay a fine of one hundred dollars and the costs of prosecution and to be imprisoned in the jail of

Douglas county, Nebraska, for the term of sixty days and until said fine and costs were paid. The imprisonment commenced on February 19, 1906. Without pursuing his remedy by writ of error the petitioner on April 2, 1906, filed in this court his application for a writ of habeas corpus, alleging that the United States had no police power or jurisdiction over the Winnebago Reservation, and that the law under which the indictment was drawn was unconstitutional and void in so far as it applied to the said Winnebago Reservation, and that the United States District Court was wholly without jurisdiction in the premises. The petition was denied. The Supreme Court said: "The ordinary procedure for the correction of errors in criminal cases is by writ of error, and that method should be pursued unless there be special circumstances calling for a departure thereof. . . . It is true that we issued a writ of habeas corpus in a case in some respects like the present, *Matter of Heff*, [1905] 197 U. S. 488 [25 S. Ct. 506, 49 U. S. (L. ed.) 848], and it is relied upon by petitioner as authority for this application, but it was shown in that case that there was a direct conflict between the state and local federal courts in the precise point of law involved, each asserting jurisdiction over the same offense; that the Court of Appeals had already decided the question adversely to the contention of petitioner, so that a writ of error from that court would have accomplished nothing; and further, that the matter involved opened up inquiry into questions of great significance affecting the respective jurisdictions of the nation and the states over large numbers of Indians. There were special reasons, therefore, for our issuing a writ of habeas corpus and investigating the matter in that case. But it does not follow from the action then taken that it is necessary or proper for this court to issue a habeas corpus in every case involving the question of the legality of a sale of liquor to Indians or the bringing of liquor into the Indian country. It is enough that the cases be disposed of in the orderly and customary mode of procedure. It may be assumed that the trial courts will follow the rulings of this court, and if there be in any case a departure therefrom the proper appellate court will correct the error. To permit every petty criminal case to be brought directly to this court upon habeas corpus, on the ground of an alleged misconception or disregard of our decisions, would be a grievous misuse of our time, which should be devoted to a consideration of the more important legal and constitutional questions which are constantly arising and calling for our determination."

VI. FEDERAL INTERFERENCE WITH CUSTODY OF STATE COURT

1. Rule Stated

Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the federal court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the federal court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. *Ex p. Crouch*, (1884) 112 U. S. 178, 5 S. Ct. 96, 28 U. S. (L. ed.) 690; *Ex p. Royall*, (1886) 117 U. S. 241, 6 S. Ct. 734, 29 U. S. (L. ed.) 868; *Ex p. Fonda*, (1886) 117 U. S. 516, 6 S. Ct. 848, 29 U. S. (L. ed.) 994; *Cuddy*, Petitioner, (1889) 131 U. S. 280, 9 S. Ct. 703, 33 U. S. (L. ed.) 154; *Medley*, Petitioner, (1890) 134 U. S. 160, 10 S. Ct. 384, 33 U. S. (L. ed.) 835; *In re Converse*, (1891) 137 U. S. 624, 11 S. Ct. 191, 34 U. S. (L. ed.) 796, *affirming* (E. D. Mich. 1890) 42 Fed. 217; *In re Duncan*, (1891) 139 U. S. 449, 11 S. Ct. 573, 35 U. S. (L. ed.) 219; *In re Wood*, (1891) 140 U. S. 278, 11 S. Ct. 738, 35 U. S. (L. ed.) 505; *Cook v. Hart*, (1892) 146 U. S. 183, 13 S. Ct. 40, 36 U. S. (L. ed.) 934; *In re Frederick*, (1893) 149 U. S. 70, 13 S. Ct. 793, 37 U. S. (L. ed.) 653; *Pepke v. Cronan*, (1894) 155 U. S. 100, 15 S. Ct. 34, 39 U. S. (L. ed.) 84; *New York v. Eno*, (1894) 155 U. S. 89, 15 S. Ct. 30, 39 U. S. (L. ed.) 80; *In re Chapman*, (1895) 156 U. S. 211, 15 S. Ct. 331, 39 U. S. (L. ed.) 401; *Whitten v. Tomlinson*, (1895) 160 U. S. 231, 16 S. Ct. 297, 40 U. S. (L. ed.) 406; *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 40 U. S. (L. ed.) 432; *Baker v. Grice*, (1898) 169 U. S. 284, 18 S. Ct. 323, 42 U. S. (L. ed.) 748, *reversing* (N. D. Tex. 1897) 79 Fed. 627; *Ohio v. Thomas*, (1899) 173 U. S. 276, 19 S. Ct. 453, 43 U. S. (L. ed.) 699; *Markuson v. Boncher*, (1899) 175 U. S. 184, 20 S. Ct. 76, 44 U. S. (L. ed.) 124; *Minnesota v. Brundage*, (1901) 180 U. S. 499, 21 S. Ct. 455, 45 U. S. (L. ed.) 639, *reversing* (C. C. Minn. 1899) 96 Fed. 963; *Reid v. Jones*, (1902) 187 U. S. 153, 23 S. Ct. 89; *Rogers v. Peck*, (1905) 199 U. S. 425, 26 S. Ct. 87, 50 U. S. (L. ed.) 256; *Ex p. Hanson*,

(D. C. Ore. 1886) 28 Fed. 127; *Ex p. Yung Jon*, (D. C. Ore. 1886) 28 Fed. 308; *In re Ah Jon*, (C. C. Cal. 1886) 29 Fed. 181; U. S. v. Roman, (S. D. Ga. 1887) 33 Fed. 117; U. S. v. Fiscus, (W. D. Pa. 1890) 42 Fed. 395; *In re Spickler*, (S. D. Ia. 1890) 43 Fed. 653; *Allen v. Black*, (S. D. Ia. 1890) 43 Fed. 228; *In re King*, (M. D. Tenn. 1892) 51 Fed. 434; U. S. v. Chapel, (D. C. Minn. 1893) 54 Fed. 140; *In re Bonner*, (N. D. Ia. 1893) 57 Fed. 184; *In re Flinn*, (W. D. N. C. 1893) 57 Fed. 496; *In re May*, (C. C. Mont. 1897) 82 Fed. 422; *In re Alexander*, (W. D. N. C. 1898) 84 Fed. 633; U. S. v. McAleese, (C. C. A. 3rd Cir. 1899) 93 Fed. 656, 35 C. C. A. 529; *In re O'Brien*, (C. C. Mass. 1899) 95 Fed. 131; *In re Bradley*, (S. D. Cal. 1898) 96 Fed. 969; *Ex p. Glenn*, (C. C. W. Va. 1900) 103 Fed. 947; *Ex p. McMinn*, (N. D. Ala. 1901) 110 Fed. 954; *In re Anderson*, (W. D. N. C. 1899) 94 Fed. 487; *In re Matthews*, (E. D. Ky. 1902) 122 Fed. 248; *In re Reeves*, (S. D. N. Y. 1903) 123 Fed. 343; *Ex p. Powers*, (W. D. N. Y. 1904) 129 Fed. 985; *In re Ammon*, (S. D. N. Y. 1904) 132 Fed. 714; *In re Wyman*, (N. D. Cal. 1904) 132 Fed. 708; *Mackenzie v. Barrett*, (C. C. A. 7th Cir. 1906) 144 Fed. 954, 76 C. C. A. 8; *Ex p. Collins*, (N. D. Cal. 1907) 154 Fed. 980; *Ex p. Chadwick*, (N. D. Cal. 1908) 159 Fed. 576; *Ex p. Martin*, (C. C. Ore. 1910) 180 Fed. 209; *Ex p. Bass*, (W. D. Ark. 1912) 192 Fed. 421; *Ex p. Bartlett*, (E. D. Wis. 1912) 197 Fed. 98; *Ex p. Tilden*, (D. C. Idaho 1914) 218 Fed. 920; *Walters v. McKinnis*, (W. D. Pa. 1915) 221 Fed. 746; *In re Hoyle*, (1879) 1 Crim. L. Mag. 472, 12 Fed. Cas. No. 6,803; (1853) 6 Op. Atty-Gen. 103; (1867) 12 Op. Atty-Gen. 258; *State v. Adler*, (1900) 87 Ark. 469, 55 S. W. 851.

"It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, [1890] 134 U. S. 372 [10 S. Ct. 584, 33 U. S. (L. ed.) 949], and *In re Neagle*, [1890] 135 U. S. 1 [10 S. Ct. 658, 34 U. S. (L. ed.) 55], but the reasons for the interference of the federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the federal tribunal." *Baker v. Guce*, (1898) 169 U. S. 284, 18 S. Ct. 323, 42 U. S. (L. ed.) 748, followed in *U. S. v. Lewis*, (1906)

200 U. S. 1, 26 S. Ct. 229, 50 U. S. (L. ed.) 343.

"The rule is well settled in this court that, while there may be a power on the part of the federal courts to issue a writ of habeas corpus where the petitioner insists that he has been deprived of his liberty without due process of law, that power will not ordinarily be exercised until an appeal made to the state courts has been denied. Certain exceptional cases have arisen in which the federal courts have granted the writ in the first instance, as where a citizen or subject of a foreign state is in custody for an act done under the authority of his own government, or an officer of the United States has been arrested under state process for acts done under the authority of the federal government, and there were circumstances of urgency which seemed to demand prompt action on the part of the federal government to secure his release. *Wildenhuss's Case*, [1887] 120 U. S. 1 [7 S. Ct. 385, 30 U. S. (L. ed.) 565]; *In re Loney*, [1890] 134 U. S. 372 [10 S. Ct. 584, 33 U. S. (L. ed.) 949]; *In re Neagle*, [1890] 135 U. S. 1 [10 S. Ct. 658, 34 U. S. (L. ed.) 55]. It is recognized, however, that the power to arrest the due and orderly proceedings of the state courts, or to discharge a prisoner after conviction before an application has been made to the Supreme Court of the state for relief, is one which should be sparingly exercised, and should be confined to cases where the facts imperatively demand it. While the power to issue writs of habeas corpus under R. S. sec. 753 [infra, p. 449] nominally extends to every case where a party 'is in custody in violation of the Constitution, or of a law or treaty of the United States,' it is not every such case where the interference of the federal court is demanded, particularly where the state court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. The state courts are as much bound as the federal courts to see that no man is punished in violation of the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the state than by an interference, which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there." *Davis v. Burke*, (1900) 179 U. S. 399, 21 S. Ct. 210, 45 U. S. (L. ed.) 249.

In the case of *Ex p. Royall*, (1886) 117 U. S. 241, 6 S. Ct. 734, 29 U. S. (L. ed.) 868, which is the leading case as to when it is proper for a federal court to discharge a state prisoner on a writ of habeas corpus, the court held that a federal court or judicial officer should not exercise the power conferred by the statutory

provision in relation to writs of habeas corpus, unless the case was one calling for immediate action and hence was what is termed a case of urgency. In the course of its opinion the court said: "This court holds that where a person is in custody under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him upon habeas corpus in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused if convicted shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of habeas corpus summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. . . . That discretion should be exercised in the light of relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

A Circuit Court of the United States should not overrule the action of the Supreme Court of a state in a case in which a party alleges himself to be imprisoned in violation of the Constitution of the United States, unless it be upon the clearest and most indubitable grounds, and the parties will be left to pursue their remedy, either by writ of error from the state Supreme Court or by appeal from the Circuit Court, to have the question decided by the Supreme Court of the United States. *In re Wo Lee*, (1886) 26 Fed. 471.

Relief by habeas corpus is properly refused in a federal Circuit Court to persons in the military service of the United States, held in the custody of state authorities to answer to a charge of homicide which is asserted by them to have been committed in the discharge of their duty, under the Federal Constitution and laws, to apprehend the deceased for a larceny of property from a federal arsenal, where there is conflicting evidence on the question whether or not the deceased had surrendered before the fatal shot was fired. *U. S. v. Lewis*, (1906) 200 U. S. 1, 26 S. Ct. 229, 50 U. S. (L. ed.) 343.

Where the petitioner held for trial in a state court asserted that the statute he was charged with violating was not applicable to the case, and that he was not

guilty of the offense charged, the court said: "Where an act, made the basis of a criminal charge under a state law, is not alleged to have been done as an agent of the national government, nor pursuant to authority conferred by it, nor in the exercise of a right by it given, the federal courts cannot properly acquire jurisdiction by the writ of habeas corpus to adjudicate the question whether the accused is guilty or not guilty. This is so whether the disputed question to be decided is one of fact or law. If the highest court of the state denies a right or immunity guaranteed by the Federal Constitution or laws, the Supreme Court may be applied to for relief." *Ex p. Crowder*, (1909) 171 Fed. 250.

Where a petitioner, a citizen and resident of Iowa, was arrested in Oregon for an alleged violation of Laws Oregon 1909, p. 386, regulating and licensing peddlers, and claimed that such ordinance was invalid as violating the commerce clause of the Federal Constitution, he was not entitled to a writ of habeas corpus issued out of the federal court, in the first instance, but should be required to resort to the state courts for relief, and if unsuccessful, to apply ultimately for review by the federal Supreme Court on a writ of error. *Ex p. Martin*, (1910) 180 Fed. 209.

In the "syllabus by the court," in *In re Dowd*, (1904) 133 Fed. 747, it was said, in respect of the powers to issue writs of habeas corpus under R. S. secs. 751-755, that "the law of the land which has been established by repeated decisions of the Supreme Court is that this power should not be exercised where the judgment of the state court under which the petitioner is confined is reviewable by appeal or by writ of error. . . . Under these decisions of the Supreme Court, neither the fact that the petition shows that the state court was without any jurisdiction of the proceeding in which its judgment was rendered (*New York v. Eno*, (1894) 155 U. S. 89, 90, 96, 98, 15 S. Ct. 30, 39 U. S. (L. ed.) 80), nor the fact that the terms of the petitioner's imprisonment will expire before a hearing can be had in the ordinary course of proceedings upon the writ of error or appeal (*Markuson v. Boucher*, (1899) 175 U. S. 184, 20 S. Ct. 76, 44 U. S. (L. ed.) 124), ordinarily withdraws a case from the effect of this general rule."

Petitioner, having been extradited, was placed on trial in a state court under the extradition indictment, and having become a witness in his own behalf, after disagreement of the jury, and before the case was finally disposed of, was again indicted for perjury alleged to have been committed on his former trial and was convicted. He appealed to the state court of appeal, and applied to the state Supreme Court for discharge on habeas corpus, challenging the state's jurisdiction

to try him for any other offense than that for which he was extradited, until he had been either convicted and served his sentence and had a reasonable time to return to his asylum country, or had been acquitted and had a like opportunity. This writ was denied, and a writ of error allowed for review by the Supreme Court of the United States. It was held that, pending the determination of such writ of error, he was not entitled to a discharge on habeas corpus issued out of the federal Circuit Court. *Ex p. Collins*, (1907) 154 Fed. 980, (1906) 149 Fed. 573.

In the case of *In re Murphy*, (C. C. Mass. 1898) 87 Fed. 549, the petitioner was in prison under a criminal sentence of the Superior Court of the state of Massachusetts for a term of not less than ten nor more than fifteen years. It was conceded that if the sentence was erroneous the laws of the state gave him a remedy by a writ of error, which was not barred; and also nearly two years of his imprisonment had expired without his asking for a writ of error or other relief, prior to the petition. It was held that in view of these facts it was apparent that there were no special circumstances requiring the issue of a writ of habeas corpus unless his case was clear.

In the case of *In re Matthews*, (E. D. Ky. 1902) 122 Fed. 248, the court, in remanding the prisoner to the state custody and applying the general rule that a federal court or judicial officer should not discharge upon writ of habeas corpus a person in custody of state authorities, on the ground that he is held in violation of the Constitution or a law or treaty of the United States, unless the case is one of "peculiar urgency," reviews at length the important cases on the question of the discharge of state prisoners upon writ of habeas corpus, by federal courts.

2. Exceptional Circumstances

Illustrations.—In the case of *In re Neagle*, (1890) 135 U. S. 1, 10 S. Ct. 658, 34 U. S. (L. ed.) 55, the circumstances were held to be exceptional, and a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and doing whatever might be necessary for that purpose, even to taking human life, was discharged on habeas corpus from custody under commitment by a magistrate of a state on a charge of homicide committed in the performance of that duty.

In the case of *In re Loney*, (1890) 134 U. S. 372, 10 S. Ct. 584, 33 U. S. (L. ed.) 949, affirming (E. D. Va. 1889) 38 Fed. 101, the circumstances were also held to be exceptional, and a person arrested by order of a magistrate of a state, for a perjury in testimony given in the case of a

contested congressional election, was discharged on habeas corpus, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal.

In *Wildenhuis's Case*, (1887) 120 U. S. 1, 7 S. Ct. 385, 30 U. S. (L. ed.) 565, the question was decided on habeas corpus whether an arrest, under authority of a state, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board the vessel while in a port within the state, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged. The question was held to be one of urgency.

In *Boske v. Comingore*, (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846, it was held that the case was one of urgency warranting the interference by a writ of habeas corpus with the custody of state authorities of a person claiming to be held in violation of the Constitution or laws of the United States, in that petitioner was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of business of the department to which he belonged.

In *Ex p. Kiefer*, (C. C. Kan. 1889) 40 Fed. 399, the petitioner was prosecuted in the police court of the city of Topeka for violating the meat inspection ordinances. Having been found guilty and sentenced, he sued out a writ of habeas corpus, claiming that the ordinances were in conflict with the Constitution of the United States and that his imprisonment was therefore illegal. The petitioner had his right of appeal from the police court to the District Court; from there to the Supreme Court of the state and thence to the Supreme Court of the United States, and it was argued that the writ should not be allowed, since the petitioner could enforce his rights in the state courts. But the court, allowing the writ, held that it was a case of urgency, since if the ordinances were invalid they were so because of an attempt to interfere with interstate commerce, and that the public as well as the petitioner were entitled to a speedy inquiry and determination in the federal court as to the constitutionality of such ordinances.

So, in cases in which the facts are such that the state court is without jurisdiction, and cannot rightfully proceed against the party, the Supreme Court has originally entertained proceedings in habeas corpus and has affirmed the action of the trial courts in granting relief in that

mode of procedure. *Cohn v. Jones*, (S. D. Ia. 1900) 100 Fed. 639.

A federal court will discharge from imprisonment by a state, on a writ of habeas corpus, a teamster in the employment of the quartermaster's department of the army, where such imprisonment is in violation of the Constitution and laws of the United States and prevents the performance of the duties of his employment, on account of "the importance of this department to the troops" and "the slow process and the delay" of carrying the case through the state courts. *Pundt v. Pendleton*, (1900) 167 Fed. 997.

While "the courts of the United States will not lightly interfere with the action of the state court, and a case must be presented to make action imperative before such action will be taken," where an officer of the Internal Revenue Department was imprisoned for contempt of court for a refusal to testify in a state court or before a grand jury with respect to facts learned by him in his official capacity which he was prohibited from divulging by the regulations of the department, the case is one of urgency, in which a federal court is not required to await the final action of the state courts, but should discharge the prisoner on a writ of habeas corpus. *Stegall v. Thurman*, (1910) 175 Fed. 813.

VII. RESTRAINT OF PERSONAL LIBERTY

1. Rule Stated

There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of habeas corpus, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, or in a madhouse, as well as those under military control, may all become proper subjects of relief by the writ of habeas corpus. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed. But something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. *Wales v. Whitney*, (1885) 114 U. S. 564, 5 S. Ct. 1050, 29 U. S. (L. ed.) 277, wherein it was held that an order of the Secretary of the Navy directing the medical director to appear for trial before a naval court-martial at a certain time and place in the city of Washington, which order stated, "You are hereby placed un-

der arrest, and you will confine yourself to the limits of the city of Washington," did not present such a case of restraint of personal liberty as to call for discharge by a writ of habeas corpus. The court said: "In the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of habeas corpus. Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon by-standers to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action. It is said in argument that such is the power exercised over the appellant under the order of the Secretary of the Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or some proper officer could have been sent to arrest and bring him back, this could only be done by another order of the secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his own convenience, and in regard to which he exercises his own will. . . . While the acts of Congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint. R. S. sec. 754 [infra, p. 462] says the application

for the writ must set forth 'in whose custody he (the petitioner) is detained, and by virtue of what claim or authority, if known;' section 755 [infra, p. 464], that 'the writ must be directed to the person in whose custody the party is;' section 757 [infra, p. 468], that this person shall certify to the court or justice before whom the writ is returnable the true cause of the detention; and by section 758 [infra, p. 468] he is required 'at the same time to bring the body of the party before the judge who granted the writ.' All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary."

Where writ would be ineffective.—Leave will not be granted to file a petition for a writ of habeas corpus where it appears that, before the case could be heard upon the writ and return, the prisoner would no longer be in custody. "It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate. And although this application has not as yet reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which petitioner complains would have terminated, we are constrained to decline to grant leave to file the petition." *Ex p. Baez*, (1900) 177 U. S. 378, 20 S. Ct. 673, 44 U. S. (L. ed.) 813. See to the same effect *Ex p. Lincoln*, (1906) 202 U. S. 178, 26 S. Ct. 602, 50 U. S. (L. ed.) 984; *U. S. v. Arnold*, (C. C. A. 1897) 82 Fed. 769, 27 C. C. A. 342.

2. Petitioner at Large on Bail

Rule stated.—The jurisdiction of the federal courts in cases of habeas corpus is statutory and can only be exercised where the body of the relator is in the custody of the respondent and is brought into court in response to the writ, and the proceeding will not lie where the relator is at large on bail. *Sibray v. U. S.*, (C. C. A. 1911) 185 Fed. 401, 107 C. C. A. 483.

3. Formal Commitment

Necessity.—Jurisdiction of a writ of habeas corpus does not depend upon the question whether there has been a formal commitment or not. *Matter of McDonald*, (1861) 9 Am. L. Reg. 661, 16 Fed. Cas. No. 8,751.

VIII. REVIEW OF PROCEEDINGS OF SPECIAL TRIBUNALS

1. In General

Scope of inquiry.—It is the duty of the court, upon a writ of habeas corpus, in

inquiring into the cause of detention, to ascertain and to determine whether a special tribunal in the exercise of its functions keeps within the limits of its statutory powers, and to adjudge its proceedings void if its action is in excess of its authority. *In re O'Sullivan*, (S. D. N. Y. 1887) 31 Fed. 447.

2. Courts-Martial

Rule stated.—Where a court-martial has jurisdiction of the offense charged, and has acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus. *In re Coy*, (1888) 127 U. S. 731, 8 S. Ct. 1263, 32 U. S. (L. ed.) 274; *In re Grimley*, (1890) 137 U. S. 147, 11 S. Ct. 54, 34 U. S. (L. ed.) 636, *reversing* (C. C. Mass. 1889) 38 Fed. 84; *Johnson v. Sayre*, (1895) 158 U. S. 109, 15 S. Ct. 773, 39 U. S. (L. ed.) 914.

While the question of the jurisdiction for general court-martial may always be inquired into upon the application of any party aggrieved by its proceedings, nevertheless if jurisdiction exists to hear and determine, and to render the particular judgment or sentence imposed, such proceedings, no matter how erroneous they may be, cannot be reviewed collaterally upon habeas corpus. *Ex p. Kearney*, (1822) 7 Wheat. 38, 5 U. S. (L. ed.) 391; *Ex p. Watkins*, (1830) 3 Pet. 193, 7 U. S. (L. ed.) 650; *Ex p. Reed*, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538; *In re Davison*, (S. D. N. Y. 1884) 21 Fed. 618; *Rose v. Roberts*, (C. C. A. 2d Cir. 1900) 99 Fed. 948, 40 C. C. A. 199; *Ex p. Fair*, (C. C. Neb. 1900) 100 Fed. 149; *Deming v. McClaughry*, (C. C. A. 8th Cir. 1902) 113 Fed. 639, 51 C. C. A. 349, *affirmed* (1902) 186 U. S. 49, 22 S. Ct. 786, 46 U. S. (L. ed.) 1049; *Ex p. Dickey*, (D. C. Me. 1913) 204 Fed. 322; *Ex p. Tucker*, (D. C. Mass. 1913) 212 Fed. 569; *Ex p. Henderson*, (1878) 11 Fed. Cas. No. 6,349; *In re Esmond*, (1886) 5 Mackey (D. C.) 64; *Closson v. U. S.*, (1896) 7 App. Cas. (D. C.) 460.

3. Immigration

Rule stated.—When the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. *Geglow v. Uhl*, (1915) 239 U. S. 3, 36 S. Ct. 2, 60 U. S. (L. ed.) 114. See to the same effect *In re O'Sullivan*, (1887) 31 Fed. 447; *In re Gottfried*, (1898) 89 Fed. 9.

In Nishimura Ekiu v. U. S., (1892) 142 U. S. 651, 12 S. Ct. 336, 35 U. S. (L. ed.) 1146, the writ of habeas corpus was sued out May 13, 1891, by a female subject of the Emperor of Japan, detained at San Francisco by a state inspector of immigration, with the approval of the collector, for the reason that, under existing laws,

she should not be permitted to land in the United States. After the issue of the writ, and before a hearing, and on May 14, one John L. Hatch was appointed United States inspector of immigration at that port, who, on May 16, made the inspection and examination required by the Act of March 3, 1891, ch. 551 (see IMMIGRATION), which he reported to the collector, and, on May 18, he intervened in opposition to the writ of habeas corpus, stating his doings and insisting that under the Act his findings and decisions were reviewable by the superintendent of immigration and the Secretary of the Treasury only. The Circuit Court sustained the intervention and remanded petitioner, and its order was affirmed on appeal by the Supreme Court. It was said by Mr. Justice Gray, delivering the opinion, that "a writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

It has been uniformly held that the finding of the executive department and its order, made in immigration proceedings, is not subject to judicial review or intervention through the writ of habeas corpus, except for failure or denial of the administrative hearing intended by the Immigration Act. *In re Cummings*, (S. D. N. Y. 1887) 32 Fed. 75; *In re Howard*, (S. D. N. Y. 1894) 63 Fed. 263; *Ex p. Avakian*, (D. C. Mass. 1910) 188 Fed. 688; *Prentis v. Di Giacomo*, (C. C. A. 9th Cir. 1911) 192 Fed. 467, 112 C. C. A. 605; *Prentis v. Stathakos*, (C. C. A. 7th Cir. 1911) 192 Fed. 469, 112 C. C. A. 607; *Prentis v. Cosmos*, (C. C. A. 9th Cir. 1912) 196 Fed. 372, 116 C. C. A. 419; *Prentis v. Sen Leung*, (C. C. A. 7th Cir. 1913) 203 Fed. 25, 121 C. C. A. 389; *Ex p. Joyce*, (D. C. Mass. 1913) 212 Fed. 282. See further the title IMMIGRATION.

In habeas corpus proceedings based on the ground that the petitioner, an alien, was ordered deported without a fair hearing, the court will grant a conditional discharge to be effective in case the immigration officers fail to give the petitioner the fair hearing on lawful evidence required by the Immigration Act within a reasonable time. *U. S. v. Petkos*, (C. C. A. 1st Cir. 1914) 214 Fed. 978, 131 C. C. A. 274.

Where a warrant of deportation does not contain the name of the alien, nor any name idem sonans, and there is no evidence tending to identify such alien with the name recited in the warrant, he may be released on habeas corpus. *U. S. v. Amor*, (C. C. A. 5th Cir. 1895) 68 Fed. 885, 16 C. C. A. 60, *distinguishing* *U. S. v. Arteago*, (C. C. A. 5th Cir. 1895) 68 Fed. 883, 16 C. C. A. 58.

Chinese exclusion.—A Chinese person who seeks to enter the United States but is denied a fair hearing and turned over to the steamship company for deportation as not entitled to enter may have a writ of habeas corpus. *Chin Yow v. U. S.*, (1908) 208 U. S. 8, 28 S. Ct. 201, 52 U. S. (L. ed.) 369, *distinguishing* *U. S. v. Ju Toy*, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040. See further *Fong Yue Ting v. U. S.*, (1893) 149 U. S. 698, 13 S. Ct. 1016, 37 U. S. (L. ed.) 905; *Lem Moon Sing v. U. S.*, (1895) 158 U. S. 538, 15 S. Ct. 967, 39 U. S. (L. ed.) 1082; *In re Jung Ah Lung*, (1885) 25 Fed. 141; *In re Chow Goo Pool*, (1884) 25 Fed. 77; *Gee Fook Sing v. U. S.*, (C. C. A. 1892) 49 Fed. 146, 1 C. C. A. 211; *U. S. v. Don On*, (N. D. N. Y. 1891) 49 Fed. 569; *In re Chin Yuen Sing*, (S. D. N. Y. 1894) 65 Fed. 572; *In re Gut Lun*, (1897) 83 Fed. 141; *In re Jew Wong Loy*, (1898) 91 Fed. 240; *U. S. v. Gin Fung*, (C. C. A. 1900) 100 Fed. 389, 40 C. C. A. 389; *Chow Loy v. U. S.*, (C. C. A. 1901) 112 Fed. 354, 50 C. C. A. 279. See also CHINESE EXCLUSION.

A child born in the United States of Chinese parents is, by the rule of the common law and the Fourteenth Amendment, a citizen of the United States, and when restrained of his liberty therein may be delivered therefrom on habeas corpus by the proper federal court. *Ex p. Chin King*, (C. C. Ore. 1888) 35 Fed. 354.

IX. CONTEMPT PROCEEDINGS

Commitment for contempt in failing to comply with an order made in the course of a proceeding of which the judge had no jurisdiction, and which was therefore void, is a proper case for issuing a writ. *Ex p. Rowland*, (1881) 104 U. S. 604, 26 U. S. (L. ed.) 861; *Ex p. Fisk*, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117; *In re Ayres*, (1887) 123 U. S. 443, 8 S. Ct. 164, 31 U. S. (L. ed.) 216; *In re Sawyer*, (1888) 124 U. S. 200, 8 S. Ct. 482, 31 U. S. (L. ed.) 402; *In re Burrus*, (1890) 136 U. S. 586, 10 S. Ct. 850, 34 U. S. (L. ed.) 500; *In re Delgado*, (1891) 140 U. S. 586, 11 S. Ct. 874, 35 U. S. (L. ed.) 578; *In re Lennon*, (1897) 166 U. S. 548, 17 S. Ct. 658, 41 U. S. (L. ed.) 1110; *In re McKenzie*, (1901) 180 U. S. 536, 21 S. Ct. 468, 45 U. S. (L. ed.) 657; *Ex p. Perkins*, (C. C. Ind. 1887) 29 Fed. 900; *Ex p. Buskirk*, (C. C. A. 1896) 72 Fed. 14, 18 C. C. A. 410; *Ex p. Irvine*, (S. D. Ohio 1896) 74 Fed. 954.

On an arrest and commitment for disobeying an injunction order, the court cannot, on habeas corpus proceedings, inquire into a defense on the merits such as the question whether the petitioner had knowledge of the injunction order. Habeas corpus is not an appellate writ and its issue is proper in contempt of court proceedings only where the judgment of commitment is void, as for want of jurisdiction.

Castner v. Pocahontas Collieries Co., (W. D. Va. 1902) 117 Fed. 184; *In re Nevitt*, (C. C. A. 8th Cir. 1902) 117 Fed. 448, 54 C. C. A. 622; *Ex p. Haggerty*, (N. D. W. Va. 1902) 124 Fed. 441.

Cas. No. 16,824; *In re Veremaitre*, (1850) 9 N. Y. Leg. Obs. 137, 28 Fed. Cas. No. 16,915; *Goodale v. Splain*, (1914) 42 App. Cas. (D. C.) 235; *In re Heilbron*, (1853) 1 Parker Crim. (N. Y.) 429; (1853) 6 Op. Atty-Gen. 237.

X. EXTRADITION PROCEEDINGS

1. Under Treaty

Scope of inquiry.—The settled rule is that the writ of habeas corpus cannot perform the office of a writ of error, and that in extradition proceedings under a treaty, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus. *In re Kaine*, (1852) 14 How. 103, 14 U. S. (L. ed.) 345; *In re Luis Oteiza y Cortes*, (1890) 136 U. S. 330, 10 S. Ct. 1031, 34 U. S. (L. ed.) 464; *Ornelas v. Ruiz*, (1898) 161 U. S. 502, 16 S. Ct. 689, 40 U. S. (L. ed.) 787; *Bryant v. U. S.*, (1897) 167 U. S. 104, 17 S. Ct. 744, 42 U. S. (L. ed.) 94; *Terlinden v. Ames*, (1902) 184 U. S. 270, 22 S. Ct. 484, 46 U. S. (L. ed.) 534; *Ex p. Zentner*, D. C. Mass.) 188 Fed. 344. See further the title EXTRADITION.

Where a person is held in custody under a commitment by a United States commissioner, for surrender under a treaty of extradition, writs of habeas corpus and certiorari may properly be issued. The court issuing the writ of habeas corpus must inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But the court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion. *In re Stupp*, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

The office of a writ of habeas corpus, in extradition proceedings, is not to correct irregularities, nor to reverse the decision of the commissioner because of some incompetent evidence admitted, nor to review his decision upon the weight and sufficiency of the testimony. The court can only inquire as to the jurisdiction of the commissioner over the subject matter and whether there was legal evidence before him supporting the judgment. *In re Adutt*, (N. D. Ill. 1893) 55 Fed. 376. See further to the same effect *Ex p. Van Aerman*, (1854) 3 Blatchf. 160, 28 Fed.

2. Interstate

Generally.—A proceeding by habeas corpus in a federal court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the state in which he is found to the state whose laws he is charged with violating. *Illinois v. Pease*, (1907) 207 U. S. 100, 28 S. Ct. 58, 52 U. S. (L. ed.) 121. See further the title EXTRADITION.

The court that hears an application for the discharge in habeas corpus of an alleged fugitive from justice is entitled to assume that the state demanding the arrest and delivery of the applicant had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers and representatives, see to it not only that he was legally tried, without any reference to his race, but would be adequately protected while in the state's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92.

In interstate extradition proceedings even when a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the state having jurisdiction of the crime. There is no discretion allowed, no inquiry into motives. The technical sufficiency of the indictment is not open. *Drew v. Thaw*, (1914) 235 U. S. 432, 35 S. Ct. 137, 59 U. S. (L. ed.) 302 [*reversing* (D. C. N. H. 1914) 214 Fed. 423; see also (D. C. N. H. 1913) 209 Fed. 56, 954], wherein the court said: "When as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculation as to what ought to be the result of a trial in the place where the constitution provides for its taking place." See to the same effect *Reed v.*

U. S., (C. C. A. 9th Cir. 1915) 224 Fed. 378, 140 C. C. A. 64.

One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant. *Illinois v. Pease*, (1907) 207 U. S. 100 28 S. Ct. 58, 52 U. S. (L. ed.) 121.

While it is within the province of the courts on inquiry, by means of habeas corpus, to determine the legality of the detention of the party whose extradition is sought, that is the question of the legality of his arrest, the court cannot investigate the guilt or innocence of the accused. *In re Roberts*, (S. D. Ga. 1885) 24 Fed. 132, *affirmed* (1885) 116 U. S., 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544.

Likewise the courts will not, on habeas corpus, go behind the "indictment" or "affidavit" if regular in form, to try the question whether a crime was in fact committed, though identity will always be investigated; and it is proper also to inquire whether the prisoner was in fact within the demanding state when the alleged crime was committed. *In re White*, (C. C. A. 2d Cir. 1893) 55 Fed. 54, 5 C. C. A. 29, *following* *Leary's Case*, (1879) 6 Abb. N. Cas. (N. Y.) 43.

Affirming a refusal of a federal Circuit Court to discharge on habeas corpus a person held in custody in Idaho to await a trial for murder there, the court said: "No obligation was imposed by the Constitution or laws of the United States upon the agent of Idaho to so time the arrest of the petitioner, and so conduct his deportation from Colorado, as to afford him a convenient opportunity, before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and as such liable, under the Act of Congress, to be conveyed to Idaho for trial there." *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148.

A person held in actual custody by a state for trial in one of its courts under an indictment for a crime against its laws will not be released on habeas corpus by a federal court because the methods by which his personal presence in the state was secured may have violated the provisions of article 4, section 2, of the Federal Constitution, or R. S. sec. 5278 (title EXTRADITION) relating to extradition proceedings. *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148; *Moyer v. Nichols*, (1906) 203 U. S. 221, 27 S. Ct. 121, 51 U. S. (L. ed.) 160.

In *Ex p. Moebus*, (1905) 137 Fed. 154, it was held that a petition for a writ of habeas corpus did not state a case for federal interference on the ground of irregularity in extradition proceedings, in view of the rule of the Supreme Court that a large measure of credence and conclusiveness must be accorded to proceedings before the governor in such cases.

In interstate extradition proceedings the acts of the executive are subject to review by the courts by means of the writ of habeas corpus, and where the requisitions issued and copies of the indictment and affidavit are not furnished as required by statute (R. S. sec. 5278, title EXTRADITION) the petitioner will be discharged. *Ex p. Hart*, (C. C. Md. 1894) *reversing* judgment (C. C. Md. 1894) 59 Fed. 894.

In a proceeding by habeas corpus, an executive warrant for the arrest of a fugitive from justice ought not to be pronounced void merely because of some technical defect in the foreign indictment or affidavit, provided the offense is substantially alleged or described. *Webb v. York*, (C. C. A. 8th Cir. 1897) 79 Fed. 616, 25 C. C. A. 133.

Defects in original arrest or commitment.—A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can legally be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. *Iasigi v. Van De Carr*, (1897) 166 U. S. 391, 17 S. Ct. 595, 41 U. S. (L. ed.) 1045, wherein the court said: "Joseph A. Iasigi, a native born citizen of Massachusetts, was arrested, February 14, 1897, on a warrant issued by one of the city magistrates of the city of New York, as a fugitive from the justice of the state of Massachusetts, charged with having committed the crime of embezzlement in that state, and, upon examination, was committed, February 16, to the custody of the warden and keeper of the city prison of the city of New York to await the warrant of the governor of New York on the requisition of the executive authority of the state of Massachusetts for his surrender as such fugitive, pursuant to part six, chapter I of title 4 of the Code of Criminal Procedure of New York, §§ 828, 830. On the 18th of February he filed a petition for the writ of habeas corpus in the District Court of the United States for the Southern District of New York, to procure his release from custody, which averred that he was the Consul General of the Sultan of Turkey at Boston, duly recognized as such by the government of the United States; that the embezzlement was charged to have occurred on July 1, 1892; that he had never been indicted by a grand jury for the commission of any crime; that he was

arrested while on a visit to New York, where access was impossible to his books and papers to vindicate himself; and that the proceedings before the city magistrate were without authority or jurisdiction because of his consular office. The writ was issued and a hearing had, and on the twelfth day of March the District Court entered an order dismissing the writ and remanding Iasigi to custody. From this order an appeal was allowed to this court. The contention of petitioner was that no court of the state of Massachusetts had jurisdiction to entertain a criminal prosecution against him by reason of the matters specified in the commitment, jurisdiction being vested, because of his official position, exclusively in the federal courts; but the conclusion of the District Court rested on the ground that whatever implications in favor of exclusive federal jurisdiction might be claimed, they were in no way incompatible with the preliminary arrest by the magistrate for removal to the state where the crimes charged against him were alleged to have been committed, and where all questions as to the proper tribunal for trial could be more properly heard and determined. On the argument in this court, it appeared from a communication from the Assistant Secretary of State, under date of March 19, that Iasigi had been removed from his consular office, and that all official connection between him and the Turkish government had been severed, as the Department of State had been officially informed by the Turkish minister on the ninth of March. Therefore when the order remanding Iasigi to the custody of the state officer was entered, he was not holding a consular office, and the supposed objection to his detention for extradition to Massachusetts did not exist. As under R. S. sec. 761 [*infra*, p. 469] it is the duty of the court, justice or judge granting the writ, on hearing, 'to dispose of the party as law and justice require,' the question at once arises whether the order of the District Court dismissing the writ should be reversed, and petitioner absolutely discharged, because the objection existed when the writ issued, although it did not when the order was entered, even if such an objection were ever tenable, which we do not intend in the slightest degree to intimate could be. If the application for the writ had been made on the twelfth of March, it could not have been awarded, on the ground alleged in this petition, and as, on that day, the petitioner could not have been discharged on that ground, in accordance with the principles of law and justice, we are unable to hold that the order of the District Court was erroneous. *Ex p. Royall*, [1886] 117 U. S. 241 [6 S. Ct. 734, 29 U. S. (L. ed.) 868]; *Ex p. Watkins*, [1830] 3 Pet. 193, 201 [7 U. S. (L. ed.) 650]; *Ex p. Milligan*, [1866] 4 Wall. 2, 111 [18 U. S. (L. ed.) 281]."

Effect of warning of nonresponsibility for expense attending arrest, etc.—A warning given by a demanding state to a surrendering state that the former would not be responsible for any expense attending the arrest and delivery of the alleged fugitive from justice is a matter for the consideration of the governor of the surrendering state when he receives the official demand for the arrest and delivery of the alleged fugitive, and not a matter that can legally affect an inquiry before the Circuit Court on a petition by the alleged fugitive for a writ of habeas corpus, the inquiry being based on whether the requisition of the demanding state and the action thereon by the governor of the surrendering state are in substantial conformity with the Constitution and the laws of the United States, and, therefore, not in any legal sense hostile to the liberty of the accused. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92.

Identity of person.—Where the petitioner was arrested in one state under an extradition warrant for his return to another state as a fugitive from justice, the question of the identity of the person described in the warrant of extradition is open upon habeas corpus proceedings either in the federal or in the state courts. *Ex p. Chung Kin Tow*, (D. C. Mass. 1914) 218 Fed. 185, *affirmed* on other grounds (C. C. A. 1st Cir. 1914) 218 Fed. 64, 133 C. C. A. 666. And to the same effect see *In re White*, (C. C. A. 2d Cir. 1893) 55 Fed. 54, 14 U. S. App. 87, 5 C. C. A. 29.

Presence in demanding state at time of crime.—"When it is conceded, or when it is so conclusively proved that no question can be made, that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding state, then the court will discharge the defendant. *Hyatt v. New York*, [1903] 188 U. S. 691 [23 S. Ct. 456, 47 U. S. (L. ed.) 657], *affirming* the judgment of the New York Court of Appeals, [1902] 172 N. Y. 176. See also *In re White*, [C. C. A. 2d Cir. 1893] 55 Fed. 54 [14 U. S. App. 87, 5 C. C. A. 29]. But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused." *Munsey v. Clough*, (1904) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515.

Fair trial.—Whether the person sought to be extradited will get a fair trial in the demanding state will not be considered on habeas corpus. *U. S. v. Cooke*, (C. C. A. 3d Cir. 1913) 209 Fed. 607, 126 C. C. A. 429, wherein the court said: "It was

earnestly urged upon us by the relator's counsel that we should take judicial notice of certain matters that are not upon the record, but were said to be established by common fame. These, it was argued, show that the relator is not likely to have a fair trial—and probably will not have a trial at all—in the courts of the demanding state. We intimate no opinion concerning the weight this argument should receive, but certainly it cannot properly be considered by this court. Occasionally such arguments have been taken into account by the executive of a state—whether legally or arbitrarily is not a matter of present concern—but they cannot be allowed to influence a court's decision upon the judicial question whether a fugitive from justice has been lawfully demanded from the asylum state. In the present case this particular argument was answered on behalf of the demanding state by the most explicit assurance that the apprehensions expressed for the relator's safety and his right to a fair trial were wholly without foundation; and, so far as this court is concerned, we must leave the subject in that situation."

Sec. 752. [Power of judges to grant writs of habeas corpus.] The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 81; Act of April 10, 1869, ch. 22, 16 Stat. L. 44; Act of March 2, 1833, ch. 57, 4 Stat. L. 634; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385; Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

"Judge" distinguished from "court."—This section indicates a distinction between a district judge and a district court. *Chow Loy v. U. S.*, (C. C. A. 1901) 112 Fed. 354, 50 C. C. A. 279.

Application for writ taken into court.—When application for the writ is made to a judge, it may be taken into the court of which he is judge. *In re Fitton*, (1891) 45 Fed. 471.

In vacation.—In this section Congress has only conferred power upon the judges of the courts, in vacation, to award writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty,—the high prerogative and judicial writ. *State v. Sullivan*, (1892) 50 Fed. 593.

In *Ex p. Barnes*, (1846) 1 Sprague 123, 2 Fed. Cas. No. 1,010, it was questioned whether a justice or judge of the federal courts had power to issue a writ of habeas corpus ad testificandum in vacation, even for the purpose of bringing witnesses into court for an approaching session, the opinion being intimated that such power was confined to the courts alone.

"Within their respective jurisdictions" has reference to the territorial jurisdiction. *Ex p. Kenyon*, (1878) 5 Dill. 385,

Conclusiveness of extradition warrant.—If the extradition warrant of the governor shows on its face that all the necessary legal prerequisites have been complied with, this is conclusive, unless the proceedings before the governor appear not to have been regular. *Chung Kin Tow v. Flynn*, (C. C. A. 1st Cir. 1914) 218 Fed. 64, 133 C. C. A. 666, *affirming* on other grounds (D. C. Mass. 1914) 218 Fed. 185.

XI. ENLISTMENT OF MINORS IN ARMY AND NAVY

Habeas corpus lies to obtain the discharge of minors who have fraudulently enlisted in the United States army or navy, but the merits of the case may not be inquired into. The issue raised can only relate to the cause of detention and its lawfulness. *U. S. v. Williford*, (C. C. A. 2d Cir. 1915) 220 Fed. 291, 136 C. C. A. 273; *Com. v. Downes*, (1836) 24 Pick. (Mass.) 227; *Gormley's Case*, (1867) 12 Op. Atty-Gen. 259. See further the titles NAVY and WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

14 Fed. Cas. No. 7,720. And the power to issue writs of habeas corpus is by this section expressly restricted to the territorial jurisdiction of the court to which the application is made. *Ex p. Gouyet*, (D. C. Mont. 1909) 175 Fed. 230. See to the same effect *In re Boles*, (C. C. A. 8th Cir. 1891) 48 Fed. 75, 4 U. S. App. 1, 1 C. C. A. 48; *Ex p. Kenyon*, (1878) 5 Dill. 385, 14 Fed. Cas. No. 7,720; *In re Buckley*, (1865) 3 Fed. Cas. No. 1,387.

"Cause of restraint of liberty."—Instead of the words "cause of restraint of liberty" the original Act contained the words "cause of commitment." See *Ex p. Watkins*, (1830) 3 Pet. 193, 7 U. S. (L. ed.) 650.

The changed phraseology, from "cause of commitment" in the original Act, will allow writs of habeas corpus to stand, and at common law they do stand, for all unlawful restraints, whether under color of process, or through the illegal acts of individuals, or under a commitment to an insane asylum. *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 331, 21 U. S. App. 481, 12 C. C. A. 145, 26 L. R. A. 784.

There must be an actual or a constructive "restraint of liberty." So, a commitment to await the action of the grand jury, followed by its failure to indict,

does not entitle the accused after his discharge to a judicial inquiry, upon habeas corpus, into the probable cause of such commitment. *In re Esselborn*, (S. D. N. Y. 1881) 8 Fed. 904.

Scope of inquiry.—It is the duty of the court making "inquiry into the cause of restraint of liberty" of one who alleges that he is in custody in violation of law, to direct such inquiry to all matters relevant to the issue joined upon the allegation. *U. S. v. Fowkes*, (C. C. A. 3d Cir. 1892) 53 Fed. 13, 3 U. S. App. 247, 3 C. C. A. 394.

Under state indictment.—A federal judge has no power or jurisdiction under

this section to grant a writ of habeas corpus where the petitioner, according to his own showing, is a prisoner in jail upon a charge preferred against him by an indictment in a state court, and is not in custody under or by color of the authority of the United States, or committed for trial before any court thereof. *Ex p. McCann*, (1865) 15 Fed. Cas. No. 8,679.

Cited generally, without specific application, in *Eaton v. Calhoun*, (W. D. Tenn. 1880) 15 Fed. 155; *In re Haskell*, (S. D. Ohio 1892) 52 Fed. 795; *In re McKane*, (S. D. N. Y. 1894) 61 Fed. 205, *affirmed* (1894) 153 U. S. 684, 14 S. Ct. 913, 38 U. S. (L. ed.) 867.

Sec. 753. [Writ of habeas corpus when prisoner is in jail.] The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify. [*R. S.*]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 81; Act of March 2, 1833, ch. 57, 4 Stat. L. 634; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385; Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

- I. Introductory, 449.
- II. Prisoner in jail, 451.
- III. Color of authority, 451.
- IV. Pursuance of law, 452.
- V. Order, process or decree, 452.
- VI. Constitution, laws or treaties, 454.
- VII. Commission, etc., of foreign state, 461.
- VIII. Bring into court to testify, 462.

1. INTRODUCTORY

Scope of jurisdiction.—"The jurisdiction of courts of the United States to issue writs of habeas corpus is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations." *Carfer v. Caldwell*, (1906) 200 U. S. 293, 26 S. Ct. 264, 50 U. S. (L. ed.) 488.

The jurisdiction of federal courts in habeas corpus cases is derived from this section, and not from sections conferring general jurisdiction. *Rosenbaum v. Board of Supervisors*, (1886) 28 Fed. 223.

History of section.—In the case of *In re Neagle*, (1890) 135 U. S. 1, 10 S. Ct.

658, 34 U. S. (L. ed.) 55, the evolution and history of this section are stated as follows: "The enactments now found in the Revised Statutes of the United States on the subject of the writ of habeas corpus are the result of a long course of legislation forced upon Congress by the attempt of the states of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the states denied. The original Act of Congress on the subject of the writ of habeas corpus, by its 14th section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question, or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the

laws of the states. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that state, and held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the Act of Congress of March 2, 1833, 4 Stat. 634, c. 57, § 7, among other remedies for such condition of affairs, provided, by its 7th section, that the federal judges should grant writs of habeas corpus in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof. The next extension of the circumstances on which a writ of habeas corpus might issue by the federal judges arose out of the celebrated McLeod Case, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that state. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the state of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus, by the Act of August 29, 1842, 5 Stat. 539, c. 257, entitled 'An Act to provide further remedial justice in the courts of the United States.' It conferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed: 'The object was to allow a foreigner, prosecuted in one of the states of the Union for an offense committed in that state, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of

habeas corpus is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief.' No more forcible statement of the principle on which the law of the case now before us stands can be made. The next extension of the powers of the court under the writ of habeas corpus was the Act of February 5, 1867, 14 Stat. 385, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that 'the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty.'" See to the same effect *In re Burrus*, (1890) 136 U. S. 586, 10 S. Ct. 850, 34 U. S. (L. ed.) 500.

For the episode which led to the enactment by Congress of the Act of Aug. 29, 1842, ch. 257, now that provision of this section which relates to a prisoner's "being a subject or citizen of a foreign state," see *Underhill v. Hernandez*, (C. C. A. 2d Cir. 1895) 65 Fed. 577, 26 U. S. App. 573, 13 C. C. A. 51, 38 L. R. A. 405, affirmed (1897) 168 U. S. 250, 18 S. Ct. 83, 42 U. S. (L. ed.) 456.

Construction.—The plain construction of this section restricts the jurisdiction of the court to such cases as come within some one of the causes of detention or imprisonment therein specifically mentioned and the court is not at liberty to go beyond them, although under special circumstances and for reasons of public policy the court might entertain the opinion that a prisoner ought to be discharged. In regulating the power to issue the writ, one purpose, if not the chief one, of the statute is to avoid and prevent any interference or clashing of authority between the courts of the United States and those of the several states, and the law should be carefully administered with that intent in view. So, the interpretation and application of the law of nations cannot be considered on a habeas corpus proceeding, unless the question arises strictly within the conditions referred to in the statute. *In re Wildenhuis*, (C. C. N. J. 1886) 28 Fed. 924, affirmed (1887) 120 U. S. 1, 7 S. Ct. 385, 30 U. S. (L. ed.) 565.

Section as containing grant of power.—

* Section 753 contains no grant of power, but is a restriction upon the power of the federal courts, prohibiting the issuance of the writ of habeas corpus in behalf of a prisoner in jail, except under the prescribed conditions enumerated in that section. To meet the conditions existing at the time of South Carolina's attempt to nullify the laws of the United States, and deal with officers of the national government under its criminal laws for acts done in the performance of official duties, Congress enacted . . . Act of March 2, 1833, ch. 57, sec. 7, 4 Stat. L. 634. This law has been recast in the Revised Statutes, and the body of it, with changed phraseology, now constitutes section 753; and as already indicated, there is in it no grant of power, so that it must now be construed with reference to its position, following sections 751 and 752 [supra, pp. 427, 448], in order to give it any definite and clear meaning, unless we assume that by implication it confers power to grant writs of habeas corpus in the excepted cases enumerated." *Clifford v. Williams*, (1904) 131 Fed. 100.

II. PRISONER IN JAIL

Imprisonment in jail appears to be the first condition recited in this section and is the controlling condition governing all of the cases which, by reason of the exceptions, the federal courts are permitted to take cognizance of. Hence the federal Circuit Courts have no jurisdiction to determine a controversy between persons who are residents of different states as to the right of custody of their infant child, who is neither restrained of her liberty nor imprisoned. *Clifford v. Williams*, (1904) 131 Fed. 100.

III. COLOR OF AUTHORITY

In general.—In all cases where federal officers, civil or military, have the custody and control of a person claimed to be unlawfully restrained of liberty, such person is restrained of liberty under color of authority of the United States, and the federal courts can properly proceed to determine the question of unlawful restraint, because no other court can properly do so. *In re Keeler*, (1843) Hempst. 306, 14 Fed. Cas. No. 7,637; *In re McDonald*, (1861) 9 Am. L. Reg. 661, 16 Fed. Cas. No. 8,751; *In re Martin*, (1866) 5 Blatchf. 303, 16 Fed. Cas. No. 9,151; *U. S. v. Crook*, (1879) 5 Dill. 453, 25 Fed. Cas. No. 14,891; *In re Winder*, (1862) 2 Cliff. 89, 30 Fed. Cas. No. 17,867.

A person held in custody by direction of the customs authorities of the port, under the provisions of the Chinese Restriction Act, is in custody under or by color of the authority of the United States, within the meaning of this section, and the writ may issue to inquire into

the cause of restraint. *U. S. v. Jung Ah Lung*, (1888) 124 U. S. 621, 8 S. Ct. 663, 31 U. S. (L. ed.) 591. See also *U. S. v. Chung Shee*, (1895) 71 Fed. 277, *affirmed* (C. C. A. 9th Cir. 1895) 76 Fed. 951, 44 U. S. App. 751, 22 C. C. A. 639.

But where a petitioner, according to his own showing, is a prisoner in a jail upon a charge preferred against him by an indictment found in a state court and has not been committed for trial before any court of the United States, the federal courts cannot proceed to inquire into the cause of his restraint. *Ex p. McCann*, (1865) 15 Fed. Cas. No. 8,679.

The Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. L. 81, provided that "either of the justices of the Supreme Court, as well as the judges of the District Courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or necessary to be brought into court to testify." It was held under that Act that a court had jurisdiction to issue habeas corpus to inquire into the legality of the imprisonment of a person held under its own sentence. *In re Greathouse*, (1864) 4 Sawy. 487, 10 Fed. Cas. No. 5,741, wherein it was said: "It is contended by the district attorney that the authority here given does not embrace cases where a prisoner is in custody under conviction and sentence; that the court, when sentence is pronounced, is *functus officio*, and has no further power over the case; that the marshal's return that he holds the prisoner by virtue of such conviction and sentence is conclusive; and that even a special pardon issued to the prisoner cannot be set up in answer to it. For this position no authority is cited. It will be seen that, if correct, it would be the duty of the court to remand a prisoner to undergo execution of a capital sentence, even though he should produce a full and free pardon by the President, under the great seal of state. Even this result the district attorney did not hesitate to admit to be the necessary consequence of the principle contended for. The terms of the statute embrace, it will be observed, all cases of commitment—and the proviso by implication includes not only cases of commitment for trial before some court of the United States, but also all cases where persons are in jail under or by color of the authority of the United States. It is evident that this language extends to all persons imprisoned under the authority of the United States, whether under the judgment of a court or the warrant of a committing magistrate."

Failure of grand jury to act.—Where a person is held and committed to await

the action of the grand jury and no indictment or information is filed against him he is entitled to be discharged on that ground on a writ of habeas corpus being issued. *In re Esselborn*, (1881) 8 Fed. 904.

Person convicted by judge de facto.—Where a court has jurisdiction of an offense, and of the accused, and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer de facto; and the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus. *Ex p. Ward*, (1899) 173 U. S. 452, 19 S. Ct. 459, 43 U. S. (L. ed.) 765. See to the same effect *Giozza v. Tiernan*, (1893) 148 U. S. 657, 13 S. Ct. 721, 37 U. S. (L. ed.) 599; *McDowell v. U. S.*, (1895) 159 U. S. 596, 16 S. Ct. 111, 40 U. S. (L. ed.) 271; *In re Ah Lee*, (D. C. Ore. 1880) 5 Fed. 899; *Griffin's Case*, (1869) Chase 364, 11 Fed. Cas. No. 5,815.

IV. PURSUANCE OF LAW

"A law," within the meaning of this phrase, is any obligation fairly and properly inferable from the Constitution, or any duty of a United States marshal to be derived from the general scope of his duties under the laws of the United States. *In re Neagle*, (1890) 135 U. S. 42, 10 S. Ct. 658, 34 U. S. (L. ed.) 55, *affirming* (N. D. Cal. 1889) 39 Fed. 833. See *In re Lee*, (D. C. Miss. 1891) 46 Fed. 59; *In re Lewis*, (D. C. Wash. 1897) 83 Fed. 159; *In re Bull*, (1877) 4 Dill. 323, 4 Fed. Cas. No. 2,119.

Under revenue laws.—See *Ex p. Carson*, (1873) 4 Hughes 215, 5 Fed. Cas. No. 2,459.

Under treasury regulations.—*U. S. v. Fuellhart*, (1901) 106 Fed. 911.

In *Boske v. Comingore*, (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846, it was held that a case was one of urgency and justified the issuance of the writ when the petitioner, a collector of the customs, was held in custody by a state court for contempt in refusing, in compliance with treasury regulations, to exhibit copies of official documents for use in the trial of a cause in the state court. It was said that his presence at his post of duty was important to the public interests, and his detention in prison by the state authorities might interfere with the regular and orderly course of the business of the department, and the District Court therefore did not err in determining the question of constitutional law raised by the application for a writ, and rendering final judgment. See also *Ohio v. Thomas*, (1899) 173 U. S. 276, 19 S. Ct. 453, 43 U. S. (L. ed.) 699.

Under military law.—See *Matter of Farrand*, (1867) 1 Abb. 140, 8 Fed. Cas.

No. 4,678; *In re Neill*, (1871) 8 Blatchf. 156, 17 Fed. Cas. No. 10,089.

Under statute regulating soldiers' home.—See *Ohio v. Thomas*, (1899) 173 U. S. 276, 19 S. Ct. 453, 43 U. S. (L. ed.) 699.

In construction of postal and telegraph line under Act of Congress.—See *Ex p. Conway*, (1891) 48 Fed. 77.

V. ORDER, PROCESS OR DECREE

In general.—When United States officers undertake to execute the process or orders of the United States courts they do so by authority of the laws of the United States, and all power necessary and proper to enable them to perform their duty is given by the laws of the United States; and when such officers are held by state authorities, for acts committed which are necessary and proper to enable them to perform their duty, they will be released on habeas corpus. "It is the duty of the United States to protect its officers when performing their duty, and there is no question about the power to do so." *U. S. v. Fullhart*, (1891) 47 Fed. 802.

Nor is a federal officer obliged to show affirmatively that he had done nothing except what he was justified in doing by process and that the action imputed to him and for which he was confined was justified by his process. *Matter of U. S.*, (1877) 24 Fed. Cas. No. 14,412, *modifying U. S. v. Jailer*, (1867) 2 Abb. 265, 26 Fed. Cas. No. 15,463.

United States marshals, deputies, and assistants, held by state authorities for acts done by them in the service of process issued from a federal court, should be discharged by a federal court on habeas corpus, *Hunter v. Wood*, (1908) 209 U. S. 205, 28 S. Ct. 472, 52 U. S. (L. ed.) 747, *affirming* (W. D. N. C. 1907) 155 Fed. 190; *Anderson v. Elliott*, (C. C. A. 1900) 101 Fed. 609, 41 C. C. A. 521; *U. S. v. Fuellhart*, (W. D. Va. 1901) 106 Fed. 911; *Ramsey v. Warren County*, (1879) 2 Flipp. 451, 20 Fed. Cas. No. 11,547; *Ex p. Robinson*, (1855) 6 McLean 355, 20 Fed. Cas. No. 11,935; *U. S. v. Morris*, (1854) 2 Am. L. Reg. 348, 26 Fed. Cas. No. 15,811; *U. S. v. Harris*, (1872) 26 Fed. Cas. No. 15,313; *Ex p. Sifford*, (1857) 5 Am. L. Reg. 659, 22 Fed. Cas. No. 12,848; *Ex p. Jenkins*, (1853) 2 Wall. Jr. C. C. 521, 13 Fed. Cas. No. 7,259; as when the officer has been committed by a state court for contempt in refusing to obey the order of that court to produce before the court a person held by the marshal under an order of a United States commissioner acting under a federal statute, *Ex p. Robinson*, (1856) 1 Bond 39, 20 Fed. Cas. No. 11,934; and when held under an order of a state court for a supposed contempt in failing to surrender to that court documents and papers which had been obtained by the United

States court for use in a case concerning which that court had concurrent jurisdiction, and of which it had first acquired jurisdiction, *Ex p. Turner*, (1879) 3 Woods 603, 24 Fed. Cas. No. 14,246.

No state judge or court, judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before the judge or court. "It is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, [but] it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority." *Ableman v. Booth*, (1858) 21 How. 506, 16 U. S. (L. ed.) 169. See *Charge to Grand Jury*, (1851) 1 Blatchf. 635, 30 U. S. (L. ed.) 18,261.

In commenting on the case of *Ableman v. Booth*, (1858) 21 How. 506, 16 U. S. (L. ed.) 169, the Attorney-General (Gormley's Case, (1867) 12 Op. Atty-Gen. 258) said that the language used in that opinion was not very specific, but he understood it as only applicable to proceedings upon habeas corpus in state courts, in case of imprisonment under process issued under the authority of the United States. The duty of the marshal to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to a state mandate of process, does not extend to an executive officer who has under his control a person alleged to be so in violation of the federal law, as in the case of a minor enlisted in the naval service, so as to excuse such executive officer from making full return to, and producing the body before, the state court issuing the writ of habeas corpus therefor, within whose territorial limits is the alleged illegal detention. See also *Tarble's Case*, (1871) 13 Wall. 397, 20 U. S. (L. ed.) 597.

Within respective districts.—The authority of the United States marshals and their deputies to act in an official capacity is confined by R. S. sec. 787 (see JUDICIAL OFFICERS) to the respective districts for which they have been appointed. Outside that district such an officer is simply a private citizen, and, as such, is amenable to the laws of the place where he may be, and when, in an unlawful attempt to serve a warrant outside of his own district, he is arrested by state authorities for carrying concealed weapons, which is an offense against the law of the state, he cannot be released by the federal courts on habeas corpus. *Walker v. Lea*, (1891) 47 Fed. 645.

No intent to interfere with federal process.—A deputy United States marshal was arrested and lodged in state jail, while on his way to serve process, under commitment by a trial justice of the state upon charges of forgery and felony. He was held not entitled to be released on habeas corpus where it did not appear that he was arrested under state authority for any act done in pursuance of federal authority, and warranted by it, nor that he was arrested by the state authorities with the motive or intent on the part of any one to interfere with the service of process of the United States. *In re Miller*, (1890) 42 Fed. 307.

Process obtained by perjury.—The petitioner was indicted in a state court for larceny alleged to have been committed under color of a writ of replevin issued by the federal court, obtained upon the affidavit of the petitioner. The federal court refused to release on habeas corpus where it appeared that the writ of replevin had been obtained by perjury and the filing of a worthless bond, and that these and other facts and circumstances showed that gross and infamous fraud had been practiced upon the court. *Ex p. Thompson*, (1876) 1 Flipp. 507, 23 Fed. Cas. No. 13,934.

Collateral attack by state court.—When a federal court or judge has heard and determined issues made by a petition and responses thereto in habeas corpus proceedings, and has found that the petitioner was acting in discharge of his duty as an officer of the United States when he committed the offense charged against him in the state courts, the findings of such federal court or judge cannot be attacked by a state court in a collateral proceeding on account of supposed irregularity in the manner of procedure before such federal court or judge. *State v. Adler*, (1900) 67 Ark. 469, 55 S. W. 851.

Soldiers.—A federal court or judge has power to issue a writ of habeas corpus on petition of the United States for the purpose of an inquiry into the cause of detention of a prisoner held by a state to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; and it has authority to determine summarily as a fact whether or not such allegation is true, and if found to be true to discharge the prisoner on the ground that the state is without jurisdiction to try him for such act. *U. S. v. Lipsett*, (1907) 156 Fed. 65.

Assistant United States attorney.—This section confers jurisdiction on federal courts to release on habeas corpus an officer of the United States held in custody for an act done or omitted under authority vested in him by the law of the United States, though there is no Act of Congress covering the particular case. Thus where

petitioner, in his official capacity as assistant United States district attorney, procured the production of state court records before a federal grand jury under an ordinary subpoena duces tecum, and thereafter held possession of such records, as such attorney, he was not subject to punishment for contempt of the state court for failure to return such records on demand, since "whatever duty the relator owed to take care of said records or to return them to their lawful custodian was a duty incumbent upon him as an officer of the court." *In re Leaken*, (1905) 137 Fed. 680, discharging petitioner from custody.

Railway ticket agent.—Under this section a federal Circuit Court had power to discharge on habeas corpus a railway ticket agent, who, acting under and in obedience to an order of a federal Circuit Court which enjoined, as being repugnant to the Federal Constitution, the enforcement by the state corporation commission and the attorney-general of state legislation reducing rates, was imprisoned under a conviction in a state court for disobeying such legislation. *Hunter v. Wood*, (1908) 209 U. S. 205, 28 S. Ct. 472, 52 U. S. (L. ed.) 747.

Posse comitatus.—In *State v. Laing*, (1904) 133 Fed. 887, 66 C. C. A. 617, (1903) 127 Fed. 213, petitioners under imprisonment on a charge of murder for the justifiable killing of a man whom they, as members of a posse comitatus, were attempting to arrest under a warrant from a federal court upon an indictment for resisting its officers, were discharged upon habeas corpus by a federal Circuit Court.

VI. CONSTITUTION, LAWS OR TREATIES

In general.—It is not the law that every person held in unlawful imprisonment has the right to invoke the aid of the courts of the United States for his release by the writ of habeas corpus. "In order to obtain the benefit of this writ and to procure its being issued by the court or justice or judge who has a right to order its issue, it should be made to appear, upon the application for the writ, that it is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the Constitution, laws, or treaties of the United States." *In re Burrus*, (1890) 136 U. S. 586, 10 S. Ct. 850, 34 U. S. (L. ed.) 500.

"Whether . . . the appellant is a prisoner in jail, within the meaning of section 753, or is restrained of his liberty by an officer of the law executing the process of a court of Virginia, in either case, it being alleged under oath that he is held in custody in violation of the Constitution, the Circuit Court has, by the express words of the statute, jurisdiction on

habeas corpus to inquire into the cause for which he is restrained of his liberty, and to dispose of him 'as law and justice require.'" *Ex p. Royall*, (1886) 117 U. S. 241, 6 S. Ct. 734, 29 U. S. (L. ed.) 868.

A party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional Act of Congress, may be discharged from imprisonment by the Supreme Court on habeas corpus, although it has no appellate jurisdiction by writ of error over the judgment. *Ex p. Siebold*, (1879) 100 U. S. 371, 25 U. S. (L. ed.) 717.

The word "law" has a wider significance than a statute or publicly declared decision, and may include an obligation arising on a regulation promulgated by a department according to law, an act in pursuance of which would be therefore in pursuance of law. *In re Hirsch*, (1896) 74 Fed. 928. See also *In re Huttman*, (1895) 70 Fed. 699.

But "the acts of the legislature of a territory are not laws of the United States." *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

A person imprisoned under a conviction in a court of Oklahoma territory was not entitled to his release on habeas corpus, under this section, because the grand jurors were summoned from the body of the county, which resulted in the selection as such jurors of persons who were not electors nor residents of the territory, since the Federal Constitution does not control the method of selection, and if any laws were violated by this method they were territorial enactments, which are not laws of the United States. *Matter of Moran*, (1906) 203 U. S. 96, 27 S. Ct. 25, 51 U. S. (L. ed.) 105. See also *Ex p. Moran*, (1906) 144 Fed. 594, 75 C. C. A. 396. For a like case see *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

Prisoner held under state process.—The courts of the United States have jurisdiction on habeas corpus to discharge from custody a person who is restrained of his liberty in violation of the Constitution or a law of the United States, although he may be held under state process for an alleged offense against the laws of such state. *In re Reinitz*, (1889) 39 Fed. 204; *U. S. v. Fiscus*, (1890) 42 Fed. 395.

A defendant charged with a criminal offense in a federal court, and at large on bail pending a determination of his case by an appellate court, when arrested and held in custody by the authorities of a state, outside of the jurisdiction of the federal courts in which his case is pending, to answer to an indictment in the state court, is not so held in violation of his constitutional rights or contrary to any law of the United States as to entitle him to a discharge by a federal court on a writ of habeas corpus, where neither the United

States nor his surety demands such discharge. *Ex p. Marrin*, (1898) 164 Fed. 631.

Validity of statute creating offense presumed.—A citizen cannot be held in custody or removed for trial where there is no provision of the common law or statute making an offense of the acts charged. In such case the committing court has no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. But the presumption is in favor of the validity of every Act of Congress, and it would not be proper for the committing magistrate to treat as invalid a statutory declaration of what should constitute an offense, except in those rare and extreme cases in which the act was plainly and palpably void. *Henry v. Henkel*, (1914) 235 U. S. 219, 35 S. Ct. 54, 59 U. S. (L. ed.) 203.

Violation of implied right.—The violation of a right implied out of the Constitution and laws of the United States would be a violation of them. *In re Fitton*, (1891) 45 Fed. 471.

"Full faith and credit clause."—Where, after the remarriage of plaintiff's divorced wife, and her removal to another state, taking with her an infant daughter awarded to her custody in divorce proceedings, another order was made in such proceedings awarding custody of the child to plaintiff, the refusal of his former wife to comply with such decree, and her obtaining a decree of adoption in the state of her domicile, without proof that the courts in such state had refused to recognize plaintiff's decree, did not confer jurisdiction on the federal Circuit Court in the state of the wife's domicile to issue a writ of habeas corpus to determine plaintiff's right to the custody of the child, on the ground that full faith and credit had been denied to plaintiff's decree awarding him the custody of the child. *Clifford v. Williams*, (1904) 131 Fed. 100.

Fifth amendment.—Compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, even if contrary to the Fifth Amendment to the Federal Constitution, do not affect the jurisdiction of the court so as to justify relief by habeas corpus. *Matter of Moran*, (1906) 203 U. S. 96, 27 S. Ct. 25, 51 U. S. (L. ed.) 105.

A federal court has no power on a writ of habeas corpus to discharge a prisoner confined for contempt by a state court for refusing to answer questions as a witness, on the ground that his answers might incriminate him; the provision of the Fifth Amendment being a limitation solely on the powers of the national government and its courts and officers. *Ex p. Munn*, (1905) 140 Fed. 782. But in *Foot v. Buchanan*, (N. D. Miss. 1902) 113 Fed. 156, it was held that the Constitution provides

that no person shall be compelled in any criminal case to be a witness against himself, and on the commitment of a person for refusing to answer a set of questions tending to show his connection with the misdemeanor charged, he should be released on habeas corpus, notwithstanding that some of the questions could have been answered without endangering the petitioner.

A prisoner who has been tried, convicted, and sentenced to imprisonment by a Circuit Court of the United States, the indictment having been amended by the district attorney, by leave of the court, after it had been returned by the grand jury, is entitled to his discharge under a writ of habeas corpus issued by the Supreme Court, on the ground that the proceeding was void. "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for though it has possession of the person, and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment." *Ex p. Bain*, (1887) 121 U. S. 1, 7 S. Ct. 781, 30 U. S. (L. ed.) 849.

The petitioner had been convicted in a special Supreme Court of the Cherokee Nation, on a charge of murder, upon an indictment returned by a body consisting of five grand jurors. Upon a petition for a writ of habeas corpus upon the ground that the grand jury, consisting only of five persons, was not a grand jury within the contemplation of the Fifth Amendment of the Constitution, the court said that this amendment does not apply to the local legislation of the Cherokee Nation so as to require all prosecutions for offenses committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment. The powers of the local government exercised by the Cherokee Nation are not federal powers created by and springing from the Constitution of the United States, but are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. *Talton v. Mayes*, (1896) 163 U. S. 376, 16 S. Ct. 986, 41 U. S. (L. ed.) 196.

Where a person is accused of an infamous crime, he must, by virtue of the Fifth Amendment, be charged with such offense by indictment or presentment of a grand jury and cannot be legally charged by information, and in a case where the accused has been found guilty upon information and imprisoned, he may sue out a writ of habeas corpus and obtain his release because he has been tried and convicted without due process of law and against the Constitution and laws of the United

States. *Ex p. McClusky*, (C. C. A. Ark. 1889) 40 Fed. 71.

But in the case of *In re Humason*, (D. C. Wash. 1891) 46 Fed. 388, it was held that where a state statute (Washington) authorized the prosecution of offenses by information, a person convicted in such state by that mode of proceeding was not entitled, on that ground, to be set at liberty by writ of habeas corpus.

Thirteenth amendment.—If an alleged apprenticeship is in fact an involuntary servitude within the meaning of the Thirteenth Amendment interdicting slavery and involuntary servitude, except as a punishment for crime, a petitioner seeking relief from such restraint will be discharged on habeas corpus. *Ex p. Turner*, (1879) 3 Woods 603, 24 Fed. Cas. No. 14,246.

Fourteenth Amendment—Due process of law.—The federal court has jurisdiction to issue a writ in behalf of a citizen who is alleged to be illegally restrained, whether it is done under color of state authority or national authority, and the inhibition of the constitutional provision, "nor shall any state deprive any citizen of life, liberty, or property without due process of law," goes against any part of the legal machinery of the state, as well as against the whole of it. *In re Monroe*, (1891) 46 Fed. 52.

In enforcing the Fourteenth Amendment the federal courts will not upon habeas corpus inquire into the guilt or innocence of the petitioner, nor substitute their judgment for that of the state courts as to what are the laws of the state in any case. Upon such a proceeding they will confine themselves to the function of seeing that the fundamental principle, that the citizen shall not be arbitrarily proceeded against contrary to the course of law, nor punished without authority of law, nor unequally, shall not be violated in any given case. *In re King*, (W. D. Tenn. 1891) 46 Fed. 905.

Relief by habeas corpus should not be accorded by a federal court to a person held in custody by the state authorities under an order of commitment entered by a state court after a jury had returned a verdict of not guilty by reason of insanity, although the prisoner may be so held in violation of the Fourteenth Amendment, since he should be left to his remedy by writ of error from the federal Supreme Court to review the final action of the highest court of the state. *Urquhart v. Brown*, (1907) 205 U. S. 179, 27 C. Ct. 459, 51 U. S. (L. ed.) 760, reversing (1905) 139 Fed. 846.

A petitioner for habeas corpus was not deprived of his liberty without due process of law by being convicted of crime upon a trial where the court failed to see to it that the testimony, which he was too deaf to hear, was repeated to him through the ear trumpet which he had with him. *Felts*

v. Murphy, (1906) 201 U. S. 123, 26 S. Ct. 366, 50 U. S. (L. ed.) 689.

The federal courts have no jurisdiction to release, by habeas corpus, a person held in the custody of the state authorities to answer for a contempt in refusing to appear and testify before a legislative investigating committee, either because such a committee cannot sit in vacation, or because the subject for investigation is excluded from the jurisdiction of the legislature by the provision of the state constitution for the separation of legislative, executive, and judicial powers, as no question of due process of law is presented. *Carfer v. Caldwell*, (1906) 200 U. S. 293, 26 S. Ct. 264, 50 U. S. (L. ed.) 488.

The Federal Constitution does not guarantee to citizens the right to a jury trial, except in the courts of the United States; nor does the fact that a prisoner, convicted and sentenced for a criminal offense in a state court, was not given a jury trial, nor entitled to one under the state statute, entitle him to be discharged on a writ of habeas corpus by a federal court, on the ground that his conviction was without due process of law. *Ex p. Brown*, (1905) 140 Fed. 461.

A petition for a writ of habeas corpus, which shows on its face that the petitioner, since his extradition from another state, has been confined in a penitentiary for five years upon no other process of commitment than the governor's warrant, states a case of deprivation of rights under the Constitution of the United States, which authorizes and requires a federal court to take jurisdiction, at least to the extent of requiring the person against whom the restraint is alleged to answer. *Ex p. Moebus*, (1905) 137 Fed. 154.

The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship, consequently habeas corpus will not lie to secure the release of a person imprisoned for having sold liquors without first obtaining a license to sell as required by a state statute. *Giozza v. Tiernan*, (1893) 148 U. S. 657, 13 S. Ct. 721, 37 U. S. (L. ed.) 599.

Commitment for contempt by a police magistrate, for a longer period than allowed by the law of the state. See *In re Monroe*, (1891) 46 Fed. 52.

Arrest under a void city ordinance.—See *In re Lee Tong*, (1883) 18 Fed. 253; *Yick Wo v. Hopkins*, (1886) 118 U. S. 356, 6 S. Ct. 1064, 30 U. S. (L. ed.) 220; *In re Quong Woo*, (1882) 13 Fed. 229; *Laundry License Case*, (1885) 22 Fed. 701; *Stockton Laundry Case*, (1886) 26 Fed. 611; *In re Wo Lee*, (1886) 26 Fed. 471; *In re Ah Jow*, (1886) 29 Fed. 181.

Act charged not a violation of the municipal ordinance.—See *Ex p. Ah Lit*, (1886) 26 Fed. 512.

Violation of Bankruptcy Act.—When a state court, in defiance of the propositions laid down, and of the order staying its proceedings lawfully made by the bankrupt court, has assumed the power, while bankruptcy proceedings are pending, to commit a bankrupt to jail for omitting to pay certain instalments of alimony due under the judgment of the state court rendered before the adjudication in bankruptcy, and from which he might be discharged in bankruptcy proceedings, the case is plainly within the provisions of this section, which manifestly includes cases of this character, as well as the more general one where the imprisonment is in violation of the Constitution and laws of the United States. *In re Houston*, (1899) 94 Fed. 119.

Under the former bankrupt law, a debt created by a fraud or embezzlement of the bankrupt was held not discharged by proceedings in bankruptcy, and where there was such fraud, and the state law provided for the arrest of such debtor, he could not be released on habeas corpus by the United States courts. But it was the duty of the United States court to examine all legal evidence brought before it from any quarter whatever, tending to show that a debt not dischargeable by the discharge of the bankrupt had or had not been contracted—the existence or non-existence of fraud. *In re Alsberg*, (1877) 16 Nat. Bankr. Reg. 116, 1 Fed. Cas. No. 261.

A federal court had no authority to relieve from imprisonment, on state process, a discharged bankrupt who was arrested in a civil action, the writ in which declared in tort in the nature of deceit, alleging the obtaining of goods by certain false and fraudulent representations. *Re Devoe*, (1868) 1 Lowell 251, 7 Fed. Cas. No. 3,843. See *Matter of Kimball*, (1868) 2 Ben. 554, 14 Fed. Cas. No. 7,768; and *In re Glaser*, (1868) 2 Ben. 180, 10 Fed. Cas. No. 5,474, in which the petitioners were released by the federal court, as the actions were founded on simple contract debts, which, on their face, would be provable and discharged in bankruptcy, and the arrests were founded only on ex parte affidavits of fraud.

A person is not in jail in custody in violation of the Constitution or of a law of the United States, when he is committed to the county jail in default of giving bond for the maintenance of a bastard child under judgment of the state court notwithstanding a discharge from bankruptcy, as such debt is not one from which his discharge in bankruptcy would be a release. *In re Baker*, (1899) 96 Fed. 954.

Petitioner held by state court for violation of federal statute.—The offense of passing counterfeited national bank bills

is one of which the courts of the United States have exclusive jurisdiction, and a petitioner will be discharged on habeas corpus from imprisonment in a prison of a state, under sentence of a court of the state for such an offense, as such imprisonment is contrary to the law of the United States. *Ex p. Houghton*, (1881) 8 Fed. 897, 7 Fed. 657. See *U. S. v. Rector*, (1850) 5 McLean 174, 27 Fed. Cas. No. 16,132.

Perjury committed in the course of a judicial investigation under the Acts of Congress is an offense against the public justice of the United States, of which R. S. secs. 629 and 711 (embodied in Judicial Code, secs. 24, 256, and repealed thereby; see JUDICIARY), give the courts of the United States exclusive jurisdiction, and one who is held by state authorities for the commission of such an offense will be released on habeas corpus. *Ex p. Bridges*, (1875) 2 Woods 428, 4 Fed. Cas. No. 1,862. See also *In re Loney*, (1890) 134 U. S. 372, 10 S. Ct. 584, 33 U. S. (L. ed.) 949, as to an arrest by state officers for perjury alleged to have been committed in a contested congressional election case.

A homicide, committed on board a United States steamer while lying at the wharf in the navy yard of the United States near the city of Portsmouth, was held to be an offense of which the United States courts have exclusive jurisdiction under R. S. secs. 5341 (embodied in Penal Laws, sec. 274, and repealed thereby; see PENAL LAWS) and 711 (embodied in Judicial Code, sec. 256, and repealed thereby; see JUDICIARY) and one who was held by state authorities for the commission of such an offense was entitled to release on habeas corpus. *Ex p. Tatem*, (1877) 1 Hughes 588, 23 Fed. Cas. No. 13,759.

"The federal courts may release a person after his conviction by a state court as well as before a trial, when he is restrained of his liberty for an act done in pursuance of a law of the United States lawfully enacted." *Campbell v. Waite*, (C. C. A. 1898) 88 Fed. 102, 59 U. S. App. 734, 31 C. C. A. 403.

Petitioner held by state court for act permitted by federal statute.—Parties have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi river to the sea through the South Pass, although they are not duly licensed and commissioned branch pilots under the laws of Louisiana. To imprison them for exercising this right is therefore to imprison them in violation of the laws of the United States, and they may be released by the federal courts on habeas corpus. *U. S. v. Spink*, (1884) 19 Fed. 631.

Errors of state courts in administering state laws—Generally.—The federal courts have no power to relieve a citizen from injustice resulting from maladministration of state laws or from errors of state

courts of competent jurisdiction. Upon the courts and judicial officers of the state he must depend for securing such rights as the laws of the state give him. *In re Converse*, (1891) 137 U. S. 624, 11 S. Ct. 191, 34 U. S. (L. ed.) 796; *In re Graham*, (1891) 138 U. S. 461, 11 S. Ct. 363, 34 U. S. (L. ed.) 1051; *In re Shibuya Jugiro*, (1891) 140 U. S. 291, 11 S. Ct. 770, 35 U. S. (L. ed.) 510; *Storti v. Massachusetts*, (1901) 183 U. S. 138, 22 S. Ct. 72, 46 U. S. (L. ed.) 121; *In re Humason*, (D. C. Wash. 1891) 46 Fed. 392.

But if the trial and sentence in a state court are made wholly void by a law of the United States, any custody under them is a violation of that law, relief from which is expressly left on habeas corpus with the courts of the United States. *In re Fitton*, (1893) 55 Fed. 271.

In *Ex p. Dorr*, (1845) 3 How. 103, 11 U. S. (L. ed.) 514, it was held that neither the Supreme Court, nor any other court of the United States, or judge thereof, could issue a habeas corpus to bring up a prisoner, who was in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. The case was decided under section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. L. 81. Said the court: "The original jurisdiction of this court is limited by the Constitution to cases affecting ambassadors, other public ministers, and consuls, and where a state is a party. Its appellate jurisdiction is regulated by acts of Congress. Under the common law, it can exercise no jurisdiction. . . . And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual who may be indicted in a Circuit Court for treason against the United States is beyond the power of federal courts and judges if he be in custody under the authority of a state."

A federal court has no jurisdiction of the writ where the facts set out show that the alleged illegal detention is only in violation of the common law or of the statutes of the state. *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 325, 21 U. S. App. 407, 12 C. C. A. 139.

The determination by the highest court of a state that the offense charged in an indictment is one punishable under the laws of the state is conclusive in a subsequent proceeding by the accused in a federal court for release on a writ of habeas corpus. *Howard v. Fleming*, (1903) 191 U. S. 126, 24 S. Ct. 49, 48 U. S. (L. ed.) 121; *Erickson v. Hodges*, (1910) 179 Fed. 177, 102 C. C. A. 443.

Federal courts have no power to interfere by habeas corpus with the imprisonment of a person under a judgment of conviction of a crime in a state court, if that court had jurisdiction over the person of the accused and did not lose such jurisdiction during the trial. *Felts*

v. Murphy, (1906) 201 U. S. 123, 26 S. Ct. 366, 50 U. S. (L. ed.) 689; *Valentina v. Mercer*, (1906) 201 U. S. 131, 26 S. Ct. 368, 50 U. S. (L. ed.) 693.

Construction of Federal Constitution.—"It often occurs in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the Constitution of the United States, that questions occur which involve the construction of that instrument and the determination of rights asserted under it. But that does not justify an interference with its proceedings by a Circuit Court of the United States, upon a writ of habeas corpus sued out by the accused either during or after the trial in the state court." *In re Wood*, (1891) 140 U. S. 278, 11 S. Ct. 738, 35 U. S. (L. ed.) 505.

An indictment for homicide outside the jurisdiction of the county and state which has taken cognizance of the offense will not entitle the defendant to release on habeas corpus, as such defendant is not "in custody in violation of the Constitution or of a law or treaty of the United States." *Ex p. Pritchard*, (1890) 43 Fed. 915.

Defective indictment.—If an indictment in a state court, under statutes not void under the Constitution of the United States, be defective, according to the essential principles of criminal procedure, an error in rendering judgment upon it—even if the accused at the trial objected to it as insufficient—should not be made the basis of jurisdiction in a court of the United States to issue a writ of habeas corpus. *Bergemann v. Backer*, (1895) 157 U. S. 655, 15 S. Ct. 727, 39 U. S. (L. ed.) 845. See also *In re Green*, (1890) 134 U. S. 377, 10 S. Ct. 586, 33 U. S. (L. ed.) 951; *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 40 U. S. (L. ed.) 432.

In a criminal prosecution in a state court where the statute creating the offense is not repugnant to the Federal Constitution, and the court has jurisdiction, its determination with respect to the sufficiency of the charge is controlling in the federal courts on an application by the accused for a writ of habeas corpus after conviction. *Erickson v. Hodges*, (1910) 179 Fed. 177, 102 C. C. A. 443.

Alien juror.—The objection that one of the jurors by whom petitioner was tried was an alien, cannot be sustained as involving an infraction of the Constitution of the United States. *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 40 U. S. (L. ed.) 432.

No citizens of negro race summoned to serve on jury.—See *Ex p. Murray*, (1895) 66 Fed. 297.

Charge to jury.—The federal courts will not release, on habeas corpus, a person convicted of murder in the first degree in a state court, on the theory that that court lost its jurisdiction to proceed in the trial because it charged the jury, in accordance with the admission of counsel

for the accused, that the only question for their consideration was the degree of murder of which the accused was guilty. *Valentina v. Mercer*, (1906) 201 U. S. 131, 28 S. Ct. 368, 50 U. S. (L. ed.) 693.

Excessive sentence.—In the case of *In re Graham*, (1891) 138 U. S. 461, 11 S. Ct. 363, 34 U. S. (L. ed.) 1051, which was a writ of error to the Supreme Court of Wisconsin to review a judgment of that court refusing to issue a writ of habeas corpus for the discharge of the plaintiff in error, the petitioner for the writ, the court said: "It is undoubtedly the general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void; but it seems that under the law of Wisconsin a judgment in a criminal case which merely exceeds in the time of punishment prescribed by the sentence that which is authorized by law, is not absolutely void, but only erroneous, and that the error must be corrected on appeal and cannot be corrected by a writ of habeas corpus. It would seem that a distinction is there made between those cases in which the judgment is irregular as being in excess of the time prescribed, and those in which it is void as changing the nature of the punishment from that authorized by the law; and that in the former class, until the time is reached which is prescribed by statute as the limit of the power of the court to punish the prisoner, he has no remedy by habeas corpus. If such be the law of the state, as would appear by this decision and the argument of counsel, we do not see that we have any right to interfere. That the prisoner should not have been sentenced for any time in excess of ten years, is very evident. When the ten years have expired it is probable the court will order the prisoner's discharge, but until then he has no right to ask the annulment of the entire judgment. Such being the ruling of the state court, and there being nothing in it repugnant to any principle of natural justice, we think that the reason given for a refusal of the writ of habeas corpus in the court below at the present time was a sound one."

Validity of death sentence.—Habeas corpus will not lie in a federal court to inquire into the question whether a death sentence arising out of a conviction in a state court is in conformity with the state constitution. *Lambert v. Barrett*, (1895) 157 U. S. 697, 15 S. Ct. 722, 39 U. S. (L. ed.) 865.

An order of a state court for the execution of the defendant, fixing a time for the execution so near at hand as to be in violation of rights secured to the defendant by the statutes of the state, does not violate any provision of the United States

Constitution, or any law of Congress made in pursuance thereof, and a federal court is without authority, under a writ of habeas corpus, to reverse or set aside the order of the state court. *In re Durrant*, (1897) 84 Fed. 314.

Commitment for contempt.—A federal judge has no jurisdiction in a case of commitment as for contempt by order of a state court, for violating an order made in a suit pending in that court, even though the suit related to Indian lands which, by federal statute, have been withdrawn from the operation of state laws. *Ea p. Forbes*, (1870) 1 Dill 363, 9 Fed. Cas. No. 4,921.

Persons in custody for disobedience of any order of a state court cannot be released by merely showing that the order of commitment is erroneous; it must be absolutely void. *Electoral College Case*, (1876) 1 Hughes 571, 8 Fed. Cas. No. 4,336. See also *Ea p. Young*, (1892) 50 Fed. 526.

Arrest of one out on federal bail.—Where the petitioner, admitted to bail while under indictment in the federal court, was arrested and imprisoned by state authorities, upon warrants charging him with crimes under the state laws, he was held not entitled to be released on habeas corpus, either on his own petition, or by the desire of the sureties on the bail bond to surrender him under the provisions of R. S. sec. 1018 (see BAIL AND RECOGNIZANCES, vol. 1, p. 491). Such imprisonment by the state authorities is not in violation of any statute law of the United States, and the question of conflict of jurisdiction is not one which can be raised by the petitioner or his sureties. *In re Fox*, (1892) 51 Fed. 427.

Right to custody of children.—The relations of father and child are not matters governed by the laws of the United States, and the writ of habeas corpus is not to be used by the judges or justices or courts of the United States except in cases where it is appropriate to their jurisdiction; and whatever may be held to be the powers of the Circuit Courts, where necessary citizenship exists between the contestants, a District Court has no jurisdiction to hear an application by a father on a writ of habeas corpus, to restore to him his children, detained by the grandparents. *In re Burrus*, (1890) 136 U. S. 586, 10 S. Ct. 850, 34 U. S. (L. ed.) 500. See to the same effect *In re Barry*, (S. D. N. Y. 1844) 42 Fed. 113; *Clifford v. Williams*, (C. C. Wash. 1904) 131 Fed. 100; *Ea p. Everts*, (1858) 1 Bond 197, 8 Fed. Cas. No. 4,581.

Right to custody of insane person.—Exercise of the function of *parens patriæ* for the determination of the right to the custody of an insane person is not within the jurisdiction of federal courts. Therefore, where a proceeding had been brought in a state court of competent jurisdiction.

between citizens of different states, to determine the insanity of an alleged insane person, and the right to custody thereof, the federal court, pending determination of such proceeding, will not review the right to the custody of such incompetent on a writ of habeas corpus alleging that he is restrained of his liberty without due process of law. *Hoadly v. Chase*, (1904) 126 Fed. 818, *affirmed* without opinion (C. C. A. 1903) 129 Fed. 1005, 64 C. C. A. 319.

Identity with escaped convict.—A federal court is without jurisdiction of a habeas corpus proceeding for the discharge of a state prisoner where the only question involved is his identity with an escaped convict, and no diversity of citizenship is alleged. *Ex p. Moebus*, (1906) 148 Fed. 39.

Unconstitutional state statute.—The repugnancy of a statute to the constitution of the state by whose legislature it was enacted cannot authorize a writ of habeas corpus from a court of the United States unless the petitioner is in custody by virtue of such statute, and unless also the statute is in conflict with the Constitution of the United States. *Andrews v. Swartz*, (1895) 156 U. S. 272, 15 S. Ct. 389, 49 U. S. (L. ed.) 422; *Crowley v. Christensen*, (1890) 137 U. S. 86, 11 S. Ct. 13, 34 U. S. (L. ed.) 620; *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 34 U. S. (L. ed.) 620; *Ex p. Brown*, (1905) 140 Fed. 461; *In re Brosnahan*, (W. D. Mo. 1883) 18 Fed. 62; *Ex p. Januszewski*, (S. D. Ohio 1911) 196 Fed. 123.

Matters involving only the construction of state statutes should be determined by the courts of the state, whose determination in respect thereto is binding upon the federal court. *In re Converse*, (1891) 137 U. S. 624, 11 S. Ct. 191, 34 U. S. (L. ed.) 796; *Storti v. Massachusetts*, (1901) 183 U. S. 138, 22 S. Ct. 72, 46 U. S. (L. ed.) 120.

The United States court cannot on a writ of habeas corpus construe state laws, and hold that they give a writ of error to the state Supreme Court, and discharge petitioner on the ground either that the courts of the state have arrived at a different conclusion and denied the writ, or have granted it and refused to make it effectual. *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 40 U. S. (L. ed.) 432.

A person held by state authorities, under an indictment based upon a state statute which is clearly a violation of the United States Constitution, should be released on habeas corpus. *Ex p. McCready*, (1874) 1 Hughes 598, 15 Fed. Cas. No. 8,732. See *Ex p. Kinney*, (1879) 3 Hughes 9, 14 Fed. Cas. No. 7,825; *Minnesota v. Barber*, (1890) 136 U. S. 313, 10 S. Ct. 862, 34 U. S. (L. ed.) 455; *In re Ziebold*, (1885) 23 Fed. 791; U. S.

v. Patterson, (C. C. N. J. 1887) 29 Fed. 775; *In re Beine*, (C. C. Kan. 1890) 42 Fed. 545.

But the rule is otherwise when the conviction was had under a constitutional state statute, of which there is an unconstitutional amendment. *Ex p. Davis*, (1884) 21 Fed. 396.

A judgment on an unconstitutional statute would be void, not merely voidable, and the federal court has jurisdiction on habeas corpus to inquire into the validity of the state statute. *In re Wong Yung Quy*, (1880) 47 Fed. 717.

A state statute forbidding the intermarriage of a white person with a negro is not a denial of the equal protection of the law. *Ex p. Kinney*, (1879) 3 Hughes 9, 14 Fed. Cas. No. 7,825.

If the state courts have sustained the constitutionality of a state statute, and the question of its validity is no longer open in the state courts, a prisoner arrested pursuant to such statute is entitled to have its validity passed upon by the federal courts in a habeas corpus proceeding. *Dreyer v. Pease*, (N. D. Ill. 1898) 88 Fed. 978, *affirmed* (1900) 176 U. S. 681, 20 S. Ct. 1025, 44 U. S. (L. ed.) 639.

Against interstate commerce.—A South Carolina statute declared it a misdemeanor, punishable by fine or imprisonment, for any person, except as provided in the Act, to bring into the state, by any means or mode of carriage, any liquor or liquids containing alcohol. The undisputed facts were that liquors were shipped at the port of Savannah, Ga., for the port of Charleston, S. C., on the schooner of which the petitioners were master and crew; that, immediately on reaching the wharf, they were arrested and detained in custody by the city police and afterwards held under a warrant; that they did not land their cargo or any part of it; and that, when they were arrested, it was afloat. They were actually engaged when arrested in interstate commerce, their detention by the police was unlawful, and the warrant by which they were incarcerated was based on a provision of law in conflict with the Constitution and law of the United States. *Ex p. Jervey*, (1895) 66 Fed. 957. (See INTOXICATING LIQUORS.)

Irreconcilability clearly shown.—An irreconcilable antagonism between a state statute and the United States Constitution must be clearly shown before the process of the United States court can be invoked, especially where the statute has received a construction by the highest court of the state not recognizing any antagonism. *In re Hoover*, (1887) 30 Fed. 51. See also *In re Jordan*, (1892) 49 Fed. 238.

Appeal on terms in state court as violating constitutional rights.—The right of appeal may be accorded by a state to a

person convicted of a crime in a trial court of the state upon such terms as in its wisdom may be deemed proper, and habeas corpus does not lie to secure the release of the prisoner on the ground that provisions of the Federal Constitution have been violated because the statute granting appeals did not permit an appellant his liberty on bail pending the appeal unless he was granted a certificate of reasonable doubt. *McKane v. Durston*, (1894) 153 U. S. 684, 14 S. Ct. 913, 38 U. S. (L. ed.) 867, *affirming* (S. D. N. Y. 1894), 61 Fed. 205.

Ex post facto law.—A state statute passed after the offense for which a petitioner for habeas corpus is tried and sentenced to death by hanging is not an ex post facto law entitling the prisoner to his discharge where it does not affect his substantial rights but only regulates minor incidents connected with the hanging. *Holden v. Minnesota*, (1890) 137 U. S. 483, 11 S. Ct. 143, 34 U. S. (L. ed.) 734.

In violation of a treaty.—A treaty with a foreign country, giving consuls police authority over the interior of ships and jurisdiction in civil matters arising out of disputes or differences on board, does not give a consul the right to the release on habeas corpus of one held by state authorities for a felonious homicide committed on board while in port. "Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction." *Wildenhuis's Case*, (1887) 120 U. S. 1, 7 S. Ct. 385, 30 U. S. (L. ed.) 565, *affirming* (C. C. N. J. 1886) 28 Fed. 924.

Equality of treatment of citizens.—A treaty between the United States and a foreign country, requiring equality of treatment, and that the same rights and privileges be accorded to a citizen of that country that are given to a citizen of the United States under like circumstances, gives to a citizen of that country such rights and liberties as are accorded by the several states to their citizens. *Storti v. Massachusetts*, (1901) 183 U. S. 138, 22 S. Ct. 72, 46 U. S. (L. ed.) 121.

Indian treaty.—A state game law is operative within its territorial limits notwithstanding an Indian treaty giving hunting privilege on unoccupied land. *Ward v. Race Horse*, (1896) 163 U. S. 504, 16 S. Ct. 1076, 41 U. S. (L. ed.) 244, *reversing* (C. C. Wyo. 1895) 70 Fed. 598.

Chinese treaty.—The federal courts have jurisdiction to determine in habeas corpus proceedings the right of a Chinese merchant domiciled in this country to enter from China, or of members of his family whose right is incidental to his own, where the remedy by appeal to the

Secretary of Commerce and Labor has been exhausted, and the right of entry denied. *Ex p. Fong Yim*, (1905) 134 Fed. 938.

For a case involving petitions for writs of habeas corpus by certain prisoners, held in violation of the provisions of the treaty of 1827 between the United States and the kingdom of Norway, see *Ex p. Anderson*, (D. C. Ma. 1910) 184 Fed. 114.

VII. COMMISSION, ETC., OF FOREIGN STATE

Officer of German army.—In *Horn v. Mitchell*, (D. C. Masa. 1915) 223 Fed. 549, *affirmed* (C. C. A. 1st Cir. 1916) 232 Fed. 19 (C. C. A.), the petitioner contended that he was entitled to a writ of habeas corpus, claiming that he was not subject to prosecution on an indictment which had been found against him, because he was an officer of the German army and committed the acts alleged to be violations of the criminal law in connection with an attack upon British territory. The District Court, answering the contention, said: "It appears from the petition that the petitioner is now confined under an order of this court directing that he furnish bail to answer to said indictment, and that, in default thereof, he stand committed. No formal defect or irregularity affecting this order is alleged. The indictment charges that the petitioner illegally transported explosives interstate from New York to Boston, and from Boston to Vanceboro. The petition alleges that this transportation was 'necessarily connected with and part of the aforesaid destruction of the bridge [near Vanceboro in British territory] in the possession of the British government.' The issues involved in a criminal prosecution cannot, generally speaking, be anticipated and tried out upon a petition for habeas corpus. All questions raised by the petitioner on this branch of this petition are open to him in the criminal case and can be determined in connection therewith. Apart from statute, therefore, the petitioner's first contention is plainly unfounded. A similar question arose in *People v. McLeod*, [1841] 25 Wend. (N. Y.) 483, 37 Am. Dec. 328, and it was there held that the writ ought not to issue before the indictment had been tried. While some portions of the opinion in that case have been much criticised, it has not, so far as I am aware, been seriously doubted upon this point. The petitioner contends however, that under Revised Statutes, section 753, passed since the *McLeod* Case, he is, of right, entitled to have the question of his immunity from prosecution on account of his alleged connection with the German army determined upon habeas corpus proceedings. The part of this section relating to subjects and citizens of foreign states was passed because of the

McLeod Case, and was designed to give jurisdiction of such matters to the federal courts. It does not seem to me that it gives to such subjects or citizens more absolute rights to habeas corpus than belong to the other classes of prisoners specified therein. Assuming, however, that the statute should be given the construction contended for by the petitioner, it is to be considered whether he has brought himself within its provisions. It appears by the petition that he is a subject of a foreign state, and that he is in custody for an act which he alleges was done under right, authority, protection, or exemption claimed under the commission of a foreign state. This is not sufficient to bring the case within the statute referred to. In order to do so, it must further appear that the petitioner's domicile was in the foreign state, and that the validity and effect of the right, authority, protection or exemption claimed under the foreign commission 'depend upon the law of nations.' The petition contains no allegation as to the petitioner's domicile, and on that account alone is plainly insufficient under the statute. For aught that appears, the petitioner may have been a German officer domiciled in the United States. While the petition alleges that the petitioner is an officer in the German army and that he did the acts, charged as criminal, as a necessary part of an attack upon the territory of Great Britain, with which his country is at war, it nowhere states that the act in question was authorized or commanded by the foreign state whose commission he holds, or that it has avowed responsibility therefor. In the absence of such authorization and avowal, I do not think that the prisoner can invoke the law of nations or his foreign commission in his defense. See letter of Mr. Webster, Secretary of State,

to Mr. Fox, April 24, 1841, 26 Wend. (N. Y.) 682. It is urged that an act done by a German officer, in the United States, in furtherance of an attack upon British territory, is presumed to have been done with the authority and under the command of his government. But I do not think that this contention can be supported. A lieutenant in the German army has presumptively no authority to act for his government in a foreign country and to bind it by what he does there."

VIII. BRING INTO COURT TO TESTIFY

Rule stated.—A commissioner of the Circuit Court has not the power to issue a writ of habeas corpus, to take from jail a person committed by the authority of the United States, and bring him before the commissioner, for the purpose of giving his deposition before such commissioner, to be used in a cause pending in the District Court. *Ex p. Barnes*, (1846) 1 Sprague 133, 2 Fed. Cas. No. 1,010.

The power to grant the writ of habeas corpus to bring a prisoner from his place of confinement to testify should be exercised only when there is necessity of having the evidence of the prisoner. Unless the necessity is so great that the ends of justice may be defeated if the evidence is not produced, the court of the jurisdiction where the evidence is needed will be slow to grant a writ which will remove a person confined by the court of another jurisdiction from his place of confinement. *In re Thaw*, (W. D. Pa. 1908) 172 Fed. 288, wherein the court held that the record disclosed no necessity for the bringing of the prisoner from his place of confinement to testify in a bankruptcy proceeding, since his evidence, if necessary, could be taken by deposition.

Sec. 754. [Application for the writ of habeas corpus.] Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application. [R. S.]

Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

Who may be petitioner — Generally.—That an application for a writ of habeas corpus is not "signed by the person for whose relief it is intended," nor affirmatively shows that the application is made at his instance or request, would justify a refusal of the writ. *In re Craig*, (1895) 70 Fed. 969. See also *Gusman v. Marrero*, (1901) 180 U. S. 81, 21 S. Ct. 293, 45 U. S. (L. ed.) 436; *In re Chavez*, (1896) 72 Fed. 1006.

The language of section 760, *infra*, seems to contemplate that the petitioner

may be one person and the party restrained another. *In re Hoyle*, (1879) 1 Crim. L. Mag. 472, 12 Fed. Cas. No. 6,803.

"Person" as including an Indian.—The habeas corpus acts nowhere describe the persons entitled to the benefits of the writ as "citizens," nor is citizenship in any way or place made a qualification for suing out the writ. *U. S. v. Crook*, (1879) 5 Dill. 453, 25 Fed. Cas. No. 14,891.

Deputy marshal.—The relator, a deputy marshal, had a commissioner's warrant for the arrest on extradition proceedings for

forgery in a foreign country of a person in jail. The return of the jailer showed that the prisoner was committed to his custody on two executions and two writs of attachment in civil actions against the body of the prisoner as an absconding debtor. The relator had sufficient interest to authorize him to move for this writ, as he had the right, and was under obligation, to take the body of the prisoner, and bring him before the commissioner, to be dealt with in extradition proceedings. *In re Mineau*, (1891) 45 Fed. 188.

Wife of imprisoned soldier.—In the case of *In re Ferrans*, (1869) 3 Ben. 442, 8 Fed. Cas. No. 4,746, a writ of habeas corpus was issued on the petition of the wife of F., to inquire into the regularity of the enlistment of F. into the army of the United States. The discharge of F. was claimed on three grounds—(1) That the oath of enlistment taken by him was taken before an officer of the army, and not before a civil magistrate, whose services could easily have been obtained; (2) that he had a wife and child when he enlisted, and his enlistment was, therefore, contrary to paragraph 930 of the rules and regulations for the recruiting service of the army of the United States, prescribed by the Secretary of War, which were claimed to have the force of a statute, under the 37th section of the Act of July 28, 1866 (14 Stat. 338); (3) that he was intoxicated when he enlisted. It was held that the wife of F. might prosecute the writ. The court said: "It is claimed on the part of the United States that the writ must be dismissed because it is not prosecuted by the recruit himself; that no one can prosecute it but himself, unless it be shown that he is debarred the opportunity of preferring a petition himself; and that such fact is not shown in this case. It has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a habeas corpus to inquire into the cause of his detention. In the case of *People v. Mercein*, [1842] 3 Hill [N. Y.] 399, 407, the Supreme Court of New York intimate that such authority from the person detained is not ordinarily necessary. In *Rex v. Ashby*, 14 How. St. Tr. 814, the House of Lords, in England, in 1704, resolved 'that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents or friends, to apply for and obtain a writ of habeas corpus, in order to procure his liberty by due course of law.' This resolution was assented to by the House of Commons. [14 How. St. Tr. 826] In the present case, the petitioner states, in her petition, that she is the wife of the recruit, and is dependent upon him for support. This is, I think, sufficient to authorize her to prosecute the writ."

State statute.—A proceeding for a writ of habeas corpus is not governed by the provisions of a state statute which allows the writ to issue on the petition of the person detained, or that of any one on his behalf, but must conform to the requirements of this section, which requires the application to be made and verified by the prisoner. *Ex p. Hibbs*, (1886) 26 Fed. 421.

Petition—"Setting forth the facts."—Facts and not conclusions must be stated in the petition. *Craemer v. Washington*, (1897) 168 U. S. 124, 18 S. Ct. 1, 42 U. S. (L. ed.) 407; *U. S. v. Williams*, (S. D. N. Y. 1913) 204 Fed. 844.

It is not enough, in order to require the court to issue a writ of habeas corpus, that the petition alleges that the prisoner is held in violation of the Constitution of the United States, or of a treaty with a foreign nation. That is a mere formal allegation, covering conclusions of law as well as of fact, and the petition must present specific allegations raising an issue. *Cuddy, Petitioner*, (1889) 131 U. S. 280, 9 S. Ct. 703, 33 U. S. (L. ed.) 154; *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 325, 21 U. S. App. 407, 12 C. C. A. 139; *In re Storti*, (1901) 109 Fed. 807, affirmed (1901) 183 U. S. 138, 22 S. Ct. 72, 46 U. S. (L. ed.) 120.

"If the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate." And when copies of the information, the verdict, and the judgment thereon are not attached to the petition, nor the essential parts thereof stated, nor any cause assigned for such omission, the petition is wholly insufficient. *Craemer v. Washington*, (1897) 168 U. S. 124, 18 S. Ct. 1, 42 U. S. (L. ed.) 407. See also *Whitten v. Tomlinson*, (1895) 160 U. S. 231, 16 S. Ct. 297, 40 U. S. (L. ed.) 406; *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 40 U. S. (L. ed.) 432; *Anderson v. Treat*, (1898) 172 U. S. 24, 19 S. Ct. 67, 43 U. S. (L. ed.) 351.

A petition by a Chinese person alleging that he has been ordered deported and that he has been denied a fair and impartial hearing must show wherein or in what respect he was denied such a hearing. *Lee Leong v. U. S.*, (C. C. A. 9th Cir. 1914) 217 Fed. 48, 133 C. C. A. 34.

Allegations distinct and unambiguous.—Facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous. *Whitten v. Tomlinson*, (1895) 160 U. S. 231, 16 S. Ct. 297, 40 U. S. (L.

ed.) 406; *Kohl v. Lehlback*, (1895) 160 U. S. 293, 16 S. Ct. 304, 40 U. S. (L. ed.) 432.

Affirmative showing of want of jurisdiction.—Want of jurisdiction of a District Court should be affirmatively shown. The general rule that unless the contrary appears from the record a cause is deemed to be without the jurisdiction of a District Court of the United States—its jurisdiction being limited by the Constitution and Acts of Congress—has no application where the judgments of such courts are attacked collaterally. *Cuddy, Petitioner*, (1889) 131 U. S. 280, 9 S. Ct. 703, 33 U. S. (L. ed.) 154.

In *Anderson v. Treat*, (1898) 172 U. S. 24, 19 S. Ct. 67, 43 U. S. (L. ed.) 351, the petition was held insufficient because it failed to set out the alleged void judicial proceedings on which the petition was founded, or the essential parts thereof. But at the hearing the original records were allowed to be referred to.

A petition which does not impeach the judgment or original mittimus, directed to the marshal, under which the petitioner was actually committed states no case for a writ. *Howard v. U. S.*, (C. C. A. 6th Cir. 1896) 75 Fed. 986, 43 U. S. App. 678, 21 C. C. A. 586, 34 L. R. A. 509.

Precedent.—*Ex p. Baez*, (1900) 177 U. S. 378, 20 S. Ct. 673, 44 U. S. (L. ed.) 813, contains a petition for writ of habeas corpus and certiorari.

Making evidence part of petition.—In *Ex p. Yabucanin*, (D. C. Mont. 1912) 199 Fed. 365, the petition was by an alien and alleged unlawful detention for deportation on a warrant therefor issued by the acting Secretary of Commerce. It further alleged that the findings and statements in said warrant were illegal in that the warrant ordered deportation "to the country whence came," not naming the country. It also alleged facts contrary to the findings. A copy of said warrant was attached to the petition, but not the evidence and report of the proceedings upon which the findings were made and warrant issued. The court said: "In so far as the allegations of the petition are based on insufficient or illegal evidence, the evidence should have been made a part of the petition. This is in furtherance of good faith in pleading, that the court may know the facts, and not merely the petitioner's conclusions, and that perjury may be assigned on his allegations, if false. See *Low Wah Suey v. Backus*, [1912] 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165, 9 Enc. Pl. & Pr. 1020. Purported evidence, uncertified,

and filed at the hearing, ordinarily will not suffice. Hence the findings of the acting secretary are presumed correct, and are final here. It would seem, however, that the warrant of deportation is defective in that it does not name the country from whence petitioner came and to which he is to be deported. For this reason it is uncertain, and authorizes deportation nowhere. It must contain specific directions for the protection of the party to be deported, and for the information of the deporting authorities and agencies. And it ought to be clear whether the alien is being deported under section 3, 20, 21, or 35 of the Immigration Act of February 20, 1907 (34 Stat. L. 898) [see IMMIGRATION]. Otherwise, great abuses might be possible. This defect, however, cannot be availed of to unconditionally break custody and effect an escape. Under the findings, petitioner is legally sentenced and subject to deportation. A proper warrant can yet issue. In the interest of justice, and to prevent its defeat, it is ordered that the petitioner be discharged by the officer detaining him, but not until ten days herefrom, and without prejudice to the right of the United States to issue a sufficient warrant and detain and deport petitioner thereon."

Copy of warrant.—Upon petition for habeas corpus, the petitioner must produce a copy of the warrant of commitment, or an affidavit that the jailer refused to give a copy. *Harrison's Case*, (1804) 1 Cranch C. C. 159, 11 Fed. Cas. No. 6,131.

Verification.—*By whom.*—In *U. S. v. Watchorn*, (S. D. N. Y. 1908) 164 Fed. 152, the court said: "Notwithstanding the language of section 754, it has been the frequent practice in this district to present habeas corpus petitions in deportation cases signed and verified by others than the person detained. In such cases, often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained, and the language of section 760 [*infra*, p. 469] plainly contemplates petitions so executed."

Before whom.—An application for the writ should be supported by oath, taken before some person competent to administer the same. An affidavit taken before one who certifies himself as justice of the peace of another state cannot be received, where there is no proof of any kind to show that the person was in fact a justice of the peace. *In re Keeler*, (1843) Hempst. 306, 14 Fed. Cas. No. 7,637.

Sec. 755. [Allowance and direction of the writ.] The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is

not entitled thereto. The writ shall be directed to the person in whose custody the party is detained. [R. S.]

Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

Declaratory of common-law practice.—The provision of this section that, if it appears from the petition itself that the relator is not entitled to his discharge, the court should deny his petition without issuing the writ, merely declares the common-law practice in this respect. *Ex p. Kearney*, (1822) 7 Wheat. 38, 5 U. S. (L. ed.) 391; *In re Haskell*, (S. D. Ohio 1892) 52 Fed. 795; *In re Sims*, (1851) 7 Cush. (Mass.) 285.

Necessity of awarding writ "forthwith."—Undoubtedly the writ should be "forthwith" awarded "unless it appears from the petition itself that the party is not entitled thereto," and the case be summarily heard and determined "as law and justice require." Such are the express requirements of the statute. If, however, it is apparent upon the petition, that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. *Ex p. Royall*, (1886) 117 U. S. 241, 6 S. Ct. 734, 29 U. S. (L. ed.) 868.

When it appears to a court having jurisdiction to issue the writ of habeas corpus that a petitioner for the same is restrained of his liberty contrary to the Constitution and laws of the United States, the writ becomes one of right, belongs to the citizen, and a court has no right to refuse it to him. The court can exercise no discretion against issuing it, but it must go as a matter of right. *Ex p. Farley*, (W. D. Ark. 1889) 40 Fed. 66.

Petition as determining duty to issue writ.—It is made the duty of the court or judge to whom application is made for a writ of habeas corpus to issue the writ "unless it appears from the petition itself that the party is not entitled thereto." It is therefore necessary to turn to the petition to ascertain the relator's right to the writ. *Terlinden v. Ames*, (1902) 184 U. S. 270, 22 S. Ct. 484, 46 U. S. (L. ed.) 534; *Filer v. Steele*, (W. D. Pa. 1915) 228 Fed. 242; *Hammon v. Hill*, (W. D. Pa. 1915) 228 Fed. 999.

"It is apparent from section 755 that, if it appears from the petition itself that the relator is not entitled to his discharge, the court should deny his petition without issuing the writ. The section only declares the common-law practice in this respect." *In re Haskell*, (S. D. Ohio 1892) 52 Fed. 795.

"It is not a question, at the time of the application for the writ, whether or not the facts alleged in the petition are true or false. They are to be verified by the oath of the petitioner, and if he sets out in his petition what is necessary to give a federal court jurisdiction, the writ must issue, and the truth or falsity of the facts alleged must be determined at the hearing." *Electoral College Case*, (1876) 1 Hughes 571, 8 Fed. Cas. No. 4,336. See also *In re Greenwald*, (1896) 77 Fed. 590.

When writ need not be awarded.—The writ need not be awarded where it appears upon the showing made by the petitioner, that if brought into court, and the cause of commitment inquired into, he would be remanded to prison. *Ex p. Terry*, (1888) 128 U. S. 280, 9 S. Ct. 77, 32 U. S. (L. ed.) 405. See also *Ex p. Milligan*, (1866) 4 Wall. 2, 18 U. S. (L. ed.) 281; *In re Jung Ah Lung*, (1885) 25 Fed. 141; *In re Barry*, (1844) 42 Fed. 113; *In re Jordan*, (1892) 49 Fed. 238; *In re King*, (1892) 51 Fed. 434; *In re Haskell*, (1892) 52 Fed. 795; *Ex p. Murray*, (1895) 66 Fed. 297; *In re Greenwald*, (1896) 77 Fed. 590; *Ex p. Davis*, (1851) 14 Law Rep. 301, 7 Fed. Cas. No. 3,613; *Matter of Kuhn*, (1843) Hempst. 306, 14 Fed. Cas. No. 7,637; *Ex p. Kinney*, (1879) 3 Hughes 9, 14 Fed. Cas. No. 7,825; *In re Taylor*, (1879) 8 N. Y. Wkly. Dig. 554, 23 Fed. Cas. No. 13,774; *U. S. v. Lawrence*, (1835) 4 Cranch C. C. 518, 26 Fed. Cas. No. 15,577; *Matter of Winder*, (1862) 2 Cliff. 89, 30 Fed. Cas. No. 17,867; *Ex p. Vallandigham*, (1863) 23 Fed. Cas. No. 16,816.

"The usual course on the application for the writ of habeas corpus is to issue the writ, and, on its return, to hear and dispose of the case. But when, as in this case, the cause of the imprisonment fully appears by the petition and the exhibits thereto, the practice prevails for the court to determine whether, on the facts presented in the petition, the prisoner if brought before the court would be discharged. *Ex p. Milligan*, [1866] 4 Wall. 2, 18 U. S. (L. ed.) 281. And where the hearing is had without issuing the writ an order may be made requiring the officer or person holding the prisoner to show cause why the writ should not issue. *Ex p. Yarbrough*, [1884] 110 U. S. 651, 4 S. Ct. 152, 28 U. S. (L. ed.) 274. Where the return to the rule shows all the essential facts, the case may be disposed of as fully as if the writ had issued." *In re Lewis*, (N. D. Fla. 1902) 114 Fed. 963.

The writ need not be awarded when it appears by the petition that the question upon which a decision is sought has been

considered and decided adversely to the petitioner in a cause on trial in the same court. "It would be unseemly and prejudicial to the orderly administration of justice for one judge to review and reverse, in a collateral proceeding, a decision made by another judge sitting in the same court, and especially so in a cause now in progress in this court, in which the decision complained of can be reviewed by the full court if the cause proceeds and the petitioner is convicted, but can never be reviewed if the petitioner should be discharged upon this proceeding." *In re Simmons*, (E. D. N. Y. 1891) 45 Fed. 241.

A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case. *U. S. v. Sing Tuck*, (1904) 194 U. S. 161, 24 S. Ct. 621, 48 U. S. (L. ed.) 917, reversing on other grounds (C. C. A. 2d Cir. 1904) 128 Fed. 592, 63 C. C. A. 199, which reversed (N. D. N. Y. 1903) 126 Fed. 386.

As the jurisdiction of the Supreme Court is appellate it must be shown that the court has the power to award a habeas corpus before one will be granted. *Ex p. Milburn*, (1835) 9 Pet. 704, 9 U. S. (L. ed.) 280.

Where the petition for the writ sets out the cause of detention, the issuance of the court is unnecessary to bring that upon the record by a return to the writ. *Horn v. Mitchell*, (C. C. A. 1st Cir. 1916) 232 Fed. 819, 147 C. C. A. 13, wherein the court said: "In proceeding to consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged, the learned district judge followed an approved course, and did not in this respect deny to the petitioner any right secured to him by section 753 (*supra*, p. 449) of the Revised Statutes."

Where it appears from the petition for habeas corpus that the case is not one which would justify the exercise of federal authority, it may be dismissed, and the court is not required either to award a writ or to issue an order to the respondent to show cause. *Ex p. Collins*, (1906) 151 Fed. 358; *Erickson v. Hodges*, (1910) 179 Fed. 177, 102 C. C. A. 443.

"Notwithstanding its somewhat peremptory language, it has been repeatedly held that it does not require an issuance of the writ instantanely, upon application, but that the court has a reasonable discretion as to the time and mode it will adopt to determine in any instance if it be a proper one for the granting of the writ," and in its discretion the court may make an order on the officer alleged to have petitioner in his custody to show cause on a day certain why the writ should not be issued. *Ex p. Collins*, (1907) 154 Fed. 980.

In jurisdictions where appeals have been

provided for in habeas corpus cases, it has come to be the rule, either as one of law or of practical administration, that a judge is not required to consider an application for a writ which has been denied by another judge, but may remit the petitioner to his remedy by appeal. *Ex p. Moebus*, (1906) 148 Fed. 39.

When the petition for a writ of habeas corpus shows that the petitioner is not legally entitled to it, the writ should not be issued, but the application for it should be denied, and the petition should be dismissed. *In re Dowd*, (1904) 133 Fed. 747.

Decision clearly right.—The application for the writ will be denied if it appears from the face of the record that the decision of the federal question which is complained of was so clearly right as not to require argument. *In re Boardman*, (1898) 169 U. S. 39, 18 S. Ct. 291, 42 U. S. (L. ed.) 653.

No common-law jurisdiction.—The writ will be denied when, if granted, and a return made admitting the facts stated in the petition, the court would discharge the petitioner, an infant, on the ground that the court cannot exercise the common-law jurisdiction over the matter. *In re Barry*, (1844) 42 Fed. 113.

To determine state boundary.—When it appeared from the petition itself that the question raised related to the jurisdiction over the ground upon which a territorial prison was located, the petition was dismissed. A dispute in respect to the true boundary between a state and a territory cannot be determined upon a petition for a writ of habeas corpus in behalf of one duly convicted and sentenced and imprisoned by the government establishing and maintaining the prison. *In re Chavez*, (1896) 72 Fed. 1006.

Demurrer.—In *Horn v. Mitchell*, (D. C. Mass. 1915) 223 Fed. 549, affirmed (C. C. A. 1st Cir. 1916) 232 Fed. 819, 147 C. C. A. 13, the question arising, whether a demurrer lay to a petition for habeas corpus, the court said: "It is contended by the petitioner that it does not, and that the court should not consider such cases, except upon the actual facts as established at a hearing. This petition is unusually full and explicit. I see no reason to doubt that it sets forth accurately and completely the substantial facts upon which the petitioner relies. No request to amend it has been made on his behalf; and it has not been suggested that any further material facts would or might be developed upon a hearing. It may be assumed, as was done in *Frank's Case*, *infra*, that the petition states all facts helpful to the prisoner. I greatly doubt whether a formal demurrer is necessary or proper in a case heard upon a petition and an order to show cause why the writ should not issue. In view of Revised Statutes, § 755, it is, I think,

sufficient if the respondent orally demurs, or, what amounts to the same thing, suggests to the court that the petition does not state a case entitling the petitioner to the writ. This was, apparently, the course followed in *Leo M. Frank's Case*, [1915] 237 U. S. 309, 35 S. Ct. 582, 59 U. S. (L. ed.) 969 (U. S. Supreme Court, April 19, 1915); and is the general practice in the Supreme Judicial Court of Massachusetts. 'Under section 755, Revised Statutes, it was the duty of the court to refuse the writ if it appeared from the petition itself that the appellant was not entitled to it.' Pitney, J., *Frank's Case*, *supra*. To the same effect, aside from any statute, was the opinion of Shaw, C. J., in *Sim's Case*, [1851] 7 Cush. (Mass.) 285, 293. See, too, *In re Boardman*, [1898] 169 U. S. 39, 18 S. Ct. 291, 42 U. S. (L. ed.) 653, and *Ex p. Baez*, [1900] 117 U. S. 378, 20 S. Ct. 673, 44 U. S. (L. ed.) 813."

Where the petition for a writ is tested by demurrer the statement of fact made in the petition must be taken as true, but this does not apply to the statement of mere conclusions. *Choy Gum v. Backus*, (C. C. A. 9th Cir. 1915) 223 Fed. 487, 139 C. C. A. 35.

Right of prisoner to appear in person at hearing of application.—A prisoner applying for a writ of habeas corpus is not entitled to appear in the District Court in person for the purpose of prosecuting his application for the writ. *Murdock v. Pollock*, (C. C. A. 8th Cir. 1915) 229 Fed. 392, 143 C. C. A. 512, wherein the court said: "It is urged, upon behalf of respondent, that where an application is filed praying that a writ of habeas corpus be granted, the court or judge to whom such application is made may do either one of three things: (1) If it appears from the petition that there is not sufficient cause for the issuance of the writ, and that the prisoner, if produced, would be remanded, the petition may be dismissed. (2) An order may issue upon the warden or other respondent to show cause why the writ prayed should not be granted. (3) The writ may be awarded forthwith, which course would command the respondent to produce the petitioner in court. It is the practice in the district of Kansas to make a preliminary determination as to the propriety of issuing the writ as above indicated, and at such

preliminary determination the prisoner does not appear in person. This practice is conceived to be of greater convenience in the administration of justice than if the prisoners were present, under the writ, in the custody of the warden, particularly in that district in which a federal penitentiary is located, and where applications for writs of habeas corpus are very numerous. It is supported and approved by abundant authority. *Ex p. Yarbrough*, [1884] 110 U. S. 651, 4 S. Ct. 152, 28 U. S. (L. ed.) 274; *Ex p. Royall*, [1886] 117 U. S. 241-254, 6 S. Ct. 734, [742], 29 U. S. (L. ed.) 868, [872]; *In re Lewis*, [N. D. Fla. 1902] 114 Fed. 963; *Erickson v. Hodges*, [C. C. A. 9th Cir. 1910] 179 Fed. 177, 102 C. C. A. 443; *In re Jordan*, [S. D. Ia. 1892] 49 Fed. 238-244; *Ex p. Farley*, [W. D. Ark. 1889] 40 Fed. 67. This procedure is adjudged to satisfy the mandate of the law relating to these writs, and if the petitioner feels aggrieved at the action of the court in denying his application, appeal will lie. His rights are thus fully safeguarded."

Person confined in insane asylum.—In *Hammon v. Hill*, (W. D. Pa. 1915) 228 Fed. 999, the facts were held insufficient to show that the relator, who was confined in an insane asylum, was entitled to a writ of habeas corpus.

Deportation proceedings.—For facts and circumstances warranting and requiring the issuing of the writ in deportation proceedings, see *Whitfield v. Hanges*, (C. C. A. 8th Cir. 1915) 222 Fed. 745, 138 C. C. A. 199.

Issuance of certiorari along with habeas corpus.—In *Ornelas v. Ruiz*, (1896) 161 U. S. 502, 16 S. Ct. 689, 40 U. S. (L. ed.) 787, it appeared that the court below which issued writs of habeas corpus also issued writs of certiorari directing the United States commissioner to send up the original papers and a transcript of the testimony on which the prisoners were committed.

Law governing proceedings on writ.—The proceedings on a writ of habeas corpus in the federal courts are not governed by the laws of the states on the subject, but by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe. *Ex p. Kaine*, (1853) 3 Blatchf. 1, 14 Fed. Cas. No. 7,597.

Sec. 756. [Time of return.] Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days. [R. S.]

History of section.—"This section was taken almost literally from the Habeas Corpus Act, ch. 2 of the 31st Car. II., which was designed to remedy procrastination and trifling with the writ. Prior to that Act the mode of compelling a return was by taking out an *alias* and then a

pluries writ, and thereafter issuing an attachment. A reasonable time has always been allowed for making the return, and it is not to be presumed that one will not be made." *Ex p. Baez*, (1900) 177 U. S. 378, 20 S. Ct. 673, 44 U. S. (L. ed.) 813.

Sec. 757. [Form of return.] The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party. [R. S.]

Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

Return, by whom signed.—A return should be signed by the person to whom the writ is directed, or should be accompanied by an explanation why that is not done. *Seavey v. Seymour*, (1871) 3 Cliff. 439, 21 Fed. Cas. No. 12,596.

Verity of return.—Where a case is heard upon exceptions or demurrer to the return, its averments must be taken as true. *Crowley v. Christensen*, (1890) 137 U. S. 86, 11 S. Ct. 13, 34 U. S. (L. ed.) 620; *Stretton v. Rudy*, (C. C. A. 5th Cir. 1910) 176 Fed. 727, 101 C. C. A. 223.

And if a return is neither demurred to nor denied, nor in any wise put at issue, it is to be taken as conclusive of the facts therein set forth. *In re Lawler*, (N. D. Ga. 1889) 40 Fed. 233.

Sufficiency of return.—A return by a United States marshal, that the petitioner had been arrested and carried out of the district by order of the war department, and that the mandate of the writ could not be obeyed, was a sufficient return. *Ex p. Benedict*, (1862) 3 Fed. Cas. No. 1,292.

A return showing that petitioner was held by the chief of police of the city under a commitment stating that he had been convicted of a misdemeanor and sentenced to pay a fine, with the alternative of imprisonment, but not showing under what particular ordinance he was convicted, was held sufficient where the defects complained of were supplied by the allegations of the petition and proofs offered by the petitioner. *In re Ah Toy*, (1891) 45 Fed. 795.

Where the return to a writ of habeas corpus fails to show that the caption and detention of the prisoner were legal and valid at the time of the issuance of the writ, he must be discharged. *In re Doo Woon*, (D. C. Ore. 1883) 18 Fed. 898.

A return by the proper immigration authorities, stating that they had decided

adversely to admission of an alien petitioner, is not only sufficient but conclusive. Even if it had not been so decided when the writ was applied for, the signing of such a return is itself a decision. *In re Chin Yuen Sing*, (S. D. N. Y. 1894) 65 Fed. 571.

But where the return of the immigration commissioner showed that the relator was detained for a special inquiry in conformity with the provisions of law, that such inquiry was had and that at least three of the inspectors found and decided that the relator was an alien and was a person likely to become a public charge, and as such was of a class of aliens excluded by law "in accordance with department circular No. 172, dated October 19, 1897," it was held that the concluding clause indicated that the inspectors rendered their decision because they felt constrained to render such decision by reason of some instructions from the Treasury Department. Such return indicated no decision by the inspectors and was not a bar to an inquiry into the facts on habeas corpus. *In re Kornmehl*, (S. D. N. Y. 1898) 87 Fed. 314.

And likewise returns in immigration proceedings which set forth no facts, but allege mere conclusions of law, are insufficient. *Stretton v. Shaheen*, (C. C. A. 5th Cir. 1910) 176 Fed. 735, 100 C. C. A. 389.

Supplemental return.—Where the reasons appear ample upon which to base an order for vacating a prior order of discharge made upon a habeas corpus proceeding, a supplemental return containing matter relevant to the question whether the order of discharge should be vacated, and pertinent as a further justification for detaining the petitioner, may be filed, although it is not the approved practice. *Tiberg v. Warren*, (C. C. A. 9th Cir. 1911) 192 Fed. 458, 112 C. C. A. 596.

Sec. 758. [Body of the party to be produced.] The person making the return shall at the same time bring the body of the party before the judge who granted the writ. [R. S.]

Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

Liability for escape of prisoner.—Where a sheriff in obedience to a writ of habeas

corpus makes a proper return and brings his prisoner before the court which issued

the writ, the safe-keeping of the prisoner while he is before the court is entirely under its control and direction. The sheriff is accordingly not responsible for the escape of the prisoner while thus in the custody of the court, and before a remand or other order placing new duties on him. *Barth v. Clise*, (1870) 12 Wall. 400, 20 U. S. (L. ed.) 393.

Production of body.—A wilful failure to make a complete return by the produc-

tion of the body as ordered in the writ is punishable as a contempt of court. *Ex p. Young*, (E. D. Tenn. 1892) 50 Fed. 526. But in some cases, notably in immigration proceedings, it is not infrequently the practice, originating in cases where the alien has some contagious disease, to dispense with the production of the body in court. *U. S. v. Williams*, (S. D. N. Y. 1913) 203 Fed. 292.

Sec. 759. [Day for hearing.] When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time. [*R. S.*]

Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

Sec. 760. [Denial of return, counter-allegations, amendments.] The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained. [*R. S.*]

Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

Scope of traverse to return.—In a habeas corpus proceeding to secure the discharge of an alien alleged to be unlawfully detained for deportation the return cannot justify the detention of the alien by anything done after the return day of the writ, and a traverse to such a return must not include anything subsequent to that date. *Ex p. Avakian*, (D. C. Mass. 1910) 188 Fed. 688.

Effect of failure to traverse return.—Where the facts set forth in the return are not traversed only questions of law are raised. *Haas v. Henkel*, (S. D. N. Y. 1909) 166 Fed. 621, *affirmed* on other grounds (1910) 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569, 17 Ann. Cas. 1112.

And the court is not authorized to go outside of the return for the facts in the case. *Moore v. U. S.*, (C. C. A. 5th Cir. 1908) 159 Fed. 701, 86 C. C. A. 569.

The averments of the answer to the return will be taken as denied by the respondent, as no further pleading is required by the statute. *In re Leary*, (1879) 10 Ben. 197, 15 Fed. Cas. No. 8,162.

In *People v. McLeod*, (1841) 1 Hill (N. Y.) 377, 37 Am. Dec. 328, it was held that the provision of the state statute

(2 N. Y. Rev. Stat. 471, sec. 50) permitting a party on habeas corpus "to deny the truth of the return and allege matters showing that he is entitled to be discharged" was not intended to give him the right to go behind the indictment and prove that he is not guilty by affidavit. At common law it was doubtful whether the prisoner could question the truth of the return or overcome it, by showing extrinsic matter upon the point of the authority to imprison. The statute in question was passed to obviate the oppression that might sometimes arise from the necessity of holding a return to be final and conclusive which is false in fact, or if true, depending for its validity on the act of a magistrate or court that can be shown by proofs aliunde to have been destitute of jurisdiction. See the adverse unofficial review of this case added as an appendix to (1841) 26 Wend. 663.

Collateral attack on judgments.—This section does not change the well-settled rule of law in relation to the conclusive effect of a judgment of a court of competent jurisdiction as to all matters properly before the court, and embraced in its judgment, as against a collateral attack. *In re Tsu Tse Mee*, (1897) 81 Fed. 702.

Sec. 761. [Summary hearing; disposition of party.] The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. [*R. S.*]

Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

Applicability to Supreme Court.—This statute is applicable to the Supreme Court, whether it is exercising its original or appellate jurisdiction. *Storti v. Massachusetts*, (1901) 183 U. S. 138, 22 S. Ct. 72, 46 U. S. (L. ed.) 120.

Scope of hearing.—"When a person under arrest applies for discharge on writ of habeas corpus the issue presented is whether he is unlawfully restrained of his liberty. R. S. sec. 752 [*supra*, p. 448]. But there is no unlawful restraint where he is held under a valid order of commitment, so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ and of the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised in habeas corpus proceedings. In cases which involve a conflict of jurisdiction between state and federal authorities, or where the treaty rights and obligations of the United States are involved, and in that class of cases pointed out in *Ex p. Royall*, [1886] 117 U. S. 241, 29 U. S. (L. ed.) 868, 6 S. Ct. 734; *Ex p. Lange*, [1873] 18 Wall. 163, 21 U. S. (L. ed.) 872; *New York v. Eno*, [1894] 155 U. S. 89, 39 U. S. (L. ed.) 80, 15 S. Ct. 30; *In re Loney*, [1890] 134 U. S. 372, 33 U. S. (L. ed.) 949, 10 S. Ct. 584, the court hearing the application will carefully inquire into any matter involving the legality of the detention, and remand or discharge, as the facts may require. But, barring such exceptional cases, the general rule is that, on such applications, the hearing should be confined to the single question of jurisdiction, and even that will not be decided in every case in which it is raised. For otherwise the 'habeas corpus courts could thereby draw to themselves, in the first instance, the control of all prosecutions in state and federal courts.' To establish a general rule that the courts on habeas corpus, and in advance of trial, should determine every jurisdictional question, would interfere with the administration of the criminal law and afford a means by which, with the existing right of appeal, delay could be secured when the Constitution contemplates that there shall be a speedy trial, both in the interest of the public, and as a right to the defendant." *Henry v. Henkel*, (1914) 235 U. S. 219, 35 S. Ct. 54, 59 U. S. (L. ed.) 203.

"The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, state or federal, on which

the charge was based. In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant state for trial upon an indictment alleged to be void. But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted, he will be discharged. If they are overruled and he is convicted, he has his right of review (*Kaizo v. Henry*, [1908] 211 U. S. 148, 53 U. S. (L. ed.) 125, 29 S. Ct. 41). The rule is the same whether he is committed for trial in a court within the district, or held under a warrant of removal to another state. He cannot, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction, and demanding a ruling thereon in habeas corpus proceedings." *Walters v. McKinnis*, (N. D. Pa. 1915) 221 Fed. 746.

In the case of *In re Mayfield*, (1891) 141 U. S. 107, 11 S. Ct. 939, 35 U. S. (L. ed.) 635, the court said: "This court has held . . . in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record."

There is plenty of authority to the effect that the federal court is not concluded by the return showing commitment by the state court, or by the indictment or information, as the case may be, but may inquire from the facts before the court, by proof aliunde, whether or not the alleged acts charged as a violation of the state laws were done "in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof." *Walker v. Lea*, (1891) 47 Fed. 645; *In re Marsh*, (1892) 51 Fed. 277; *Campbell v. Waite*, (C. C. A. 1898) 88 Fed. 102, 59 U. S. App. 734, 31 C. C. A. 403; *In re Houston*, (1899) 94 Fed. 119; *Griffin's Case*, (1869) Chase 364, 11 Fed. Cas. No. 5,815; *Ex p. Jenkins*, (1853) 2 Wall. Jr. C. C. 521, 13 Fed. Cas. No. 7,259; *Ex p. Sifford*, (1857) 5 Am. L. Reg. 659, 22 Fed. Cas. No. 12,848; *U. S. v. McClay*, (1877) 4 Cent. L. J. 255, 26 Fed. Cas. No. 15,660. See also *Robb v. Connolly*,

(1884) 111 U. S. 624, 4 S. Ct. 544, 28 U. S. (L. ed.) 542.

It has been held however that where a person is held on process on a final judgment, after conviction on a trial on an indictment, and a habeas corpus is issued, and the return to the writ states the process as the cause of detention, the "facts" the court is required to determine, either on such return alone or by the aid of a certiorari, are the final judgment, the conviction, the fact of a trial, and the indictment. The particulars of the evidence which led to the conviction are no part of such "facts." *In re Stupp*, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

In *U. S. v. Ames*, (N. D. Ill. 1899) 95 Fed. 453, it was held that where an Act of Congress was of doubtful validity it was not for the Circuit Court, upon the hearing of a petition upon a writ of habeas corpus, to hold the law unconstitutional. *U. S. v. Ames*, (N. D. Ill. 1899) 95 Fed. 453.

Contempt for refusing to testify.—In a habeas corpus proceeding to secure one's discharge from imprisonment resulting from his refusal to testify on the ground that to do so would tend to incriminate him the court said: "The first question for consideration in this hearing is how far this court may look beyond the commitment and its recitals into the evidence and circumstances upon which the committing court acted. It is and must be conceded that the court had full jurisdiction to try the indictment, to issue the subpoena which brought the witness to the stand, and to direct him to be sworn. It had jurisdiction over the defendants and over the cause. But the act of the court here complained of, while in the course of the trial of the indictment and of the defendants, concerned one who was not a party to the proceeding; and the jurisdiction of the court with reference to the witness is distinct from, though it grows out of, the jurisdiction to try the indictment. It is possible that the witness, by a direct proceeding in error as from a criminal case, might have the validity of his sentence inquired into by an appellate court. Whether this be true or not, it is unnecessary to decide. It is clear that the decisions of the Supreme Court require this court to hold that, upon such a question as this, the testimony and facts upon which the court acted in committing the witness may and must be considered by the court before which the validity of the commitment is to be tested in a collateral way upon habeas corpus. In the *Counselman Case*, [1892] 142 U. S. 547 [12 S. Ct. 195, 35 U. S. (L. ed.) 1110] the whole proceeding, together with all the evidence given by the witness and the action of the court, was examined on habeas corpus. In the case of *Ex p. Fisk*, [1885] 113 U. S. 713, 5 S. Ct. 724 [28 U. S. (L. ed.)

1117], the question was on habeas corpus to determine the validity of the commitment for contempt of a party defendant to an action removed to the federal court from the state court in New York, for his refusal to answer a question put to him in a proceeding authorized by a statute of the state for the examination of defendants before a master prior to the trial. In that case the court held that the statutory procedure was not applicable to the federal court, and therefore that the court was without power to compel a witness to answer in such proceeding, and that the commitment was void. In that case the entire proceeding before the circuit court was considered by the supreme court. The question whether the statute applied to the examination of witnesses in a federal court was a mere matter of procedure, which, with reference to the cause under consideration by the court, could not affect its jurisdiction. It had the power to decide whether that procedure should be followed in the cause, and a judgment rendered by it in the cause would not have been void, even though reached by evidence obtained in accordance with the state statute; but when the statute was used as the basis for a commitment for contempt by a witness who declined to answer, its application to the federal practice did affect the power and jurisdiction of the court to commit the witness whose testimony was invoked under it. In the light of the *Counselman Case* and the case of *Ex p. Fisk*, the duty of this court to examine into and consider the facts upon which the trial court acted in committing the petitioners cannot be doubted. If the petitioners, in their refusal to answer the questions, were within the protection of the fifth amendment to the constitution, the power of the court to commit them for their refusal was exceeded, and the invalidity of the commitment may be declared in this collateral inquiry."

Bill of exceptions.—Upon habeas corpus to inquire into a detention under a conviction in a federal Circuit Court, affirmed by the proper Circuit Court of Appeals, the bill of exceptions cannot be examined with a view to determining whether there was any testimony to support the accusation. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101, 21 Ann. Cas. 849.

"The bill of exceptions is not a part of the record of a judgment into which a court may look, in a proceeding where the judgment is collaterally attacked. It is only a part of the record in direct proceedings on error for the examination of a reviewing court, and can never be considered in habeas corpus to test the validity of the judgment." *In re Haskell*, (1892) 52 Fed. 795.

Jury trial.—A jury trial is not necessary in order to determine the facts of

the case. *U. S. v. Lipsett*, (1907) 156 Fed. 65.

Petitioner as competent witness.—A proceeding by habeas corpus is a "civil action" and not a criminal proceeding, and the petitioner is therefore a competent witness in his own behalf. *In re Reynolds*, (1867) 3 Hughes 559, 20 Fed. Cas. No. 11,720. See also *Goldsmith v. Valentine*, (1910) 36 App. Cas. (D. C.) 63.

Weighing evidence.—In the federal courts it is well settled that upon habeas corpus the court will not weigh the evidence, although, if there is an entire lack of evidence to support the accusation, the court may order his discharge. *Price v. Henkel*, (1910) 216 U. S. 488, 30 S. Ct. 257, 54 U. S. (L. ed.) 581, *following* *Hyde v. Shine*, (1905) 199 U. S. 62, 25 S. Ct. 760, 50 U. S. (L. ed.) 90.

Discretion of court.—"The injunction to hear the case summarily, and thereupon 'dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government; between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex p. Royall*, (1886) 117 U. S. 241, 6 S. Ct. 734, 29 U. S. (L. ed.) 868. See also *Minnesota v. Brundage*, (1901) 180 U. S. 499, 21 S. Ct. 455, 45 U. S. (L. ed.) 639.

When a sentence pronounced was in violation of the statutes of the United States, the action of the court was in that matter in excess of its jurisdiction and void, but the Supreme Court may delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects of jurisdiction which are the subject of complaint may be corrected. *Medley, Petitioner*, (1890) 134 U. S. 160, 10 S. Ct. 384, 33 U. S. (L. ed.) 835; *In re Bonner*, (1894) 151 U. S. 242, 14 S. Ct. 323, 38 U. S. (L. ed.) 149; *In re Christian*, (1897) 82 Fed. 199; *In re Gut Lun*, (1897) 84 Fed. 323; *De Bara v. U. S.*, (C. C. A. 1900) 99 Fed. 942, 40 C. C. A. 194; *Ex p. Davis*, (1901) 112 Fed. 139.

Reference to guardian ad litem to find facts.—This provision, as it now stands, apparently governs all proceedings based on a petition conforming to R. S. sec. 754 (*supra*, p. 462), and an order of the court, referring the case to a guardian ad litem of the petitioner, to determine the law and facts on such evidence as he might choose to hear and consider, may properly be made, when the order does not direct a dis-

continuance of the suit, or give the guardian ad litem an absolute right so to discontinue, or conclude the court to act on his election. *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 331, 21 U. S. App. 481, 12 C. C. A. 145, 26 L. R. A. 784.

"Dispose of the party as law and justice require."—If the "party" is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged. *In re Neagle*, (1890) 135 U. S. 1, 10 S. Ct. 658, 34 U. S. (L. ed.) 55; *In re Anderson*, (1899) 94 Fed. 487; *Walters v. McKinnis*, (N. D. Pa. 1915) 221 Fed. 746.

In *Medley, Petitioner*, (1890) 134 U. S. 160, 10 S. Ct. 384, 33 U. S. (L. ed.) 835, the prisoner under sentence of death pronounced by a Colorado court applied for a writ of habeas corpus on the ground that the statute under which he was sentenced was materially different from that which existed when the crime was committed, an additional punishment being provided for, and was therefore an *ex post facto* law. The Supreme Court said: "These considerations render it our duty to order the release of the prisoner from the custody of the warden of the penitentiary of Colorado, as he is now held by him under the judgment and order of the court. A question suggests itself, however, to the court which is not a little embarrassing, and which was not presented by counsel in the argument of the case. This consideration arises from the fact that there does not seem to be in the record before us any error in the proceedings of the court on the trial and the verdict of the jury, by which the party was convicted of murder in the first degree. It is only when the sentence or judgment of the court upon that verdict is entered that the error of the proceedings commences. When, in the language of the judgment of the court, the prisoner was ordered to be 'kept by the warden of the penitentiary in solitary confinement until the day of his execution,' and when the knowledge of the day and the hour of his execution was by the statute to be withheld from him, the Constitution of the United States was violated because the additional punishments were inflicted on him by reason of the direction of the statute, which we have just seen was an *ex post facto* law, and in those respects void as being forbidden by the Constitution of the United States. If this were a writ of error to the Supreme Court of Colorado, as *Kring's case* was a writ of error to the Supreme Court of Missouri, our duty would be plain, namely, to reverse the judgment for the error found in it and remand the case to the state court for further proceedings. If such were the case before us our duty would

oe to reverse the judgment and remand the case to the court below to deal with the prisoner in the face of the fact that a verdict of guilty, which was valid and legal, remains unenforced. But under the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement in the penitentiary under the statute of Colorado invalid as to this case. The language of the act of Congress, however, seems to have contemplated some emergency of the kind now before us. Section 761 of the Revised Statutes declares that the court, or justice, or judge (before whom the prisoner may be brought by writ of habeas corpus) shall proceed in a summary way to determine the facts of the case by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require. What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of section 753 [*supra*, p. 449], he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against, in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the statute under which he is now held in custody is an *ex post facto* law in regard to his offense, it repeals the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the attorney general of the state of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court." See to the same effect *Ex p. Peeke*, (D. C. N. J. 1906) 144 Fed. 1016, *affirmed* (C. C. A. 3d Cir. 1907) 153 Fed. 166, 82 C. C. A. 340; *U. S. v. Carpenter*, (C. C. A. 9th Cir. 1907) 151 Fed. 214, 81 C. C. A. 194, 10 Ann. Cas. 509, 9 L. R. A. (N. S.) 1043.

Where in a proceeding under this section a prisoner makes an application for

a discharge on the ground that the court committed an error in passing sentence, and the court, on finding a defect in such sentence, remands him to the trial court for a correction of the same, it is a proper disposition of the party "as law and justice require." *Bryant v. U. S.*, (C. C. A. 8th Cir. 1914) 214 Fed. 51, 130 C. C. A. 491.

A writ of habeas corpus must be denied if it be apparent that the only result, if the writ were issued, would be the remanding of the petitioner to custody, for the object of the writ is to ascertain whether the prisoner applying for it can legally be detained, and it is the duty of the court, justice or judge, granting the writ, on hearing, "to dispose of the party as law and justice may require." *In re Boardman*, (1898) 169 U. S. 39, 18 S. Ct. 291, 42 U. S. (L. ed.) 653.

It has been held that a defect in the warrant is no ground for the discharge of the petitioner on a writ of habeas corpus. The rule in all such cases made obligatory by this section is that the judge granting the writ shall on the hearing "dispose of the party as law and justice require." This means not as law and justice required at the time of the arrest, but as law and justice require at the time of the hearing. *Ong Seen v. Burnett*, (C. C. A. 9th Cir. 1916) 232 Fed. 850, 147 C. C. A. 44.

In proceedings upon habeas corpus the authority of the courts is not so restricted as to compel them in every instance either to discharge the prisoner absolutely or to remand him to the custody of the person producing him, but the provision empowering and requiring the court to "dispose of the party as law and justice require," authorizes the court to commit the custody of the party to any one showing a right thereto. *Motherwell v. U. S.*, (C. C. A. 1901) 107 Fed. 437, 48 C. C. A. 97, *reversed* apparently on other grounds (1902) 183 U. S. 424, 22 S. Ct. 195, 46 U. S. (L. ed.) 264, *sub nom.* *Tucker v. Alexandroff*, wherein the power of the court to order the return of seamen deserting from foreign ships, in the absence of treaty, was questioned.

Removal for resentence.—The petitioner was held by a United States marshal for removal to the district in which he had been indicted or convicted in order to be resentenced. The court said that while R. S. sec. 1014 (title CRIMINAL LAW, vol. 2, p. 654) does not authorize the removal of a party for any other purpose than for trial, the court might make an order for removal under this section. *In re Christian*, (1897) 82 Fed. 885.

Stay of execution.—The Circuit Court of Appeals will stay the issuing of a mandate of affirmance of a dismissal by the Circuit Court of a petition for habeas corpus pending the decision of the Supreme Court upon an application for a

certiorari. The execution of a sentence should be stayed pending the final determination, unless very exceptional circumstances justify the court in refusing to do so. *Rose v. Roberts*, (C. C. A. 1900) 99 Fed. 952, 40 C. C. A. 203.

Confinement in another federal district.—Where the chief officer of the Chinese exclusion laws for a state, in his return to a writ of habeas corpus directed to him, has admitted that Chinese persons in whose behalf the writ was issued are detained by him, and has obtained a stipulation waiving their production in court, the court has jurisdiction to inquire into the legality of their detention, although they may in effect be confined in another district of the state. *Ex p. Fong Yim*, (1905) 134 Fed. 938.

Sufficiency of order discharging from custody.—In the case of *In re Urzua*, (S. D. N. Y. 1911) 188 Fed. 540, it was held that an order dismissing a writ of habeas corpus entitled in the Circuit Court of the Southern District of New York was manifestly a court order, and it was not necessary to name any particular term in the caption, because for the purposes of issuing and disposing of writs of habeas corpus the court was always open.

Res judicata.—It has been held that the doctrine of res judicata does not apply in habeas corpus. *In re Kopel*, (S. D. N. Y. 1906) 148 Fed. 505. But see *contra*, *U. S. v. Chung Shee*, (S. D. Cal. 1895) 71 Fed. 277, *affirmed* (C. C. A. 9th Cir. 1896) 76 Fed. 951, 44 U. S. App. 751, 22 C. C. A. 639, wherein the court said: "Again, it has been held that in proceedings upon habeas corpus the determination of the court upon the facts has the effect of a verdict of a jury. *Bonnett v. Bonnett*, [1883] 61 Ia. 199, 16 N. W. 91. Indeed, the authorities without exception seem to hold that when a person has been discharged upon habeas corpus the issues of law and fact involved are res judicata, and the person so discharged cannot, for the same cause be again lawfully arrested. *Church, Hab. Corp.* § 386; *Ex p. Jilz*, [1876] 64 Mo. 205; *In re Crow*, [1884] 60 Wis. 349, 19 N. W. 713; *Yates' Cas.*, [1810] 6 Johns. 337. On this point the government contends that 'in the federal courts the doctrine of res judicata is not applicable to a decision in a habeas corpus proceeding,' and cites as authorities *Ex p. Kaine*, [1853] 3 Blatchf. 5, [14] Fed. Cas. No. 7,597, and *Ex p. Cuddy*, [S. D. Cal. 1889] 40 Fed. 65. These cases, however, so far from sustaining, are against, the government's contention. In the first the court, after declaring that in proceedings upon a writ of habeas corpus the federal courts follow, not the laws and regulations of the states, but the common

law of England, proceeds thus: 'That, according to that system of laws, so guarded is it in favor of the liberty of the subject, the decision of one court or magistrate upon the return to the writ, refusing to discharge the prisoner, is no bar to the issuing of a second or third or more writs by any other court or magistrate having jurisdiction of the case.' Thus it will be seen from this opinion that it is only where the prisoner is remanded that the decision of the court is not final. The same may be said of *Ex p. Cuddy*, *supra*. From the opinion of Justice Field in this last case the following quotation is made in the government's brief: 'The doctrine of res judicata was not held applicable to a decision of one court or justice thereof; the entire judicial power of the country could thus be exhausted.' The latter part of this quotation would be meaningless, except upon the idea that Justice Field was discussing a case wherein the prisoner was remanded. The same is true of the opinion of the court in *Re Perkins*, [1852] 2 Cal. 430, cited in the government's brief. While, therefore, these decisions do not expressly so hold, the implication from them is unavoidable that where, on a writ of habeas corpus, the prisoner is discharged, the decision is a final determination in his or her favor."

In *Ex p. Kaine*, (1853) 3 Blatchf. 1, 14 Fed. Cas. No. 7,597, it was held that a decision under one writ, refusing the discharge of a prisoner, is no bar to the issuing of any number of other successive writs by any court or magistrate having jurisdiction.

In the case of *In re White*, (C. C. Minn. 1891) 45 Fed. 237, it was held that a discharge on habeas corpus was not res judicata where it was not upon the merits.

Whether the refusal of a discharge on habeas corpus in a federal court would constitute res judicata, where the entire case may be taken up on appeal as a matter of right, *quare*; but where a discharge on habeas corpus has been refused in a state court, in which state a refusal of a discharge on habeas corpus is not a bar to a new petition, such refusal in the state court would not be a bar to a petition in the federal court. *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 331, 21 U. S. App. 481, 12 C. C. A. 145, 26 L. R. A. 784.

The writ will be refused when it appears that the question upon which a decision is sought has been considered and decided adversely to the contention for the petitioner in a cause then on trial. This is especially so in a cause in progress in which the decision complained of can be reviewed by the full court if the cause proceeds and the petitioner is convicted. *In re Simmons*, (1891) 45 Fed. 241.

Sec. 762. [In cases involving the law of nations, notice to be served on State attorney-general.] When a writ of habeas corpus is issued in the

case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under an alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceeding, to be prescribed by the court, or justice, or judge at the time of granting said writ, shall be served on the attorney-general or other officer prosecuting the pleas of said State, and due proof of such service shall be made to the court, or justice, or judge before the hearing. [R. S.]

Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

Sec. 763. [Appeals in cases of habeas corpus to Circuit Court.]
[Superseded.]

This section was as follows:

"From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

"1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

"2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385; Act of March 27, 1868, ch. 34, 15 Stat. L. 44.

By the Act of March 3, 1891, ch. 517, § 4, 26 Stat. L. 827, it was provided that no appellate jurisdiction should thenceforth be exercised by any existing Circuit Courts. By the Judicial Code of March 3, 1911, ch. 13, §§ 289-291, 36 Stat. L. 1167, given under the title JUDICIARY, the Circuit Courts were entirely abolished and their powers and duties conferred on the District Courts. Section 128 of said Code prescribed the appellate jurisdiction of the Circuit Court of Appeals, and section 238 thereof prescribed the appellate jurisdiction of the Supreme Court. These provisions necessarily supersede R. S. secs. 763 and 764, but the status of R. S. secs. 765 and 766 would seem to be questionable, and these sections are therefore given *infra*, pp. 479, 480.

Introductory.—The notes which follow, while relating to a section which has been superseded as seen above, seem to warrant preservation.

Case removed by appeal.—Where a petition is filed and the case heard in the District Court, the case can be removed into the Circuit Court only by appeal, and in that state of the case the jurisdiction of the Circuit Court is wholly appellate. Such jurisdiction must be exercised upon the same evidence as that introduced in the District Court, except where competent evidence was offered and excluded; errors of the District Court may be corrected. *Seavey v. Seymour*, (1871), 3 Cliff. 439, 21 Fed. Cas. No. 12,596.

Taking appeal to next term.—Nothing in this section requires an appeal from the final decision of the District Court, or judge thereof, to be taken, as in ordinary cases at law or suits in equity or admiralty, to the next term of the Circuit

Court thereafter to be held. The subject is regulated by section 765, *infra*. *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544.

No bill of exceptions is required in cases brought up on appeal, especially when the errors assigned are matters appearing in the record. *Solomon v. Davenport*, (C. C. A. 1898) 87 Fed. 318, 59 U. S. App. 52, 30 C. C. A. 664.

Heard before circuit justice at chambers.—An objection that the hearing of the appeal from the District Court was had before the circuit justice at chambers, and not in open court, if it could ever have been properly interposed and insisted on, cannot be made for the first time in the Supreme Court where it appears "that the order to that effect was made without objection taken at the time, or afterwards, in the District or Circuit Court, or at the hearing before [the justice]; that the appellant appeared at the time and place

by counsel and was heard; that the arrangement was made for the convenience of the parties and to avoid delay; and that it does not seem to have involved any hardship or injustice to the party now complaining." *Roberts v. Reilly*, (1885) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544.

Facts as well as law.—The decision of the District Court may be reviewed on the facts as well as on the law by appeal. *In re Neagle*, (1890) 135 U. S. 1, 10 S. Ct. 658, 34 U. S. (L. ed.) 55; *Virginia v. Paul*, (1893) 148 U. S. 107, 13 S. Ct. 536, 37 U. S. (L. ed.) 386, citing *Horner v. U. S.*, (1892) 143 U. S. 570, 12 S. Ct. 522, 36 U. S. (L. ed.) 266. See also *In re Henrich*, (1867) 5 Blatchf. 414, 11 Fed. Cas. No. 6,369.

Mandamus.—But the decision of the District Court cannot be reviewed or controlled by writ of mandamus. *Ex p. Schwab*, (1878) 98 U. S. 240, 25 U. S. (L. ed.) 105; *Ex p. Perry*, (1880) 102 U. S. 183, 26 U. S. (L. ed.) 43; *Ex p. Morgan*, (1885) 114 U. S. 174, 5 S. Ct. 825, 29 U. S. (L. ed.) 135; *Virginia v. Paul*, (1893) 148 U. S. 107, 13 S. Ct. 536, 37 U. S. (L. ed.) 386, citing *In re Morrison*, (1893) 147 U. S. 14, 13 S. Ct. 246, 37 U. S. (L. ed.) 60.

It was held, before the revision, that Circuit Courts possessed no power under the Act of 1789 (see R. S. sec. 753, *supra*, p. 449), to re-examine a decision of the District Court, in cases within the provisions of that Act, as the Act made no provision for the removal of such cases from the District to the Circuit Court by writ of error or appeal. *Seavey v. Seymour*, (1871) 3 Cliff. 439, 21 Fed. Cas. No. 12,596.

Appeals to Circuit Court of Appeals.—Appeals from the District Courts in cases of habeas corpus are now cognizable by the Circuit Court of Appeals as the lawful successor of the Circuit Courts with respect to such appellate jurisdiction. *U. S. v. Fowkes*, (C. C. A. 3d Cir. 1892) 53 Fed. 13, 3 U. S. App. 247, 3 C. C. A. 394.

The Circuit Court of Appeals have no jurisdiction to entertain appeals in habeas corpus cases which involve the construction or the application of the Federal Constitution. *Davis v. Burke*, (C. C. A. 1899) 97 Fed. 501, 38 C. C. A. 299.

The proceeding should be removed from the Circuit Court to the Circuit Court of Appeals by appeal, as distinguished from a writ of error. *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 331, 21 U. S. App. 481, 12 C. C. A. 145, 26 L. R. A. 784.

The jurisdiction of the Circuit Court of Appeals, to hear an appeal from the Circuit Court on a writ of habeas corpus, is clear where the reasons of appeal bring up for review only questions relative to the proceedings of the court below in connection with the guardian ad litem of the petitioner, and exclude the consideration of any question touching the construction or application of the Constitution of the United States, and especially where it is not certain that the Circuit Court will ever, even if the case is remanded to it, be required to pass upon any constitutional question. *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 325, 21 U. S. App. 407, 12 C. C. A. 139.

The Circuit Court of Appeals may take jurisdiction of an appeal from a decision of the District Court in cases where, before the creation of that court by the Act of March 3, 1891 (see JUDICIARY), the Circuit Court for the circuit would have had jurisdiction under R. S. sec. 764, *U. S. v. Fowkes*, (C. C. A. 1893) 53 Fed. 13, 3 U. S. App. 247, 3 C. C. A. 394.

An appeal lies to the Circuit Court of Appeals from an order made by a district judge at chambers. Section 4 of the Act of March 3, 1891 (see JUDICIARY), must be construed as lodging in the Circuit Court of Appeals the appellate jurisdiction from final decisions of district judges which was previously exercised by the Circuit Courts under R. S. sec. 764. *Webb v. York*, (C. C. A. 1896) 74 Fed. 753, 40 U. S. App. 114, 21 C. C. A. 65.

Sec. 764. [Appeals to Supreme Court.] [Superseded.]

This section was as follows:

"From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section."

Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539.

This section was amended to read as above given by the Act of March 3, 1885, ch. 353, 23 Stat. L. 437.

Originally this section was as follows:

"SEC. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section."

See the note to the preceding R. S. sec. 763.

Introductory.—The notes which follow, while relating for the most part to statutes which have been superseded as seen above, seem to warrant preservation.

Effect of Act of March 3, 1885.—By the

law, as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the Circuit Court from any court of justice or judge inferior to the Circuit Court in a certain class of

habeas corpus cases. But there was no appeal to the Supreme Court in any case except where the prisoner was the subject or citizen of a foreign state, and was committed or confined under the authority or law of the United States or of any state, on account of any act done or omitted to be done under the commission or authority of a foreign state, the validity of which depended upon the law of nations. But afterward, by the Act of Congress of March 3, 1885, 23 Stat. 437, this was extended by amendment as follows: "That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: 'From the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described in the preceding section.'" *In re Neagle*, (1890) 135 U. S. 1, 10 S. Ct. 658, 34 U. S. (L. ed.) 55.

Effect of Act of March 3, 1891, creating Circuit Courts of Appeals.—It cannot be inferred from the amendment of section 766, *infra*, by the Act of March 3, 1893, that Congress regarded the sections specially providing for appeals on habeas corpus as unrepealed by the Act of March 3, 1891, creating the Circuit Courts of Appeals. While the general right of appeal from the judgment of Circuit Courts directly to the Supreme Court is taken away by the Act of March 3, 1891, the right of appeal still exists in the cases designated in section 5 of that Act. *In re Lennon*, (1893) 150 U. S. 393, 14 S. Ct. 123, 37 U. S. (L. ed.) 1120. See also *Horner v. U. S.*, (1892) 143 U. S. 570, 12 S. Ct. 522, 36 U. S. (L. ed.) 266; *In re Iasigi*, (1897) 79 Fed. 755; *Ex p. Jacobi*, (1900) 104 Fed. 681. See JUDICIARY.

Since the Act of March 3, 1891, an appeal may be taken to the Supreme Court from a decision of a District Court in a habeas corpus case, where the construction of an extradition treaty is involved. *Rice v. Ames*, (1901) 180 U. S. 371, 21 S. Ct. 406, 45 U. S. (L. ed.) 577. See also *Boake v. Comingore*, (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846. But where the question raised is whether the petitioner was seeking an asylum in the United States at the time of his arrest, and does not involve the construction of the treaty, an appeal to the Supreme Court will not lie. *In re Newman*, (1897) 79 Fed. 615. See JUDICIARY.

Where the case involved the constitutionality of a law of the United States it was held to be within the appellate jurisdiction of the Supreme Court, notwithstanding the appeal was taken after the Act establishing the Circuit Courts of Appeals took effect. *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 651, 12 S. Ct. 336, 35 U. S. (L. ed.) 1146.

Where an appeal is taken directly to the Supreme Court under section 5 of the

Act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, the Supreme Court acquires jurisdiction of the entire case, and all questions involved in it, and not merely the question of the constitutionality of the law of the United States. *Horner v. U. S.*, (1892) 143 U. S. 570, 12 S. Ct. 522, 36 U. S. (L. ed.) 266.

In *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 1113, *affirming* (E. D. Mo. 1907) 155 Fed. 662, the court said: "Since the passage of the act establishing the Circuit Court of Appeals (26 Stat. 826) appeals in habeas corpus cases from the District and Circuit Courts can only be taken to the Circuit Court of Appeals, unless they are of the kind specified in section 5 of the act, wherein a direct appeal to this court is allowed. *In re Lenon*, 150 U. S. 393. Of this latter class is 'any case that involves the construction or application of the Constitution of the United States.' In the case at bar the position of the appellant is that his detention in custody is unlawful, because the indictment, which is its only excuse, is not a charge of crime within the meaning of the provision of the Constitution regulating interstate extradition. Art. IV, § 2, par. 2. The precise and only question to be determined is whether the indictment constituted such a charge. The decision of the question requires us to ascertain and declare the meaning of the extradition clause, and therefore 'involves the construction of the Constitution of the United States.'"

Appeal from state court.—Where a state court refuses to discharge on habeas corpus proceedings a person alleged to be a fugitive from justice, and a writ of error issues from the United States Supreme Court to the state court to review the judgment refusing the discharge, the former court will only consider the record to determine whether the latter court erred and will not pass upon evidence not embodied in the record by a bill of exceptions. *Illinois v. Pease*, (1907) 207 U. S. 100, 28 S. Ct. 58, 52 U. S. (L. ed.) 121.

Appeal as of right.—When the original application for a writ of habeas corpus alleges that the petitioner is restrained of his liberty in violation of the Constitution of the United States, he is entitled as of right to prosecute an appeal to the Supreme Court from the order of the Circuit Court denying that application. *In re Shibuya Jugiro*, (1891) 140 U. S. 291, 11 S. Ct. 770, 35 U. S. (L. ed.) 510. See *Ex p. McCardle*, (1867) 6 Wall. 318, 18 U. S. (L. ed.) 816.

The Circuit Court has no discretion in the matter of granting an appeal to the Supreme Court, but the right is absolute. *In re Sun Hung*, (1885) 24 Fed. 723; *In re Marmo*, (D. C. N. J. 1905) 138 Fed. 201.

But in *In re Durrant*, (1898) 84 Fed. 317, the court, commenting on the *Sun Hung* case, above cited, said: "That, however, was a case clearly involving questions arising under the Constitution and treaties of the United States, and in which the good faith of the proceedings was not doubted, and the proceeding itself not one in any way obstructing the execution of the criminal laws of the state. In such a case it is clear that the denial of an order allowing the appeal would be a gross abuse of discretion, and the question of the power of the court to refuse an appeal, in a case where it was clearly apparent that the process of appeal was being used solely for the purpose of obstructing the execution of the judgment of a state court, the validity of which had already been sustained by the Supreme Court of the United States, was not presented to or in the mind of the judge delivering that opinion," and in commenting on the *Ju-giro* case, *supra*, the court further said: "Notwithstanding our respect for the learning and ability of the judge delivering the opinion in that case, we are not able to agree with the conclusion thus reached by him. When it manifestly appears to the court that the application for the writ is entirely destitute of merit, and that the effect of allowing an appeal from its final judgment in the proceeding will only result in obstructing the execution of the laws of the state, then the court may properly refuse to enter an order giving its consent to such appeal."

An appeal directly to the United States Supreme Court from a decision of the Circuit Court denying the writ of habeas corpus was held to be proper under averments contained in the petition, that the imprisonment of the appellant was in violation of the Federal Constitution. *Dimmick v. Tompkins*, (1904) 194 U. S. 540, 24 S. Ct. 780, 48 U. S. (L. ed.) 1110.

Scope of review.—In this section the term "appeal," and not "writ of error," is used as the mode of review, and as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered, an appeal requires the appellate court to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge. *In re Neagle*, (1890) 135 U. S. 1, 10 S. Ct. 658, 34 U. S. (L. ed.) 55.

The general rule that a writ of habeas corpus cannot be used to perform the office of a writ of error applies not only to original writs issued by the Supreme Court, but on appeals to it from courts below in habeas corpus proceedings. *Gonzales v. Cunningham*, (1896) 164 U. S. 612, 17

S. Ct. 182, 41 U. S. (L. ed.) 572. See *Horner v. U. S.*, (1892) 143 U. S. 570, 12 S. Ct. 522, 36 U. S. (L. ed.) 266; *In re Schneider*, (1893) 148 U. S. 157, 13 S. Ct. 572, 37 U. S. (L. ed.) 404; *In re Lennon*, (1893) 150 U. S. 393, 14 S. Ct. 123, 37 U. S. (L. ed.) 1120.

"We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the Act of Congress and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government." *Benson v. McMahon*, (1888) 127 U. S. 457, S. S. Ct. 1240, 32 U. S. (L. ed.) 234.

"The proposition is fundamental, and is necessary to prevent an appellate court from exercising virtually original jurisdiction, that the court below must have had an opportunity to pass on the questions raised on appeal, and that whether it had such opportunity must appear by the record or be fairly inferable from what does appear in it." *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 331, 21 U. S. App. 481, 12 C. C. A. 145, 26 L. R. A. 784.

The Supreme Court will affirm the decision of a District Court remanding the petitioner to custody, where it is made to appear to the Supreme Court that an objection to the custody existed at the time when the writ issued, though it did not so appear when the order of the District Court remanding the petitioner was entered. *Iasigi v. Van de Carr*, (1897) 166 U. S. 391, 17 S. Ct. 595, 41 U. S. (L. ed.) 1045.

An order at chambers by a circuit judge is not appealable. *Lambert v. Barrett*, (1895) 157 U. S. 697, 15 S. Ct. 722, 39 U. S. (L. ed.) 865. See also *Ex p. Jacobi*, (1900) 104 Fed. 681.

This section gives an appeal to the Supreme Court in habeas corpus cases only from the final decision of a Circuit Court, and an appeal does not lie to the Supreme Court from an order discharging a prisoner made by a circuit judge sitting as judge, and not as a court; and the order of the judge that the paper be filed, and his order recorded in the Circuit Court, does not make his decision as judge a decision of the court. *Carper v. Fitzgerald*, (1887) 121 U. S. 87, 7 S. Ct. 825, 30 U. S. (L. ed.) 882; *McKnight v. James*, (1895) 155 U. S. 685, 15 S. Ct. 248, 39 U. S. (L. ed.) 310; *Whitten v. Tomlinson*, (1895) 160 U. S. 231, 16 S. Ct. 297, 40 U. S. (L. ed.) 406. See also *In re Palliser*, (1890) 136 U. S. 257, 10 S. Ct. 1034, 34 U. S. (L. ed.) 514. See *supra*,

this note, "Effect the Act of March 3, 1891."

But when the record discloses that, while the original order was made at chambers, the final order was the decision of the Circuit Court at a stated term, the appeal will lie. *Harkrader v. Wadley*, (1898) 172 U. S. 148, 19 S. Ct. 119, 43 U. S. (L. ed.) 399.

Appeals from District of Columbia.—Under the Revised Statutes of the District of Columbia, final judgments of the Supreme Court of the District may be taken to the Supreme Court of the United States as in the case of final judgments of the Circuit Courts of the United States. This local legislation cannot be construed as extending the appellate jurisdiction so as to include all subsequent legislation touching appeals from Circuit Courts, so that the Act of 1885, amending this section, does not extend the appellate jurisdiction on judgments of the District of Columbia in cases described in the first clause of section 763, *supra*. The Act of March 3, 1885 (23 Stat. L. 443, ch. 355), regulating appeals from the Supreme Court of the District of Columbia and the several territories, does not apply to appeals in habeas corpus cases from the District of Columbia, as, a proceeding in habeas corpus being a civil and not a criminal proceeding, the Act prescribes that the matter in dispute must be money, or some right the value of which can be calculated and ascertained, and the matter in dispute in a habeas corpus case has no money value. *Cross v. Burke*, (1892) 146 U. S. 82, 13 S. Ct. 22, 36 U. S. (L. ed.) 896, in which case the court said that in the case of *Wales v. Whitney*, (1885) 114 U. S. 564, 5 S. Ct. 1050, 29 U. S. (L. ed.) 277, holding that the judgments of the Supreme Court of the District of Columbia on habeas corpus are subject to review, the question of jurisdiction did not appear to have been contested, and the court did not consider itself bound by the view expressed. See *In re Heath*, (1892) 144 U.

S. 92, 12 S. Ct. 615, 36 U. S. (L. ed.) 358; *In re Belt*, (1895) 159 U. S. 95, 15 S. Ct. 987, 40 U. S. (L. ed.) 88.

"By Act of Congress of March 3, 1885, 23 Stat. L. 437, ch. 353, section 764 of the Revised Statutes was so amended as to remove the restriction to the second clause of section 763, and restore the appellate jurisdiction of this court from decisions of the Circuit Courts in habeas corpus cases as it had existed prior to the passage of the Act of March 27, 1868, 15 Stat. L. 44, ch. 34. But this did not have that effect as to judgments of the Supreme Court of the District of Columbia in those cases for the reasons given in *In re Heath*, (1892) 144 U. S. 92 [12 S. Ct. 615, 36 U. S. (L. ed.) 358]; *Cross v. Burke*, (1892) 146 U. S. 82 [13 S. Ct. 22, 36 U. S. (L. ed.) 876]." *Gonzales v. Cunningham*, (1896) 164 U. S. 612, 17 S. Ct. 182, 41 U. S. (L. ed.) 572.

Appeals from territorial supreme courts.

—The final judgments of territorial Supreme Courts may, under R. S. sec. 702 (now section 245 of the Judicial Code, title JUDICIARY), and R. S. sec. 1909 (title TERRITORIES), be reviewed by writ of error and appeal under the same regulations as those of the Circuit Court of the United States, and this applies to final orders on habeas corpus. The effect of the Act of March 3, 1885, ch. 355, 23 Stat. L. 443, would have been the same as to such judgments of the Supreme Court of the District of Columbia (see *supra*, this note, under "Appeals from District of Columbia"), but under R. S. sec. 1909 appeals would lie from the decisions of the territorial Supreme Courts on habeas corpus, when they would not lie from Circuit Courts or courts of the District of Columbia in like cases, and the Act of 1885, ch. 355, was not intended to do away with this special provision. *Gonzales v. Cunningham*, (1896) 164 U. S. 612, 17 S. Ct. 182, 41 U. S. (L. ed.) 572. But see *In re Borrego*, (1896) 8 N. M. 655, 46 Pac. 211.

Sec. 765. [Appeals, how taken.] The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the cause. [R. S.]

Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

For the "two preceding sections" mentioned in the text, being sections 763, 764, see the notes to R. S. 762, *supra*, p. 474.

Scope.—The provisions of this section are in force in habeas corpus cases, except as to the right and mode of appeal which

are regulated by the Circuit Court of Appeals Act of March 3, 1891, ch. 517. *In re Lasigi*, (1897) 79 Fed. 755, citing *In re*

Lennon, (1893) 150 U. S. 393, 14 S. Ct. 123, 37 U. S. (L. ed.) 1120.

When appeal taken.—In *Roberts v. Reilly*, (1886) 116 U. S. 80, 6 S. Ct. 291, 29 U. S. (L. ed.) 544, it was held that there was nothing in R. S. sec. 763 (noted *supra*, p. 475) which required an appeal from the final decision of the District Court to be taken, as in ordinary cases at law or suits in equity or admiralty, to the next term of the Circuit Court thereafter to be held. The provision of this section "evidently contemplates the summary character of proceedings under the writ of habeas corpus as not admitting, in favor of the liberty of the citizen, the delays usually and necessarily attending ordinary litigations between parties, and confers upon the judicial tribunal, or the judge hearing the application and making the order which is the subject of the appeal, discretion to send up the case to the appellate tribunal, under such regulations and orders as may seem best adapted to secure the speediest and most effective justice. This harmoniously adapts the practice in direct appeals in such cases, under these sections of the Revised Statutes, to that exercised independently of these provisions, by means of the original writ of habeas corpus, with the aid of a writ of certiorari, to bring up the record of the proceedings to be reviewed."

Bail.—Supreme Court rule 34 provides that the prisoner may be "enlarged upon recognizance, as hereinafter provided," and the next clause of the rule provides only for such a recognizance where an appeal is taken upon the discharge of the prisoner. Under this section and the rule a district judge has no authority to admit petitioner to bail pending appeal from his order refusing to discharge him. *In re Iasigi*, (1897) 79 Fed. 755. See also *In re McKane*, (1894) 61 Fed. 205.

Circuit Court of Appeals.—This section relates to the proceedings on appeal to the Supreme Court specially authorized by the preceding section; it has no reference to appeals to the Circuit Court of Appeals, which do not depend on R. S. secs. 763 and 764, *supra*, pp. 475, 476, but on the Act of March 3, 1891, establishing that court. *King v. McLean Asylum*, (C. C. A. 1894) 64 Fed. 325, 21 U. S. App. 407, 12 C. C. A. 139.

The Act of 1893, above cited, evidently contemplates that R. S. secs. 765 and 766 remain in force, except as to the right and mode of appeal, which are regulated by the Circuit Court of Appeals Act of March 3, 1891, ch. 517. *In re Iasigi*, (1897) 79 Fed. 755. See also *In re Lennon*, (1893) 150 U. S. 393, 14 S. Ct. 123, 37 U. S. (L. ed.) 1120.

Sec. 766. [Pending proceedings in certain cases, action by State authority void.] Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void. *Provided*, That no such appeal shall be had or allowed after six months from the date of the judgment or order complained of. [R. S.]

Act of Aug. 29, 1842, ch. 257, 5 Stat. L. 539; Act of Feb. 5, 1867, ch. 28, 14 Stat. L. 385.

This section was amended to read as above given by the Act of March 3, 1893, ch. 226, 27 Stat. L. 751. The amendment consisted in the addition of the proviso at the close.

See the notes to R. S. sec. 762, *supra*, p. 474.

Scope of section.—This section makes ample provision for giving full effect to the jurisdiction of the federal court, in cases where the petitioner alleges that he is restrained of his liberty in violation of the Constitution or of a law of the United States. *In re Neagle*, (1889) 39 Fed. 833.

Purpose of statute.—The purpose of this statute is to prevent the state authorities from doing an act which has been or may be in a pending proceeding declared unlawful by the federal courts. *In re Strauss*, (C. C. A. 2d Cir. 1903) 126 Fed. 327, 63 C. C. A. 99.

Effect of stay.—A suspension of pro-

ceedings in the state court, when it occurs under the circumstances stated in this section, has not the same effect as a certificate of reasonable doubt given by a state judge, under a state statute, after the execution of the judgment of conviction has been commenced. The only purpose of the statute is to prevent the state court, or the state, pending proceedings on appeal to the Supreme Court, from changing, to the prejudice of the accused, the situation as it was at the time the appeal was taken from the judgment of the Circuit Court disallowing an application for a writ of habeas corpus, based on grounds of which, under the statutes

of the United States, the federal courts could take cognizance. *McKane v. Durston*, (1894) 153 U. S. 684, 14 S. Ct. 913, 38 U. S. (L. ed.) 867.

Merit of appeal as material element.—It is the appeal and not the merit of the appeal which operates as a stay on the proceedings in the state court. *Ex p. Edgar*, (1897) 119 Cal. 123, 51 Pac. 29.

Necessity of order staying proceedings.—No order staying proceedings under state authority is made a condition to such stay, and the bare pendency of the appeal effects a stay. *Lambert v. Barrett*, (1895) 159 U. S. 660, 16 S. Ct. 135, 40 U. S. (L. ed.) 296.

"Proceeding against person so imprisoned."—A reprieve by the governor of a state, postponing, until a fixed date, the execution of a death sentence, evidently granted to permit the prisoner to appeal to the federal Supreme Court from the order of a District Court denying habeas corpus, is not a proceeding "against the person so imprisoned," etc., within the meaning of this section. *Rogers v. Peek*, (1905) 199 U. S. 425, 26 S. Ct. 87, 50 U. S. (L. ed.) 256.

The action of a trial judge of a state court, on appeal being taken by a convicted defendant, in considering a statement of facts presented by the defendant, and settling the case on appeal, notwithstanding the pendency of a petition for a writ of habeas corpus in a federal court, is not a proceeding "against" the defendant in the sense of this statute. *State v. Humason*, (1892) 4 Wash. 413, 30 Pac. 718.

"In process of being heard and determined."—When the Supreme Court affirms, with costs, the judgment of the Circuit Court denying an application for a writ of habeas corpus, it is a final judgment on the premises, and nothing remains that is "in process of being heard and determined;" and the state court has power to proceed, though it would be more appropriate and orderly for the state court to defer final action until the mandate is issued and filed in the Circuit Court.

In re Shibuya Jugiro, (1891) 140 U. S. 291, 11 S. Ct. 770, 35 U. S. (L. ed.) 510. See also *McKane v. Durston*, (1894) 153 U. S. 684, 14 S. Ct. 913, 38 U. S. (L. ed.) 867; *In re Boardman*, (1898) 169 U. S. 39, 18 S. Ct. 291, 42 U. S. (L. ed.) 653; *In re Fitton*, (1893) 55 Fed. 271; *People v. Durrant*, (1897) 119 Cal. 54, 50 Pac. 1070.

Acquittal pending habeas corpus.—Where, after the issuance of a writ of habeas corpus out of a federal court to review petitioner's arrest for violation of a state statute, he was tried and acquitted in the state court, such trial and acquittal were null and void, and therefore constituted no ground for dismissal of the writ. *Ex p. Martin*, (1910) 180 Fed. 209.

An order of a state court directing the execution of a petitioner on habeas corpus while an appeal on the habeas corpus is pending in the Supreme Court of the United States is absolutely void, and a federal District Court may issue its writ of habeas corpus for the purpose of bringing the petitioner into the custody of the court, so that the court might fully protect him against the execution of such illegal order. *In re Ebanks*, (1897) 84 Fed. 311, *affirmed* (1897) 168 U. S. 707, 18 S. Ct. 942, 42 U. S. (L. ed.) 1214.

Sentence to hard labor.—Application for a writ of habeas corpus will be denied where it appears that, while an appeal of the petitioner to the Supreme Court of the United States on a prior proceeding on habeas corpus is pending, he is required by the terms of his sentence, which is under review in such appeal, and by the provisions of the state law regulating state prisons, to do hard labor when confined therein. A rule adopted under section 765, *supra*, providing that the custody in which the prisoner was when he applied for the writ shall remain undisturbed despite the pendency of his appeal, is not inconsistent with this section. *In re McKane*, (1894) 61 Fed. 205, *affirmed* (1894) 153 U. S. 684, 14 S. Ct. 913, 38 U. S. (L. ed.) 867.

An Act Restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings.

[*Act of March 10, 1908, ch. 76, 35 Stat. L. 40.*]

[Appeals to Supreme Court.] That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance. [*35 Stat. L. 40.*]

HALL-MARK ACT

See FALSE STAMPING

HARBORS

See RIVERS, HARBORS AND CANALS

HARRISON ACT (OPIUM)

See INTERNAL REVENUE

HARTER ACT

See LIMITATION OF VESSEL OWNERS' LIABILITY

HATCH ACT

See AGRICULTURE

HAWAIIAN ISLANDS

- I. ANNEXATION OF TERRITORY, 486.
 - II. GOVERNMENT OF TERRITORY GENERALLY, 490.
 - III. THE LEGISLATURE, 495.
 - IV. THE EXECUTIVE, 509.
 - V. THE JUDICIARY, 518.
 - VI. UNITED STATES OFFICERS, 521.
 - VII. MISCELLANEOUS, 523.
-

I. Annexation of Territory, 486.

Res. of July 7, 1898, No. 55 ("Hawaiian Annexation," or Newlands Resolution), 486.

- Sec. 1. Cession Accepted, 486.*
- 2. Appointment of Commissioners, 489.*
- 3. Appropriation, 490.*

II. Government of Territory Generally, 490.

Act of April 30, 1900, ch. 339 ("Hawaii Territorial Act"), 490

Chapter I. General Provisions, 490.

- Sec. 1. Definitions, 490.*
- 2. Territory of Hawaii, 490.*
- 3. Government of the Territory of Hawaii, 491.*
- 4. Citizenship, 491.*
- 5. Application of the Laws of the United States, 491.*
- 6. Laws of Hawaii, 492.*
- 7. Laws Repealed, 492.*
- 8. Certain Offices Abolished, 494.*
- 9. Amendment of Official Titles, 494.*
- 10. Construction of Existing Statutes, 494.*
- 11. Style of Process, 495.*

III. The Legislature, 495.

Act of April 30, 1900, ch. 339, 495.

Chapter II. The Legislature, 495.

- Sec. 12. The Legislative Power, 495.*
- 13. Qualification of Members, 495.*
- 14. General Elections, 496.*
- 15. Each House Judge of Qualifications of Members, 496.*
- 16. Disqualifications of Legislators, 496.*
- 17. Disqualifications of Government Officers and Employees, 496.*
- 18. Idiots Convicts, etc., 496.*
- 19. Oath of Office, 496.*
- 20. Officers and Rules, 497.*
- 21. Ayes and Noes, 497.*
- 22. Quorum, 497.*

Sec. 23. Smaller Number Than Quorum May Adjourn, 497.

24. Ascertaining Quorum, 497.

25. Punishment of Persons Not Members, 497.

26. Compensation of Members, 498.

27. Punishment of Members, 498.

28. Exemption from Liability, 498.

29. Exemption from Arrest, 498.

The Senate, 498.

Sec. 30. Number of Members, 498.

31. Vacancies, 499.

32. Senatorial Districts, 499.

33. Apportionment, 499.

34. Qualifications of Senators, 499.

The House of Representatives, 499.

Sec. 35. Number of Representatives, 499.

36. Term of Office, 499.

37. Vacancies, 499.

38. Representative Districts, 500.

39. Apportionment, 500.

40. Qualifications of Representatives, 500.

Legislation, 500.

Sec. 41. Sessions of the Legislature, 500.

42. Adjournments, 500.

43. Duration of Session — Extra and Special Sessions, 501.

44. Enacting Clause — English Language, 501.

45. Title of Laws, 501.

46. Reading of Bills, 501.

47. Certification of Bills from One House to the Other, 502.

48. Signing Bills, 502.

49. Veto of Governor, 502.

50. Procedure upon Receipt of Veto, 502.

51. Failure to Sign or Veto, 502.

52. Appropriations, 502.

53. Estimates for Appropriations, 503.

54. Failure to appropriate for Current Expenses — Extra Session, 503.

55. Legislative Power, 503.

56. Town, City, and County Government, 506.

Elections, 506.

Sec. 57. Exemption of Electors on Election Day, 506.

58. Military Service on Election Day, 507.

59. Method of Voting for Representatives, 507.

60. Qualifications of Voters for Representatives, 507.

61. Method of Voting for Senators, 507.

62. Qualifications of Voters for Senators and in all Other Elections, 508.

63. Disqualification of Persons in Military Service, 508.

64. Rules and Regulations for Administering Oaths and Holding Elections — Ballou's Compilation, 508.

65. Altering Boundaries of Election Districts, 509.

IV. The Executive, 509.

Act of April 30, 1900, ch. 339, 509.

Chapter III. The Executive, 509.

Sec. 66. The Executive Power, 509.

67. Enforcement of Law, 510.

68. General Powers of the Governor, 510.

69. Secretary of the Territory, 510.

70. Acting Governor in Certain Contingencies, 511.

71. Attorney-General, 511.

72. Treasurer, 511.

73. Commissioner of Public Lands, 511.

74. Commissioner of Agriculture and Forestry, 515.

75. Superintendent of Public Works, 515.

76. Superintendent of Public Instruction — Labor Statistics, 516.

77. Auditor and Deputy Auditor, 516.

78. Surveyor, 516.

79. High Sheriff, 516.

80. Appointment, Removal, Tenure, and Salaries of Officers, 517.

V. The Judiciary, 518.

Act of April 30, 1900, ch. 339, 518.

Chapter IV. The Judiciary, 518.

Sec. 81. The Judiciary, 518.

82. Supreme Court, 518.

83. Laws Continued in Force, 519.

84. Disqualification by Relationship, Pecuniary Interest, or Previous Judgment, 519.

VI. United States Officers, 521.

Act of April 30, 1900, ch. 339, 521

Chapter V. United States Officers, 521.

Sec. 85. Delegate to Congress, 521.

86. Federal Court, 521.

87. Internal-Revenue District, 523.

VII. Miscellaneous, 523.

Act of April 30, 1900, ch. 339, 523.

Chapter VI. Miscellaneous, 523.

Sec. 89. Revenues from Wharves, 523.

90. Disposition of Hawaiian Postage Stamps, 524.

91. Disposition of Public Property Ceded to the United States, 524.

92. Salaries of Officers, 525.

93. Imports from Hawaii into the United States, 525.

94. Investigation of Fisheries, 525.

95. Repeal of Laws Conferring Exclusive Fishing Rights, 526.

96. Proceedings for Opening Fisheries to Citizens, 526.

97. Quarantine, 526.

98. American Register for Certain Vessels, 527.

99. Crown Land Free from Trusts, etc., 527.

Sec. 100. Naturalization, 527.

101. Certificates of Residence for Chinese, 528.

102. Postal Savings Banks, 528.

103. Surplus, etc., in Postal Savings Bank to Be Paid into United States Treasury, 529.

104. When Act Takes Effect, 529.

Act of Jan. 14, 1903, ch. 186, 529.

Sec. 1. Hawaiian Silver Coins Receivable for Government Dues, 529.

2. To Be Recoined in United States Subsidiary Coins, 530.

3. Exchange for United States Coins, 530.

4. Payment for Mutilated Coins, 530.

5. To Be Legal Tender until Jan. 1, 1904, 530.

6. Redemption of Silver Certificates, 530.

7. Limitation of United States Liability, 530.

Act of May 26, 1906, ch. 2561, 531.

Disposal of Ceded Property — Confirmation of Former Sales — Proceeds, 531.

CROSS-REFERENCES

Census in, see CENSUS.

Customs Officers and Ports of Entry, see CUSTOMS DUTIES.

Hospital Station for the Study of Leprosy, see HOSPITALS AND ASYLUMS.

Pay and Retirement of Officers and Men Serving in, see WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

I. ANNEXATION OF TERRITORY

Joint Resolution To provide for annexing the Hawaiian Islands to the United States.

[*Res. of July 7, 1898, No. 55, 30 Stat. L. 750.*]

[SEC. 1.] [**Cession accepted.**] That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or

persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations.

The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper. [30 Stat. L. 750, 751.]

This is the first section of the "Hawaiian Annexation Resolution," or the "Newlands Resolution," and was preceded by the following preamble:

"Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore," [30 Stat. L. 150.]

Power to acquire territory by cession.—The Constitution of the United States implies the power to acquire territory by cession or conquest, and that power carries with it all proper and incidental power. *Peacock v. Hawaii*, (1899) 12 Hawaii 27. See also PHILIPPINE ISLANDS; PORTO RICO.

Annexation.—Until this resolution was signed by the President, the republic of Hawaii possessed all the attributes of sov-

ereignty; on the consummation of annexation all the rights of sovereignty were relinquished by the republic and granted to the United States. During the period taken by the federal government to perfect a new system all the functions of the government remained for exercise by the existing republic. *Spencer v. McStocker*, (1898) 11 Hawaii 581.

Date of formal transfer.—Though the resolution of annexation was passed July

7, 1898, the formal transfer was not made until Aug. 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States. *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016.

While the purpose was to acquire and extend the sovereignty of the United States over the islands, it was proposed only to provide, by the resolution of annexation, a provisional government until Congress should become possessed of the information necessary to enable it to determine what should be the permanent status of the annexed territory. The meaning of the resolution thus indicated by its terms is reflexly demonstrated by the Act of April 30, 1900, ch. 339 (*infra*, p. 490, by which the islands were undoubtedly made a part of the United States in the fullest sense, and given a territorial form of government. The mere annexation did not affect the incorporation of the islands into the United States, and the provisions of the Constitution as to grand and petit juries were not, by the resolution of annexation, made applicable. *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016.

Extension of Constitution to Hawaii.—One of the grounds for believing that Congress did not intend fully to extend the Constitution to Hawaii or fully to incorporate those islands as an integral part of the United States, is the construction put upon the resolution by Congress itself as shown by the Organic Act of April 30, 1900, ch. 339 (*infra*, p. 490). *See p. Ah Oi*, (1901) 13 *Hawaii* 534.

All municipal legislation contrary to the Constitution of the United States ceased to be of force or effect after the twelfth day of August, 1898. *See p. Edwards*, (1900) 13 *Hawaii* 32.

The power to permit the government of a newly acquired territory to continue for such reasonable time as may be deemed necessary and proper by the political department of the acquiring government, is one of the incidental powers carried with the sovereign power to acquire territory; and this is so whether the territory is acquired by cession or conquest, by treaty or joint resolution. *Peacock v. Hawaii*, (1899) 12 *Hawaii* 27.

Between annexation and the organization of the territory, the laws of Hawaii, with certain exceptions, remained in force. *Hawaii v. Edwards*, (1898) 11 *Hawaii* 571.

In continuing the municipal legislation of the island not contrary to the Constitution of the United States it was not intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately, and without legislation, the common-law proceedings by grand and petit jury which had been held applicable to other organ-

ized territories. *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016.

Inconsistent Hawaiian law.—Any law of the Hawaiian Islands inconsistent with the terms of this resolution of annexation is invalid and inapplicable. (1898) 22 *Op. Atty-Gen.* 249.

The vessel registry laws of Hawaii were not abrogated immediately upon annexation. *Spencer v. McStocker*, (1899) 12 *Hawaii* 66, (1898) 11 *Hawaii* 581.

Customs laws and regulations.—Under this resolution, until Congress acted, the government of Hawaii had the lawful right to collect customs duties prescribed by its laws. *Peacock v. Hawaii*, (1899) 12 *Hawaii* 27.

The provision above, relative to customs laws and regulations, is a valid exercise of power by Congress. *See p. Ah Oi*, (1901) 13 *Hawaii* 546.

The provision that existing customs relations of the Hawaiian Islands with the United States and other countries should remain unchanged until legislation should be enacted extending the United States customs laws to such islands, was only declaratory of what would have been, without expression, the proper construction of the resolution so far as the tariff laws of the United States are concerned. (1899) 22 *Op. Atty-Gen.* 565.

This resolution was held to be constitutional against the following objections: First. That the Constitution of the United States is in full force and effect in all the territory of the United States. Second. That among the limitations to which Congress is subjected in dealing with territories is the requirement that all duties, etc., shall be uniform throughout the United States. Third. That one of the limitations under which Congress legislates is that no tax or duty shall be laid on articles exported from any state. Fourth. That the Tariff Act levying duties upon articles imported from foreign countries does not apply to goods brought into one of the ports of the United States from a place which has theretofore been annexed as part of the territory of the United States. *Crossman v. U. S.*, (1900) 105 *Fed.* 608.

Honolulu was held to be a Pacific port of the United States under the Tariff Act of 1897. (1902) 24 *Op. Atty-Gen.* 6. See the notes to section 87 of this Act, *infra*, p. 523.

Chinese immigration.—By virtue of the above provision relating to Chinese immigration, United States laws upon the subject were extended to and put in force in the Hawaiian Islands. *Matter of Wong Tuck*, (1899) 11 *Hawaii* 600. See also *Matter of Ah Ho*, (1899) 11 *Hawaii* 654. See **CHINESE EXCLUSION**.

The Secretary of the Treasury has authority to admit to the Hawaiian Islands such Chinese persons as departed therefrom under regulations of the existing

government allowing them to return, as they are not excluded by the extension to the islands of the law and regulations now operative within the United States. (1899) 22 Op. Atty.-Gen. 353.

There is nothing in this resolution, nor in any law of Congress, which would prevent the entrance into these islands of Chinese legally resident in the United States and holding certificates of registration. "The further immigration" of Chinese forbidden by this resolution is immigration from countries other than the United States. The question of the right of such Chinese persons to return to the United States from the Hawaiian Islands is not decided. (1901) 23 Op. Atty.-Gen. 487.

The restrictions placed upon the admission to the United States of Chinese persons of the exempt class, and the regulations affecting the departure and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands or to such persons residing there who may wish to depart with the intention of returning. (1898) 22 Op. Atty.-Gen. 249.

Public lands.—In 1899 Attorney-General Griggs ruled as follows in a communication to the President respecting the public lands of the Hawaiian Islands: Congress having failed to legislate on the subject of public lands for the Hawaiian Islands, the government of Hawaii is not reinvested with its former power of their disposition. The Hawaiian Republic, as a separate and sovereign power, ceased to exist when the resolution of annexation took effect, and it exists as an organized government only for the purpose of municipal legislation and for such special purposes as were expressed in the resolution, the sale and disposition of the public lands not being one of the latter class. The term "municipal legislation" is limited to that class of laws that relates solely to the internal affairs of the country and the relations of the people to each other. By the resolution of annexation the public property of Hawaii, including the lands, became vested in the United States, and only by their authority or direction can those lands be disposed of. All interest of the Republic of Hawaii in public lands at the time the resolution of annexation took effect was thereby transferred to the United States, and thenceforth the officials of Hawaii were without power to convey by grant or cession the legal or equitable title of the United States. The resolution of annexation took effect as of the date of its approval, to wit, July 7, 1898, with respect to public lands, and not Aug. 12, 1898, the date on

which the ceremonies took place formally transferring possession. The Hawaiian government has no power to convey or confirm title to public lands where conditional sales or entries were made prior to the resolution of annexation, and the conditions entitling such persons or entrymen to a grant have been subsequently performed. (1899) 22 Op. Atty.-Gen. 627.

By the resolution of annexation the government of Hawaii was deprived of all authority to dispose of public lands in any manner whatsoever, except by virtue of special laws enacted by Congress. The officers of the Hawaiian government have no authority to sell or otherwise dispose of the public lands in the Hawaiian Islands, and any such sales or agreements to sell are absolutely null and void as against the government of the United States. (1899) 22 Op. Atty.-Gen. 574.

Criminal convictions and verdicts rendered before the legislature could act, in accordance with existing legislation, but not in accordance with the Constitution of the United States, are not nullified by this resolution. *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016.

During the transition period between annexation and territorial organization, felons could be lawfully prosecuted without the intervention of the grand jury, and convicted by nine out of twelve petit jurors. *Hawaii v. Edwards*, (1899) 12 Hawaii 55; *Hawaiian Star Newspaper Assoc. v. Saylor*, (1898) 12 Hawaii 64; *Ex p. Mankichi*, (1901) 13 Hawaii 570, following *Ex p. Ah Oi*, (1901) 13 Hawaii 534.

No person could be put upon trial for an infamous crime after Aug. 12, 1898, without having been first indicted by a grand jury, nor could one be convicted of such a crime save by the unanimous verdict of twelve jurors. *Ex p. Edwards*, (1900) 13 Hawaii 32.

Title to military reservation at Kahauiki.—By the joint resolution of Congress accepting the cession of the Hawaiian Islands and the transfer to the United States of the ownership of all public lands therein, and by acquiring by purchase from individuals the leases held by them covering the lands comprising the military reservation at Kahauiki, Oahu Island, the United States acquired complete title to that reservation. (1904) 25 Op. Atty.-Gen. 225.

In fixing upon the proper construction to be given to this resolution it is important to bear in mind the history and condition of the islands prior to their annexation. This history and condition is reviewed by Mr. Justice Brown in *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016.

SEC. 2. [Appointment of commissioners.] That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate. [30 Stat. L. 751.]

SEC. 3. [Appropriation.] That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect. [30 Stat. L. 751.]

II. GOVERNMENT OF TERRITORY GENERALLY

An Act To provide a government for the Territory of Hawaii.

[Act of April 30, 1900, ch. 339, 31 Stat. L. 141.]

CHAPTER I.—GENERAL PROVISIONS.

DEFINITIONS.

SEC. 1. That the phrase "the laws of Hawaii," as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America.

The constitution and statute laws of the Republic of Hawaii then in force, set forth in a compilation made by Sidney M. Ballou under the authority of the legislature, and published in two volumes entitled "Civil Laws" and "Penal Laws," respectively, and in the Session Laws of the Legislature for the session of eighteen hundred and ninety-eight, are referred to in this Act as "Civil Laws," "Penal Laws," and "Session Laws." [31 Stat. L. 141.]

This is the first section of chapter 1 of the "Hawaii Territorial Act." Said Act consists of six chapters, which are given in their numerical order throughout this title. Under subdivision VII of this title, *infra*, p. 523, are placed separate Acts relating to particular matters in the territory.

"Laws of Hawaii."—The construction of this phrase in the first, fifth, and sixth sections of the Act is considered in the case of *The Schooner Robert Lewers Co. v. Kekauoha*, (C. C. A. 1902) 114 Fed. 849, 52 C. C. A. 483.

By this Act it was provided that the laws of Hawaii not inconsistent with the laws and the Constitution of the United States, or the provisions of the Act, should remain in force, subject to repeal or

amendment. *Mutual Life Ins. Co. v. McGrew*, (1903) 188 U. S. 291, 23 S. Ct. 375, 47 U. S. (L. ed.) 480.

Eminent domain—jury trial.—By the Hawaiian statute itself an issue of fact in respect to the value of land sought to be taken by the United States in the exercise of the power of eminent domain must be tried by jury. *U. S. v. Honolulu Plantation Co.*, (C. C. A. 1903) 122 Fed. 581, 58 C. C. A. 279.

TERRITORY OF HAWAII.

SEC. 2. That the islands acquired by the United States of America under an Act of Congress entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States," approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii. [31 Stat. L. 141.]

The Res. of July 7, 1898, No. 55, mentioned in this section is given *supra*, p. 486.

Incorporated territory.—By this Act the Hawaiian Islands are given the status of an incorporated territory. *Downes v.*

Bidwell, (1901) 182 U. S. 244, 21 S. Ct. 770, 45 U. S. (L. ed.) 1088.

GOVERNMENT OF THE TERRITORY OF HAWAII.

SEC. 3. That a Territorial government is hereby established over the said Territory, with its capital at Honolulu, on the island of Oahu. [31 Stat. L. 141.]

CITIZENSHIP.

SEC. 4. That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.

And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight, and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii. [31 Stat. L. 141.]

Chinese citizens.—Chinese persons who on Aug. 12, 1898, were citizens of the republic of Hawaii, become by virtue of this section citizens of the United States. (1901) 23 Op. Atty.-Gen. 509; (1901) 23 Op. Atty.-Gen. 352; (1901) 23 Op. Atty.-Gen. 345.

A Chinese child born in Hawaii in 1885, and taken to China by his mother, is entitled to re-enter that territory where his father still resides. (1901) 23 Op. Atty.-Gen. 345.

APPLICATION OF THE LAWS OF THE UNITED STATES.

SEC. 5. That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying several appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: *Provided*, That sections eighteen hundred and forty-one to eighteen hundred and ninety-one, inclusive, nineteen hundred and ten and nineteen hundred and twelve, of the Revised Statutes, and the amendments thereto, and an Act entitled "An Act to prohibit the passage of local or special laws in the Territories of the United States, to limit territorial indebtedness, and for other purposes," approved July thirtieth, eighteen hundred and eighty-six, and the amendments thereto, shall not apply to Hawaii. [31 Stat. L. 141, as amended by 36 Stat. L. 443.]

This section was amended to read as above given by an Act of May 27, 1910, ch. 258, § 1. As originally enacted it was as follows:

"SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States:

"*Provided*, That sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the Territory of Hawaii." [31 Stat. L. 141.]

For R. S. secs. 1841-1891 and the Act of July 30, 1886, ch. 818, mentioned in the text see the title TERRITORIES.

By this Act the Constitution is formally extended to these islands. *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016.

Constitutional amendments.—The seventh amendment of the United States Constitution is in full force in Hawaii. *Bannister v. Lucas*, (1912) 21 Hawaii 222, Ann. Cas. 1916A 1138.

Jurisdiction of courts.—As to the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit under this section,

see *Wright v. MacFarlane*, (C. C. A. 1903) 122 Fed. 770, 58 C. C. A. 570.

National Banking Acts.—This Act extends the National Banking Acts of the United States (see NATIONAL BANKS) to the territory of Hawaii, and would authorize the comptroller to grant permission for the organization of national banks therein. (1900) 23 Op. Atty.-Gen. 177.

Unanimity of verdicts is essential under the provisions of this Act, but it may be waived. *Pringle v. Hilo Mercantile Co.*, (1901) 13 Hawaii 705.

LAWS OF HAWAII.

SEC. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States. [*31 Stat. L. 142.*]

Authority of Congress.—Congress in the exercise of its power to govern the territories had the authority to make the above provision. *Tomikawa v. Gama*, (1902) 14 Hawaii 431. See also *In re Austin*, (1903) 15 Hawaii 114.

Municipal corporation.—It appears that Congress did not intend, in creating the territory, to create a municipal corporation proper with the liabilities of such corporations. *Coffield v. Territory*, (1901) 13 Hawaii 478.

Federal courts following construction of local statutes by Hawaiian courts.—The federal courts will follow the construction given by the courts of the government of Hawaii to local statutes. *Kea-*

loha v. Castle, (1908) 210 U. S. 153, 28 S. Ct. 684, 52 U. S. (L. ed.) 998.

Jurisdiction of crime in Honolulu harbor.—There is nothing in the Hawaiian Organic Act which expressly or impliedly deprives the federal courts of their jurisdiction under R. S. sec. 5339 (now embodied in Penal Laws, §§ 272, 273, see title PENAL LAWS) to punish a murder committed on board a ship lying in the harbor of Honolulu. *Wynne v. U. S.*, (1910) 217 U. S. 234, 30 S. Ct. 447, 54 U. S. (L. ed.) 748.

Cited without specific application in *Bannister v. Lucas*, (1912) 21 Hawaii 222, Ann. Cas. 1916A 1136.

[LAWS REPEALED.]

SEC. 7. That the constitution of the Republic of Hawaii and the laws of Hawaii, as set forth in the following acts, chapters, and sections of the civil laws, penal laws, and session laws, and relating to the following subjects, are hereby repealed:

CIVIL LAWS: Sections two and three, Promulgation of laws; chapter five, Flag and seal; sections thirty to thirty-three, inclusive, Tenders for supplies; chapter seven, Minister of foreign affairs; chapter eight, Diplomatic and consular agents; sections one hundred and thirty-four and one hundred and thirty-five, National museum; chapter twelve, Education of Hawaiian youths abroad; sections one hundred and fifty to one hundred and fifty-six, inclusive, Aid to board of education; chapter fourteen, Minister of the interior; sections one hundred and sixty-six to one hundred and sixty-eight, inclusive, one hundred and seventy-four and one hundred and seventy-five, Government lands; section one hundred and ninety, Board of commissioners of public lands; section four hundred and twenty-four, Bureau of agriculture and forestry; chapter thirty-one, Agriculture and manufactures; chapter thirty-two, Ramie; chapter thirty-three, Taro flour; chapter thirty-four, Development of resources; chapter thirty-five, Agriculture; section four hundred and seventy-seven, Brands; chapter thirty-seven, Patents; chapter thirty-eight, Copyrights; sections five hundred and fifty-six and five hundred and fifty-seven, Railroad subsidy; chapter forty-seven, Pacific cable; chapter forty-eight, Hospitals; chapter fifty-one, Coins and currency; chapter fifty-four, Consolidation of public debt; chapter fifty-six, Post-office; chapter fifty-seven, Exemptions from postage; chapter fifty-eight, Postal savings banks; chapter sixty-five, Import duties; chapter sixty-six, Imports; chapter sixty-seven, Ports of entry and collection districts; chapter sixty-eight, Collectors; chapter sixty-nine, Registry of vessels; section one thousand and eleven, Custom-house charges; section eleven hundred and two, Elections; section eleven hundred and thirty-two, Appointment of magistrate; last clause of first subdivision and fifth subdivision of section eleven hundred and forty-four, first subdivision of section

eleven hundred and forty-five, Jurisdiction; sections eleven hundred and seventy-three to eleven hundred and seventy-eight, inclusive, Translation of decisions; section eleven hundred and eighty-eight, Clerks of court; sections thirteen hundred and twenty-nine, thirteen hundred and thirty-one, thirteen hundred and thirty-two, thirteen hundred and forty-seven to thirteen hundred and fifty-four, inclusive, Juries; sections fifteen hundred and nine to fifteen hundred and fourteen, inclusive, Maritime matters; chapter one hundred and two, Naturalization; section sixteen hundred and seventy-eight, Habeas corpus; chapter one hundred and eight, Arrest of debtors; subdivisions six, seven, ten, twelve to fourteen of section seventeen hundred and thirty-six, Garnishment; sections seventeen hundred and fifty-five to seventeen hundred and fifty-eight, inclusive, Liens on vessels; chapter one hundred and sixteen, Bankruptcy, and sections eighteen hundred and twenty-eight to eighteen hundred and thirty-two, inclusive, Water rights.

PENAL LAWS: Chapter six, Treason; section [s] sixty-five to sixty-seven, inclusive, Foot binding; chapter seventeen, Violation of postal laws; section three hundred and fourteen, Blasphemy; sections three hundred and seventy-one to three hundred and seventy-two, inclusive [sic], Vagrants; sections four hundred and eleven to four hundred and thirteen, inclusive, Manufacture of liquors; chapter forty-three, Offenses on the high seas and other waters; sections five hundred and ninety-five and six hundred and two to six hundred and five, inclusive, Jurisdiction; section six hundred and twenty-three, Procedure; sections seven hundred and seven hundred and one, Imports; section seven hundred and fifteen, Auction license; section seven hundred and forty-five, Commercial travelers; sections seven hundred and forty-eight to seven hundred and fifty-five, inclusive, Firearms; sections seven hundred and ninety-six to eight hundred and nine, inclusive, Coasting trade; sections eight hundred and eleven and eight hundred and twelve, Peddling foreign goods; sections eight hundred and thirteen to eight hundred and fifteen, inclusive, Importation of live stock; section eight hundred and nineteen, Imports; sections eight hundred and eighty-six to nine hundred and six, inclusive, Quarantine; section eleven hundred and thirty-seven, Consuls and consular agents; chapter sixty-seven, Whale ships; sections eleven hundred and forty-five to eleven hundred and seventy-nine, inclusive, and twelve hundred and four to twelve hundred and nine, inclusive, Arrival, entry, and departure of vessels; chapters sixty-nine to seventy-six, inclusive, Navigation and other matters within the exclusive jurisdiction of the United States; sections thirteen hundred and forty-seven and thirteen hundred and forty-eight, Fraudulent exportation; chapter seventy-eight, Masters and servants; chapter ninety-three, Immigration; sections sixteen hundred and one, sixteen hundred and eight, and sixteen hundred and twelve, Agriculture and forestry; chapter ninety-six, Seditious offenses; and chapter ninety-nine, Sailing regulations.

SESSION LAWS: Act fifteen, Elections; Act twenty-six, Duties; Act twenty-seven, Exemptions from duties; Act thirty-two, Registry of vessels; section four of Act thirty-eight, Importation of live stock; Act forty-eight, Pacific cable; Act sixty-five, Consolidation of public debt; Act sixty-six, Ports of entry; and Act sixty-eight, Chinese immigration. [31 *Stat. L.* 142, 143.]

Jury trial.—For the effect of this and other sections of the act on the right to obtain trial juries in the manner pre-

scribed by the Hawaiian statutes as amended by the Organic Act, see *Territory v. Ng Kow*, (1904) 15 *Hawaii* 602.

CERTAIN OFFICES ABOLISHED.

SEC. 8. That the offices of President, minister of foreign affairs, minister of the interior, minister of finance, minister of public instruction, auditor-general, deputy auditor-general, surveyor-general, marshal, and deputy marshal of the Republic of Hawaii are hereby abolished. [31 Stat. L. 143.]

The office of Minister of the Interior was abolished by this section, and his powers and duties distributed, in so far as they were continued, among other officers. *Ninomiya v. Keпоikai*, (1903) 15 Hawaii 273.

AMENDMENT OF OFFICIAL TITLES.

SEC. 9. That wherever the words "President of the Republic of Hawaii," or "Republic of Hawaii," or "Government of the Republic of Hawaii," or their equivalents, occur in the laws of Hawaii not repealed by this Act, they are hereby amended to read "Governor of the Territory of Hawaii," or "Territory of Hawaii," or "Government of the Territory of Hawaii," or their equivalents, as the context requires. [31 Stat. L. 143.]

CONSTRUCTION OF EXISTING STATUTES.

SEC. 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed; and those in favor of or against the Republic of Hawaii, and not assumed by or transferred to the United States, shall be equally valid in favor of or against the government of the Territory of Hawaii. All offenses which by statute then in force were punishable as offenses against the Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this Act, or shall be repealed or changed by law. No person shall be subject to imprisonment for nonpayment of taxes nor for debt. All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this Act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii:

Provided, That no suit or proceedings shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or service, nor shall any remedy exist or be enforced for breach of any such contract, except in a civil suit or proceeding instituted solely to recover damages for such breach:

Provided further, That the provisions of this section shall not modify or change the laws of the United States applicable to merchant seamen.

That all contracts made since August twelfth, eighteen hundred and ninety-eight, by which persons are held for service for a definite term, are hereby declared null and void and terminated, and no law shall be passed to enforce said contracts in any way; and it shall be the duty of the United States marshal to at once notify such persons so held of the termination of their contracts.

That the Act approved February twenty-sixth, eighteen hundred and eighty-five, "To prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," and the Acts amendatory thereof and supplemental thereto, be, and the same are hereby, extended to and made applicable to the Territory of Hawaii. [31 Stat. L. 143, 144.]

The Act of Feb. 26, 1885, ch. 164, mentioned in the text, has been almost entirely superseded by the various subsequent Acts relating to the same subject. See the title IMMIGRATION.

Admiralty suits.—Congress intended to make a general provision in regard to all classes of suits and actions, of whatever nature, then pending in the courts of the republic of Hawaii, and to exclude none whatever. The words "and other proceedings" are sufficiently comprehensive when used in connection with the language which precedes them to include admiralty suits. *Wilder's Steamship Co. v. Hind*, (C. C. A. 1901) 108 Fed. 113, 47 C. C. A. 243

Suits on contracts for personal services.—The first proviso of this section does not prohibit the issuance of an injunction to restrain the exhibition or dealing in motion picture films in the territory of Hawaii in violation of a contract not to exhibit or to deal in such films. Such a contract is not one of the class which this section provides shall not be enforced, but for a violation of which the parties must be relegated to an action

for damages. *Consolidated Amusement Co. v. Hughes*, (1915) 22 Hawaii 550.

Contempt proceedings.—Enforcement by contempt proceedings of an administrator's official duty to pay a creditor a dividend is not within the prohibition in this section against imprisonment for debt. *Matter of Ahi*, (1908) 19 Hawaii 233.

Imprisonment for debt.—The writ of *ne exeat* is not now available in Hawaii in an action of *assumpsit* to prevent a defendant from going away from the territory or to compel him to give security for the payment of the judgment that may be recovered. The execution of the writ would subject the defendant to imprisonment for debt contrary to the provisions of this section. *Oahu Lumber, etc., Co. v. Ding Sing*, (1904) 15 Hawaii 413.

Limitations.—See *Kunewa v. Kaanaana*, (1907) 18 Hawaii 252.

Cited generally in *Honolulu Athletic Park v. Lowry*, (1915) 22 Hawaii 585.

STYLE OF PROCESS.

SEC. 11. That the style of all process in the Territorial courts shall hereafter run in the name of "The Territory of Hawaii," and all prosecutions shall be carried on in the name and by the authority of the Territory of Hawaii. [31 Stat. L. 144.]

III. THE LEGISLATURE

CHAPTER II.—THE LEGISLATURE.

THE LEGISLATIVE POWER.

SEC. 12. That the legislature of the Territory of Hawaii shall consist of two houses, styled, respectively, the senate and house of representatives, which shall organize and sit separately, except as otherwise herein provided.

The two houses shall be styled "The legislature of the Territory of Hawaii." [31 Stat. L. 144.]

This is the first section of chapter II of the Act of April 30, 1900, ch. 339. See the notes to section 1 of this Act, *supra*, p. 490.

[QUALIFICATION OF MEMBERS.]

SEC. 13. That no person shall sit as a senator or representative in the legislature unless elected under and in conformity with this Act. [31 Stat. L. 144.]

Cited generally in *Cooke v. Thayer*, (1914) 22 Hawaii 247.

GENERAL ELECTIONS.

SEC. 14. That a general election shall be held on the Tuesday next after the first Monday in November, nineteen hundred, and every second year thereafter: *Provided, however,* That the governor may, in his discretion, on thirty days' notice, order a special election before the first general election, if, in his opinion, the public interests shall require a special session of the legislature. [31 Stat. L. 144.]

For a case under this section, see *Fairchild v. Smith*, (1903) 15 Hawaii 265.
Cited, without specific application, in *Lane v. Fern*, (1910) 20 Hawaii 290, Ann.

Cas. 1913B 155; *Cooke v. Thayer*, (1914) 22 Hawaii 247.

Amendment of election laws.— See note under sec. 85 of this Act, *infra*, p. 521.

EACH HOUSE JUDGE OF QUALIFICATIONS OF MEMBERS.

SEC. 15. That each house shall be the judge of the elections, returns, and qualifications of its own members. [31 Stat. L. 145.]

Neither the secretary of the territory nor the courts should undertake to pass upon the question of the eligibility of a candidate, in view of this section, except

when it is clearly their duty to do so. The jurisdiction of each house of the legislature is exclusive in such cases. *Harris v. Cooper*, (1902) 14 Hawaii 145.

DISQUALIFICATIONS OF LEGISLATORS.

SEC. 16. That no member of the legislature shall, during the term for which he is elected, be appointed or elected to any office of the Territory of Hawaii. [31 Stat. L. 145.]

DISQUALIFICATIONS OF GOVERNMENT OFFICERS AND EMPLOYEES.

SEC. 17. That no person holding office in or under or by authority of the Government of the United States or of the Territory of Hawaii shall be eligible to election to the legislature, or to hold the position of a member of the same while holding said office. [31 Stat. L. 145.]

[IDIOTS, CONVICTS, ETC.]

SEC. 18. No idiot or insane person, and no person who shall be expelled from the legislature for giving or receiving bribes or being accessory thereto, and no person who, in due course of law, shall have been convicted of any criminal offense punishable by imprisonment, whether with or without hard labor, for a term exceeding one year, whether with or without fine, shall register to vote or shall vote or hold any office in, or under, or by authority of, the government, unless the person so convicted shall have been pardoned and restored to his civil rights. [31 Stat. L. 145.]

The mere commission of an offense, without conviction, is not a disqualification under this section. *Kanealii v. Hardy*, (1905) 17 Hawaii 9.

Irregular or fraudulent nomination.— One implicated in fraud or forgery in

securing a nomination to office and convicted therefor, can be ousted from the office under this section. *Territory v. Kanealii*, (1906) 17 Hawaii 243, 7 Ann. Cas. 837.

OATH OF OFFICE.

SEC. 19. That every member of the legislature, and all officers of the government of the Territory of Hawaii, shall take the following oath or affirmation:

I solemnly swear (or affirm), in the presence of Almighty God, that I will faithfully support the Constitution and laws of the United States, and conscientiously and impartially discharge my duties as a member of the legislature, or as an officer of the government of the Territory of Hawaii (as the case may be). [31 Stat. L. 145.]

Oath of attorneys.—The Organic Act did not require those who held licenses as attorneys to take any new oath. Section 19 made this obligatory only upon “every member of the legislature and all officers of the government of the territory.” *Matter of Davis*, (1904) 15 Hawaii 377.

OFFICERS AND RULES.

SEC. 20. That the senate and house of representatives shall each choose its own officers, determine the rules of its own proceedings, not inconsistent with this Act, and keep a journal. [31 Stat. L. 145.]

AYES AND NOES.

SEC. 21. That the ayes and noes of the members on any question shall, at the desire of one-fifth of the members present, be entered on the journal. [31 Stat. L. 145.]

QUORUM.

SEC. 22. That a majority of the number of members to which each house is entitled shall constitute a quorum of such house for the conduct of ordinary business, of which quorum a majority vote shall suffice; but the final passage of a law in each house shall require the vote of a majority of all the members to which such house is entitled. [31 Stat. L. 145.]

[SMALLER NUMBER THAN QUORUM MAY ADJOURN.]

SEC. 23. That a smaller number than a quorum may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may provide. [31 Stat. L. 145.]

[ASCERTAINING QUORUM.]

SEC. 24. That, for the purpose of ascertaining whether there is a quorum present, the chairman shall count the number of members present. [31 Stat. L. 145.]

PUNISHMENT OF PERSONS NOT MEMBERS.

SEC. 25. That each house may punish by fine, or by imprisonment not exceeding thirty days, any person not a member of either house who shall be guilty of disrespect of such house by any disorderly or contemptuous behavior in its presence or that of any committee thereof; or who shall, on account of the exercise of any legislative function, threaten harm to the body or estate of any of the members of such house; or who shall assault, arrest, or detain any witness or other person ordered to attend such house, on his way going to or returning therefrom; or who shall rescue any person arrested by order of such house.

But the person charged with the offense shall be informed, in writing, of the charge made against him, and have an opportunity to present evidence and be heard in his own defense. [31 Stat. L. 146.]

COMPENSATION OF MEMBERS.

SEC. 26. That the members of the legislature shall receive for their services, in addition to mileage at the rate of ten cents a mile each way, the sum of six hundred dollars for each regular session, payable in three equal installments on and after the first, thirtieth, and fiftieth days of the session, and the sum of two hundred dollars for each special session: *Provided*, That they shall receive no compensation for any extra session held under the provisions of section fifty-four of this Act. [31 Stat. L. 146, as amended by 36 Stat. L. 444.]

This section was amended to read as above given by an Act of May 27, 1910, ch. 258, § 2. As originally enacted it was as follows:

"SEC. 26. That the members of the legislature shall receive for their services, in addition to mileage at the rate of ten cents a mile each way, the sum of four hundred dollars for each regular session of the legislature, payable in three equal installments on and after the first, thirtieth, and fiftieth days of the session, and the sum of two hundred dollars for each extra session of the legislature." [31 Stat. L. 146.]

The Legislative, Executive, and Judicial Appropriation Act of July 16, 1914, ch. 141, 38 Stat. L. 749, provided:

"That the members of the Legislature of the Territory of Hawaii shall not draw their compensation of \$200 or any mileage for an extra session, held in compliance with section fifty-four of an Act to provide a government for the Territory of Hawaii, approved April thirtieth, nineteen hundred."

Similar provisions have appeared in like Appropriation Acts for previous years.

PUNISHMENT OF MEMBERS.

SEC. 27. That each house may punish its own members for disorderly behavior or neglect of duty, by censure, or by a two-thirds vote suspend or expel a member. [31 Stat. L. 146.]

EXEMPTION FROM LIABILITY.

SEC. 28. That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions in either house. [31 Stat. L. 146.]

EXEMPTION FROM ARREST.

SEC. 29. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of over ten days each way. [31 Stat. L. 146.]

THE SENATE.

NUMBER OF MEMBERS.

SEC. 30. That the Senate shall be composed of fifteen members, who shall hold office for four years: *Provided, however*, That of the senators elected at the first general election, two from the first district, one from the second, three from the third, and one from the fourth district shall hold office for two years only, the details of such apportionment to be provided for by the legislature. [31 Stat. L. 146.]

As much of the foregoing section as is contained in the proviso was superseded by an Act of May 19, 1902, ch. 817, 32 Stat. L. 200, which provided for the term of office of senators of the first election.

VACANCIES.

SEC. 31. That vacancies caused by death, resignation, or otherwise shall be filled for the unexpired term at general or special elections. [31 Stat. L. 146.]

SENATORIAL DISTRICTS.

SEC. 32. That for the purpose of representation in the senate, until otherwise provided by law, the Territory is divided into the following senatorial districts, namely:

First district: The island of Hawaii.

Second district: The islands of Maui, Molokai, Lanai, and Kahoolawe.

Third district: The island of Oahu.

Fourth district: The islands of Kauai and Niihau. [31 Stat. L. 147.]

[APPORTIONMENT.]

SEC. 33. That the electors in the said districts shall be entitled to elect senators as follows:

In the first district, four;

In the second district, three;

In the third district, six;

In the fourth district, two. [31 Stat. L. 147.]

QUALIFICATIONS OF SENATORS.

SEC. 34. That in order to be eligible to election as a senator a person shall —

Be a male citizen of the United States;

Have attained the age of thirty years;

Have resided in the Hawaiian Islands not less than three years and be qualified to vote for senators in the district from which he is elected. [31 Stat. L. 147.]

Section 31, Revised Laws of Hawaii, conflict with section 34 of the Organic Act. prescribing the time within which nomination certificates must be filed, is not in Chandler v. Mott-Smith, (1908) 19 Hawaii 225.

THE HOUSE OF REPRESENTATIVES.

NUMBER OF REPRESENTATIVES.

SEC. 35. That the house of representatives shall be composed of thirty members, elected, except as herein provided, every second year. [31 Stat. L. 147.]

TERM OF OFFICE.

SEC. 36. That the term of office of the representatives elected at any general or special election shall be until the next general election held thereafter. [31 Stat. L. 147.]

Cited generally in Cooke v. Thayer, (1914) 22 Hawaii 247.

VACANCIES.

SEC. 37. That vacancies in the office of representative caused by death, resignation, or otherwise shall be filled for the unexpired term at special elections. [31 Stat. L. 147.]

REPRESENTATIVE DISTRICTS.

SEC. 38. That for the purpose of representation in the house of representatives, until otherwise provided by law, the Territory is divided into the following representative districts, namely:

First district: That portion of the island of Hawaii known as Puno, Hilo, and Hamakua.

Second district: That portion of the island of Hawaii known as Kau, Kona, and Kohala.

Third district: The islands of Maui, Molokai, Lanai, and Kahoolawe.

Fourth district: That portion of the island of Oahu lying east and south of Nuuanu street and a line drawn in extension thereof from the Nuuanu Pali to Mokapu Point.

Fifth district: That portion of the island of Oahu lying west and north of the fourth district.

Sixth district: The islands of Kauai and Niihau. [31 Stat. L. 147.]

APPORTIONMENT.

SEC. 39. That the electors in the said districts shall be entitled to elect representatives as follows:

In the first district, four;

In the second district, four;

In the third district, six;

In the fourth district, six;

In the fifth district, six;

In the sixth district, four. [31 Stat. L. 148.]

QUALIFICATIONS OF REPRESENTATIVES.

SEC. 40. That in order to be eligible to be a member of the house of representatives a person shall, at the time of election —

Have attained the age of twenty-five years;

Be a male citizen of the United States;

Have resided in the Hawaiian Islands not less than three years;

And shall be qualified to vote for representatives in the district from which he is elected. [31 Stat. L. 148.]

Section 31, Revised Laws of Hawaii, is not in conflict with this section of the Organic Act. *Chandler v. Mott-Smith*, (1908) 19 Hawaii 225.

For a case under this section, involving ineligibility to membership in the house of representatives, see *Harris v. Cooper*, (1902) 14 Hawaii 145.

LEGISLATION.

SESSIONS OF THE LEGISLATURE.

SEC. 41. That the first regular session of the legislature shall be held on the third Wednesday in February, nineteen hundred and one, and biennially thereafter, in Honolulu. [31 Stat. L. 148.]

[ADJOURNMENTS.]

SEC. 42. That neither house shall adjourn during any session for more than three days, or sine die, without the consent of the other. [31 Stat. L. 148.]

[DURATION OF SESSION — EXTRA AND SPECIAL SESSIONS.]

SEC. 43. That each session of the legislature shall continue not longer than sixty days, excluding Sundays and holidays: *Provided, however,* That the governor may extend such session for not more than thirty days.

The governor may convene the legislature, or the senate alone, in special session, and, in case the seat of government shall be unsafe from an enemy, riot, or insurrection, or any dangerous disease, direct that any regular or special session shall be held at some other than the regular meeting place. [31 Stat. L. 148.]

ENACTING CLAUSE — ENGLISH LANGUAGE.

SEC. 44. That the enacting clause of all laws shall be, "Be it enacted by the legislature of the Territory of Hawaii." All legislative proceedings shall be conducted in the English language. [31 Stat. L. 148.]

TITLE OF LAWS.

SEC. 45. That each law shall embrace but one subject, which shall be expressed in its title. [31 Stat. L. 148.]

Construction.—The provision of this section that "each law shall embrace but one subject, which shall be expressed in its title," should be liberally construed. The title may be broader than the Act, provided it is not delusive; the Act may cover different matters, provided they have natural connection and are fairly embraced in one subject. A provision limiting civil jury trials, unless by consent, to the first sixty days of each term in the first circuit, may properly be included in an Act purporting in its title to amend a certain section of the Revised Laws "relating to terms of the Circuit Courts," the other provisions of which Act relate to the length, adjournment, and extension of the terms in the several circuits. *Ahmi v. Buckle*, (1905) 17 Hawaii 200.

Force and effect.—This section has the force and effect of a constitutional requirement and is mandatory. *Territory v. Kua*, (1914) 22 Hawaii 307.

Section violated.—In *Dole v. Cooper*, (1903) 15 Hawaii 297, it was held that an Act entitled "An Act providing for the organization and government of counties and districts, and the management and control of public works and institutions therein," was invalid as to so much thereof as purported to create a territorial board of public institutions and to transfer to it matters theretofore belonging to the territorial superintendent of public works, and with which the counties were

to have nothing to do—in view of section 45 of the Act given in the text.

So in *Territory v. Oahu County*, (1904) 15 Hawaii 365, it was held that so much of Act 31, Laws of 1903, known as the County Act, as provides new features in territorial taxation not incidental to county organization or government, was void under the provision of this section, and that the void portion was such an essential feature as to vitiate the whole Act.

Act 99, Session Laws 1913, was entitled "An Act to amend section 1323 of the Revised Statutes as amended by Act 151 of the Laws of 1909, relating to the issuance of licenses. But the body of the Act contained a proviso relating to the payment of taxes. The proviso was held void as not expressed in the title. *Territory v. Kua*, (1914) 22 Hawaii 307.

Enactment by reference.—The short Act by which the legislature enacted the Revised Laws of Hawaii as a whole, by reference, was not in violation of this section, and said Revised Laws were constitutionally enacted. *Matter of Tom Pong*, (1906) 17 Hawaii 566.

Act 143 of the Session Laws of 1911 was held not to be in conflict with this section, a proper construction of the body of the Act showing that there is no variance or inconsistency between body and title. The subject of the Act is that which the title expresses. *Smithies v. Conkling*, (1911) 20 Hawaii 600.

READING OF BILLS.

SEC. 46. That a bill in order to become a law shall, except as herein provided, pass three readings in each house, on separate days, the final passage of which in each house shall be by a majority vote of all the members to

which such house is entitled, taken by ayes and noes and entered upon its journal. [31 Stat. L. 148.]

The court may examine the legislative journals to ascertain whether a statute did in fact pass three readings in each

branch of the legislature as required by this section. *Smithies v. Conkling*, (1911) 20 Hawaii 600.

CERTIFICATION OF BILLS FROM ONE HOUSE TO THE OTHER.

SEC. 47. That every bill when passed by the house in which it originated, or in which amendments thereto shall have originated, shall immediately be certified by the presiding officer and clerk and sent to the other house for consideration. [31 Stat. L. 149.]

SIGNING BILLS.

SEC. 48. That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. [31 Stat. L. 149.]

VETO OF GOVERNOR.

SEC. 49. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it, and it shall become a law. If the governor does not approve such bill, he may return it, with his objections, to the legislature.

He may veto any specific item or items in any bill which appropriates money for specific purposes; but shall veto other bills, if at all, only as a whole. [31 Stat. L. 149.]

PROCEDURE UPON RECEIPT OF VETO.

SEC. 50. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes, which shall be entered upon its journal.

If after such reconsideration such bill, or part of a bill, shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become law. [31 Stat. L. 149.]

FAILURE TO SIGN OR VETO.

SEC. 51. That if the governor neither signs nor vetoes a bill within ten days after it is delivered to him it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such ten days.

If any bill shall not be returned by the governor within ten days. (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature by their adjournment prevents its return, in which case it shall not be a law. [31 Stat. L. 149.]

APPROPRIATIONS.

SEC. 52. That appropriations, except as herein otherwise provided, shall be made by the legislature. [31 Stat. L. 149, as amended by 36 Stat. L. 444.]

This section was amended to read as above given by an Act of May 27, 1910, ch. 258, § 3. As originally enacted it was as follows:

"SEC. 52. That appropriations, except as otherwise herein provided, shall be made biennially by the legislature:

"*Provided, however,* That pending the time when this Act shall take effect and until a session of the legislature of the Territory of Hawaii shall be held, the President may, in his discretion, authorize and direct the use of such money in the treasury of the Republic of Hawaii as well as of the Territory of Hawaii, as he shall think requisite and proper for carrying on the government of the Territory of Hawaii, the preservation of the public health, the completion of the sewerage system of the city of Honolulu, and such other expenditures as in the President's judgment shall seem to be appropriate." [31 Stat. L. 149.]

By section 104 of this Act, *infra*, p. 529, the foregoing section 52 became effective on the approval of said Act.

Dividing the biennial period.—The provision in this section that appropriations shall be made biennially does not prevent the legislature from dividing the biennial period into two parts, namely, six months before and eighteen months after the inauguration of county government, for the purpose of making different appropria-

tions for each of those parts. *In re Boyd*, (1903) 15 Hawaii 361.

The legislature has exclusive power over money paid into the treasury and it can only be withdrawn by an appropriation by law. *In re Cummins*, (1911) 20 Hawaii 518.

[ESTIMATES FOR APPROPRIATIONS.]

SEC. 53. That the governor shall submit to the legislature, at each regular session, estimates for appropriations for the succeeding biennial period. [31 Stat. L. 149.]

[FAILURE TO APPROPRIATE FOR CURRENT EXPENSES — EXTRA SESSION.]

SEC. 54. That in case of failure of the legislature to pass appropriation bills providing for payments of the necessary current expenses of carrying on the government and meeting its legal obligations as the same are provided for by the then existing laws, the governor shall, upon the adjournment of the legislature, call it in extra session for the consideration of appropriation bills, and until the legislature shall have acted the treasurer may, with the advice of the governor, make such payments, for which purpose the sums appropriated in the last appropriation bills shall be deemed to have been reappropriated. And all legislative and other appropriations made prior to the date when this Act shall take effect, shall be available to the government of the Territory of Hawaii. [31 Stat. L. 150.]

See the note to section 26 of this, *supra*, p. 498.

Items not necessary for current expenses.—The legislature may include in an appropriation bill passed at an extra session called under the provisions of this section an item which is not for "necessary current expenses of carrying on the government," provided the matter covered by the appropriation is one for which an appropriation may rightfully be made. *In re Queen's Hospital*, (1904) 15 Hawaii 514.

Section applied.—In *In re Hawaiian Star Newspaper Assoc.*, (1904) 15 Hawaii 532, it appeared that the legislature failed at its regular session in 1903 to provide for the necessary expenses of the government for the succeeding biennial period.

In its extra session, immediately after, it passed complete appropriation bills for the first six months of the biennial period and bills providing for a portion of the necessary expenses of the last eighteen months, but failed to provide for perhaps a half of the necessary expenses for those eighteen months on the supposition that those expenses would be borne by counties under an Act which turned out to be void. It was held that the expenses so unprovided for could be paid out of the last appropriation bills by the treasurer with the advice of the governor, under this section, and that "the last appropriation bills," within the meaning of this section, were those of 1901 and not the six months bills of 1903.

LEGISLATIVE POWER.

SEC. 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and

laws of the United States locally applicable. The legislature, at its first regular session after the census enumeration shall be ascertained, and from time to time thereafter, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory; but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; nor shall it grant private charters, but it may by general act permit persons to associate themselves together as bodies corporate for manufacturing, agricultural, and other industrial pursuits, and for conducting the business of insurance, savings banks, banks of discount and deposit (but not of issue), loan, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association:

Provided, That no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States, but existing vested rights in real estate shall not be impaired.

No divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory unless the applicant therefor shall have resided in the Territory for two years next preceding the application, but this provision shall not affect any action pending when this Act takes effect;

nor shall any lottery or sale of lottery tickets be allowed;

nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the Territorial legislature shall provide;

nor shall any public money be appropriated for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government;

nor shall the government of the Territory of Hawaii, or any political or municipal corporation or subdivision of the Territory, make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof;

Nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, harbor, and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any such subdivision shall not exceed one per centum of the assessed value of the property in the Territory or subdivision, respectively, as shown by the then last assessments for taxation, whether such assessments are made by the Territory or the subdivision or subdivisions, and the total indebtedness of the Territory shall not at any time be extended beyond seven per centum

of such assessed value of property in the Territory and the total indebtedness of any such subdivision shall not at any time be extended beyond three per centum of such assessed value of property in the subdivision, but nothing in this Act shall prevent the refunding of any indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof; nor shall any bond or other instrument of any such indebtedness be issued unless made payable in not more than thirty years from the date of the issue thereof; nor shall any such bond or indebtedness be issued or incurred until approved by the President of the United States: *Provided*, That the legislature may by general act provide for the condemnation of property for public uses, including the condemnation of rights of way for the transmission of water for irrigation and other purposes. [31 Stat. L. 150, as amended by 36 Stat. L. 444.]

This section was amended by an Act of May 27, 1910, ch. 258, § 4, by changing the last paragraph beginning with the words "nor shall any debt" to read as given in the text. As originally enacted this paragraph was as follows: "Nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, and harbor and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any subdivision shall not exceed one per centum upon the assessed value of taxable property of the Territory or subdivision thereof, as the case may be, as shown by the last general assessment for taxation, and the total indebtedness for the Territory shall not at any time be extended beyond seven per centum of such assessed value, and the total indebtedness of any subdivision shall not at any time be extended beyond three per centum of such assessed value, but nothing in this provision shall prevent the refunding of any existing indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof, nor shall any bond or other instrument of any such indebtedness be issued unless made redeemable in not more than five years and payable in not more than fifteen years from the date of the issue thereof; nor shall any such bond or indebtedness be incurred until approved by the President of the United States." [31 Stat. L. 150.]

Congress in the exercise of its power to govern the territories had the authority to make the provision that the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. *Tomikawa v. Gama*, (1902) 14 Hawaii 431.

The power of the territorial legislature of Hawaii is that conferred expressly or by proper implication by the Organic Act organizing that territory, that Act standing in relation to the legislature of that territory much as the Constitution of the United States does to Congress. The grant of the power of legislation conferred by this section of that Act, within the limitation prescribed, confers the power to organize the courts of that territory, to fix their jurisdiction, and the number of their judges. The grant of power is not an abdication by Congress of any of its own power to legislate for the territory, but only a grant of such powers as Congress does not itself choose to exercise. This limitation forbids the exercise of such power whenever and to the extent that

it has been exercised by Congress in subsisting enactments. (1901) 23 Op. Atty-Gen. 539.

Taxation.—Taxation is a "rightful subject of legislation" within the meaning of that phrase as used in this section. The Income Tax Law of Hawaii was construed in relation to the provisions of the above section. *Robertson v. Pratt*, (1901) 13 Hawaii 590. See also *Keola v. Parker*, (1913) 21 Hawaii 597.

The power of taxation was conferred upon the local legislature with all the completeness and effectiveness with which that power is vested in and exercised by the legislature of any of the states. *In re Craig*, (1911) 20 Hawaii 483 [citing *Peacock v. Pratt*, (C. C. A. 9th Cir. 1903) 121 Fed. 772, 58 C. C. A. 48]; *In re Kalana*, (1914) 22 Hawaii 96; *Cassels v. Wilder*, (1915) 23 Hawaii 61.

Municipal corporations.—The provisions of this section prohibiting the granting of private charters and special franchises do not apply to municipal corporations. *Emmeluth v. Oahu County*, (1908) 19 Hawaii 171.

License of social club.—In view of the

provision of this section, "nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the territorial legislature shall provide," a failure on the part of the legislature, if any there be, to provide for licenses for social clubs would not be a defense for selling without license as provided by law. *Territory v. Pacific Club*, (1905) 16 Hawaii 507.

Intoxicating liquors.—The selling of liquor is prohibited by this section, in the absence of territorial legislation regulating or restricting it. *Territory v. Miguel*, (1907) 18 Hawaii 402.

Garnishment of senators' salaries.—A territorial statute by which the salary of a territorial senator is subject to garnishment for the payment of his debts is not in conflict with this section. See *Kong v. Chillingworth*, (1909) 19 Hawaii 428.

Police power.—The right to legislate in the exercise of the police power was conferred upon the local legislature. *In re Craig*, (1911) 20 Hawaii 483 (*citing Territory v. Guyott*, (1889) 9 Mont. 46, 22 Pac. 134); *Territory v. Hoy Chong*, (1912) 21 Hawaii 39, Ann. Cas. 1915A 1155; *Territory v. Makaiwi*, (1913) 21 Hawaii 631.

Limitation of bonded indebtedness.—The limitation in this section of bonded indebtedness of a subdivision of the territory to a certain percentage of the assessed value of taxable property of such

subdivision refers to property taxable by such subdivision, and therefore a county without the power of taxation has no power to issue bonds. *Robinson v. Baldwin*, (1908) 19 Hawaii 9.

Act 96 of the Laws of 1907 requiring a license fee of \$5 for a fishing boat with a beam of 30 inches or more is not in conflict with this section which prohibits granting special privileges or immunities. *Territory v. Matsubara*, (1909) 19 Hawaii 641.

"Rightful subject of legislation."—*Act 144, Session Laws of 1911*, which provided for the appropriation of a sum of money for the purpose of refunding the amount of a fine paid pursuant to a judgment of a court of competent jurisdiction, was held to be invalid as an invasion of judicial power in its attempt to repudiate, overturn and set aside a judgment. *In re Cummins*, (1911) 20 Hawaii 518.

Chapter 83, Revised Laws, relating to the improvements of lands, is not in violation of this section as it was not enacted in pursuance of the taxing power. *Brown v. Campbell*, (1912) 21 Hawaii 314.

The legislature has exclusive power over money paid into the treasury and it can only be withdrawn by an appropriation by law. *In re Cummins*, (1911) 20 Hawaii 518.

Cited generally in *Bannister v. Lucas*, (1912) 21 Hawaii 222, Ann. Cas. 1916A 1136.

TOWN, CITY, AND COUNTY GOVERNMENT.

SEC. 56. That the legislature may create counties and town and city municipalities within the Territory of Hawaii and provide for the government thereof; and all officials thereof shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislature of the Territory." [31 Stat. L. 151, as amended by 33 Stat. L. 1035.]

This section was amended by an Act of March 3, 1905, ch. 1465, § 1, by adding thereto the clause beginning with the words "and all officials" to the end of the section, making it read as given in the text.

Counties.—While construing the County Act to accord with the spirit and intent of this section, it is proper that the conditions under which the county system was established should be borne in mind and due significance attached to the fact that its establishment was neither coincident, as was the case in the other territories, with the establishment of a general system of laws, nor, as in cases of towns and cities in the older states, did the quasi

municipal county system antedate or grow up with a general system of laws. It is undesirable to extend powers of counties so as to duplicate unnecessarily the laws of the territory. *Territory v. McCandless*, (1908) 18 Hawaii 616, 13 Ann. Cas. 795.

Cited.—This section is cited but not construed or applied in *Castle v. Atkinson*, (1905) 16 Hawaii 769.

ELECTIONS.

EXEMPTION OF ELECTORS ON ELECTION DAY.

SEC. 57. That every elector shall be privileged from arrest on election day during his attendance at election and in going to and returning there-

from, except in case of breach of the peace then committed, or in case of treason or felony. [31 Stat. L. 151.]

[MILITARY SERVICE ON ELECTION DAY.]

SEC. 58. That no elector shall be so obliged to perform military duty on the day of election as to prevent his voting, except in time of war or public danger, or in case of absence from his place of residence in actual military service, in which case provision may be made by law for taking his vote. [31 Stat. L. 151.]

METHOD OF VOTING FOR REPRESENTATIVES.

SEC. 59. That each voter for representative may cast a vote for as many representatives as are to be elected from the representative district in which he is entitled to vote.

The required number of candidates receiving the highest number of votes in the respective representative districts shall be the representatives for such districts. [31 Stat. L. 151.]

Cited generally in *Cooke v. Thayer*, (1914) 22 Hawaii 247.

QUALIFICATIONS OF VOTERS FOR REPRESENTATIVES.

SEC. 60. That in order to be qualified to vote for representatives a person shall —

First. Be a male citizen of the United States.

Second. Have resided in the Territory not less than one year preceding and in the representative district in which he offers to register not less than three months immediately preceding the time at which he offers to register.

Third. Have attained the age of twenty-one years.

Fourth. Prior to each regular election, during the time prescribed by law for registration, have caused his name to be entered on the register of voters for representatives for his district.

Fifth. Be able to speak, read, and write the English or Hawaiian language. [31 Stat. L. 151.]

This section applies to the first election as well as to subsequent elections, to the exclusion of R. S. sec. 1859 (title TERRITORIES), which prescribes the qualifications of voters at first elections in the territories in general. *Matter of Loucks*, (1900) 13 Hawaii 17.

The provision as to residence should be construed as requiring the necessary term of residence in the Hawaiian Islands, and not necessarily after the establishment of a territorial government over said islands. *Matter of Loucks*, (1900) 13 Hawaii 17.

One who has no place of abode except on the steamer engaged in inter-island

trade is not a resident of a particular precinct, although that steamer, when at Honolulu, docks at a wharf in such precinct and Honolulu is her home port. *Matter of Irving*, (1900) 13 Hawaii 22.

Registration.—Section 60 refers to registration not as a regulation or prerequisite or condition but as a qualification. *Fairchild v. Smith*, (1913) 15 Hawaii 265.

Section 31 of the Revised Laws of Hawaii prescribing the time within which nomination certificates must be filed is not in conflict with section 60 of the Organic Act. *Chandler v. Mott-Smith*, (1908) 19 Hawaii 225.

METHOD OF VOTING FOR SENATORS.

SEC. 61. That each voter for senator may cast one vote for each senator to be elected from the senatorial district in which he is entitled to vote.

The required number of candidates receiving the highest number of votes in the respective senatorial districts shall be the senators for such district[s]. [31 Stat. L. 152.]

QUALIFICATIONS OF VOTERS FOR SENATORS AND IN ALL OTHER ELECTIONS.

SEC. 62. That in order to be qualified to vote for senators and for voting in all other elections in the Territory of Hawaii a person must possess all the qualifications and be subject to all the conditions required by this Act of voters for representatives. [31 Stat. L. 152.]

This section is not in conflict with section 31, Revised Laws of Hawaii, which prescribes the time within which nomina-

tion certificates must be filed. Chandler v. Mott-Smith, (1908) 19 Hawaii 225.

[DISQUALIFICATION OF PERSONS IN MILITARY SERVICE.]

SEC. 63. That no person shall be allowed to vote who is in the Territory by reason of being in the Army or Navy or by reason of being attached to troops in the service of the United States. [31 Stat. L. 152.]

[RULES AND REGULATIONS FOR ADMINISTERING OATHS AND HOLDING ELECTIONS — BALLOU'S COMPILATION.]

SEC. 64. That the rules and regulations for administering oaths and holding elections set forth in Ballou's Compilation, Civil Laws, Appendix, and the list of registering districts and precincts appended, are continued in force with the following changes, to wit:

Strike out the preliminary proclamation and sections one to twenty-six, inclusive, sections thirty and thirty-nine, the second and third paragraphs of section forty-eight, the second paragraph of section fifty, and sections sixty-two, sixty-three, and sixty-six, second paragraph of section one hundred.

In section twenty-nine strike out all after the word "Niihau" and in lieu thereof insert: "The boards of registration existing at the date of the approval of this Act shall go out of office, and new boards, which shall consist of three members each, shall be appointed by the governor, by and with the advice and consent of the senate, whose terms of office shall be four years. Appointments made by the governor when the senate is not in session shall be valid until the succeeding meeting of that body."

In section thirty-one strike out "the first day of April and the thirtieth day of June, in the year eighteen hundred and ninety-seven," and insert in lieu thereof "the last day of August and the tenth day of October, in the year nineteen hundred."

Strike out the words "and the detailed record" in sections fifty-two and one hundred and twelve.

Strike out "marshal" wherever it occurs and insert in lieu thereof "high sheriff."

Strike out of section fifty-three the words "except as provided in section one hundred and fourteen hereof."

In sections fifty-three, fifty-four, fifty-six, fifty-seven, fifty-nine, sixty, seventy-one, seventy-five, eighty-six, ninety-two, ninety-three, ninety-four, ninety-five, one hundred and eleven, one hundred and twelve, and one hundred and thirteen strike out the words "minister" and "minister of the

interior " wherever they occur and insert in lieu thereof the words " secretary of the Territory.

In section fifty-six, paragraph three, strike out " interior office " and insert " office of the secretary of the Territory."

In section fifty-six, first paragraph, after the words " candidate for election " insert " to the legislature; " and in the last paragraph strike out the word " only."

Strike out the word " elective " in section sixty-four.

In sections twenty-seven, sixty-four, sixty-five, sixty-eight, seventy, and seventy-two strike out the words " minister of the interior " or " minister " wherever they occur and insert in lieu thereof the word " governor."

Amend section sixty-seven so that it will read: "At least forty days before any election the governor shall issue an election proclamation and transmit copies of the same to the several boards of inspectors throughout the Territory, or where such election is to be held."

In section seventy-five strike out the word " perfectly," and in section seventy-six strike out " in " and insert " on."

In section one hundred and twelve strike out " interior department " and insert in lieu thereof " office of the secretary of the Territory."

In section one hundred and fourteen strike out the word " Republic " wherever it occurs and insert in lieu thereof " Territory."

In section one hundred and fifteen strike out the words " minister " and " minister of the interior " and insert in lieu thereof " treasurer," and strike out all after the word " refreshments:" *Provided, however,* That for the holding of a special election before the first general election the governor may prescribe the time during which the boards of registration shall meet and the registration be made. [31 Stat. L. 152.]

This section must be regarded as special.

Cited.—This section was cited generally without specific application, in *Harris v. Cooper*, (1902) 14 Hawaii 145; *In re*

Contested Election, (1903) 15 Hawaii 325. Amendment to election laws.—See note under sec. 85 of this Act, *infra*, p. 521.

[ALTERING BOUNDARIES OF ELECTION DISTRICTS.]

SEC. 65. That the legislature of the Territory may from time to time establish and alter the boundaries of election districts and voting precincts and apportion the senators and representatives to be elected from such districts. [31 Stat. L. 153.]

IV. THE EXECUTIVE

CHAPTER 3.—THE EXECUTIVE.

THE EXECUTIVE POWER.

SEC. 66. That the executive power of the government of the Territory of Hawaii shall be vested in a governor, who shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and shall hold office for four years and until his successor shall be appointed and qualified, unless sooner removed by the President. He shall be not less than thirty-five years of age; shall be a citizen of the Territory of Hawaii; shall be commander in chief of the militia thereof; may grant

pardons or reprieves for offenses against the laws of the said Territory and reprieves for offenses against the laws of the United States until the decision of the President is made known thereon. [31 Stat. L. 153.]

This is the first section of chapter 3 of the Act of April 30, 1900, ch. 339. See the note to section 1 of said Act, *supra*, p. 490.

Pardon by legislature.—The power of pardon vested in the executive is exclusive and that power may not be lawfully exercised by the legislative or judicial departments. *In re Cummins*, (1911) 20 Hawaii 518.

Partial pardons.—The power to grant pardons refers to and includes all manner of pardons known to the law and

includes pardons which are partial in their operation as well as those which are full and absolute. Under the authority vested in him by this section the governor may in any case remit the fine imposed under the judicial sentence and leave all of the other penalties and disabilities in full force. *In re Cummins*, (1911) 20 Hawaii 518.

ENFORCEMENT OF LAW.

SEC. 67. That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known. [31 Stat. L. 153.]

GENERAL POWERS OF THE GOVERNOR.

SEC. 68. That all the powers and duties which, by the laws of Hawaii, are conferred upon or required of the President or any minister of the Republic of Hawaii (acting alone or in connection with any other officer or person or body) or the cabinet or executive council, and not inconsistent with the Constitution or laws of the United States, are conferred upon and required of the governor of the Territory of Hawaii, unless otherwise provided. [31 Stat. L. 153.]

SECRETARY OF THE TERRITORY.

SEC. 69. That there shall be a secretary of the said Territory, who shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and who shall be a citizen of the Territory of Hawaii and hold his office for four years and until his successor shall be appointed and qualified, unless sooner removed by the President. He shall record and preserve all the laws and proceedings of the legislature and all acts and proceedings of the governor, and promulgate proclamations of the governor. He shall, within thirty days after the end of each session of the legislature, transmit to the President, the President of the Senate, and the Speaker of the House of Representatives of the United States one copy each of the laws and journals of such session. He shall transmit to the President, semiannually, on the first days of January and July, a copy of the executive proceedings, and shall perform such other duties as are prescribed in this Act or as may be required of him by the legislature of Hawaii. [31 Stat. L. 154.]

ACTING GOVERNOR IN CERTAIN CONTINGENCIES.

SEC. 70. That in case of the death, removal, resignation, or disability of the governor, or his absence from the Territory, the secretary shall exercise all the powers and perform all the duties of governor during such vacancy, disability, or absence, or until another governor is appointed and qualified. [31 Stat. L. 154.]

ATTORNEY-GENERAL.

SEC. 71. That there shall be an attorney-general, who shall have the powers and duties of the attorney-general and those of the powers and duties of the minister of the interior which relate to prisons, prisoners, and prison inspectors, notaries public, and escheat of lands under the laws of Hawaii, except as changed by this Act and subject to modification by the legislature. [31 Stat. L. 154.]

TREASURER.

SEC. 72. That there shall be a treasurer, who shall have the powers and duties of the minister of finance and those of the powers and duties of the minister of the interior which relate to licenses, corporations, companies, and partnerships, business conducted by married women, newspapers, registry of conveyances, and registration of prints, labels, and trade-marks under the laws of Hawaii, except as changed in this Act and subject to modification by the legislature. [31 Stat. L. 154.]

The office of minister of the interior was abolished by section 8 of the Organic Act (*supra*, p. 494) and his powers and duties distributed, so far as they were continued, among other officers, and to the treasurer as provided in section 72. *Ninomiya v. Kepoikai*, (1913) 15 Hawaii 273.

Powers of treasurer.—The treasurer of the Territory may under proper circum-

stances, when in good faith he believes it necessary, bring suit in his own name to prevent loss of revenue to the territorial treasury and charge the reasonable cost therefor to the "incidental" appropriation for his office. *In re The Treasurer*, (1904) 15 Hawaii 718.

Cited generally in *Smithies v. Conkling*, (1911) 20 Hawaii 600.

COMMISSIONER OF PUBLIC LANDS.

SEC. 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. In said laws "land patent" shall be substituted for "royal patent;" "commissioner of public lands" for "minister of the interior," "agent of public lands," and "commissioners of public lands," or their equivalents; and the words "that I am a citizen of the United States," or "that I have declared my intention to become a citizen of the United States, as required by law," for the words "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," or "that I have received letters of denization under the Republic of Hawaii," or "that I have received a certificate of special right of citizenship from the Republic of

Hawaii." And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than fifteen years, and in every such case the land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, in which case the rent reserved shall be reduced in proportion to the value of the part so withdrawn, and every such lease shall contain a provision to that effect. All funds arising from the sale or lease or other disposal of such lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: *Provided*, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive order, or orders, by the President of the United States.

No person shall hereafter be entitled to receive any certificate of occupation, right of purchase lease, cash freehold agreement, or special homestead agreement who or whose husband or wife shall previously have taken or held any land under any such certificate, lease, or agreement hereafter made or issued, or under any homestead lease or patent based thereon; or who or whose husband or wife, or both of them, shall then own other land in the Territory, the combined area of which and the land in question exceeds eighty acres; or who is an alien, unless he has declared his intention to become a citizen of the United States as provided by law; nor shall any person who, having so declared his intention, shall hereafter take or hold under any such certificate, lease, or agreement, continue so to hold or become entitled to a homestead lease or patent of the land, unless he shall have become a citizen within five years after so taking.

No land for which any such certificate, lease, or agreement shall hereafter be issued, or any part thereof or interest therein or control thereof, shall, without the written consent of the commissioner and governor, thereafter, whether before or after a homestead lease or patent has been issued thereon, be or be contracted to be in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to or acquired or held by or for the benefit of any alien or corporation; or, before or after the issuance of a homestead lease or before the issuance of a patent, to or by or for the benefit of any other person; or, after the issuance of a patent, to or by or for the benefit of any person who owns, holds, or controls, directly or indirectly, other land or the use thereof the combined area of which and the land in question exceeds eighty acres: *Provided*, That these prohibitions shall not apply to transfers or acquisitions by inheritance or between tenants in common.

Any land in respect of which any of the foregoing provisions shall be violated shall forthwith be forfeited and resume the status of public land and may be recovered by the Territory or its successors in an action of ejectment or other appropriate proceeding. And noncompliance with the terms of any such certificate, lease, or agreement, or of the law applicable thereto, shall entitle the commissioner, with the approval of the governor before patent has been issued, with or without legal process, notice, demand, or previous entry, to retake possession and thereby determine the estate: *Provided*, That the times limited for compliance with any such terms may

be extended by the commissioner, with such approval, upon its appearing that an effort has been made in good faith to comply therewith.

The persons entitled to take under any such certificate, lease, or agreement shall be determined by drawing or lot, after public notice as hereinafter provided; and any lot not taken, or taken and forfeited, or any lot or part thereof surrendered with the consent of the commissioner, which is hereby authorized, may be disposed of upon application at not less than the advertised price by any such certificate, lease, or agreement without further notice. The notice of any sale, drawing, or allotment of public land shall be by publication for a period of not less than sixty days in one or more newspapers of general circulation published in the Territory.

The commissioner, with the approval of the governor, may give to any citizen of the United States or to any person who has legally declared his intention to become a citizen, and who shall hereafter become such, which said person has, or who and whose predecessors in interest have, improved any parcel of public lands and resided thereon continuously since April thirtieth, nineteen hundred, a preference right to purchase so much of such parcel and such adjoining land as may reasonably be required for a home, at a fair price, to be determined by three disinterested citizens appointed by the governor, in the determination of which price the value of improvement shall, when deemed just and reasonable, be disregarded: *Provided, however,* That this privilege shall not extend to any original lessee or to an assignee of an entire lease of public lands.

The commissioner may also, with such approval, issue, for a nominal consideration, to any church or religious organization, or person or persons or corporation representing it, a patent for any parcel of public land occupied continuously for not less than five years heretofore and still occupied by it as a church site under the laws of Hawaii.

No sale of lands for other than homestead purposes, except as herein provided, and no exchange by which the Territory shall convey lands exceeding either forty acres in area or five thousand dollars in value, shall be made. No lease of agricultural lands exceeding forty acres in area, or of pastoral or waste lands exceeding two hundred acres in area, shall be made without the approval of two-thirds of the board of public lands which is hereby constituted, the members of which are to be appointed by the governor as provided in section eighty of this Act, and until the legislature shall otherwise provide said board shall consist of six members and its members be appointed for terms of four years: *Provided, however,* That the commissioner may, with the approval of said board, sell for residence purposes lots and tracts, not exceeding three acres in area, and that sales of government lands may be made upon the approval of said board whenever necessary to locate thereon railroad rights of way, railroad tracks, side tracks, depot grounds, pipe lines, irrigation ditches, pumping stations, reservoirs, factories and mills and appurtenances thereto, including houses for employees, mercantile establishments, hotels, churches, and private schools, and all such sales shall be limited to the amount actually necessary for the economical conduct of such business or undertaking: *Provided further,* That no exchange of government lands shall hereafter be made without the approval of two-thirds of the members of said board, and no such exchange shall be made except to acquire lands directly for public uses.

Whenever twenty-five or more persons, having the qualifications of homesteaders, who have not theretofore made application under this Act shall

make written application to the commissioner of public lands for the opening of agricultural lands for settlement in any locality or district, it shall be the duty of said commissioner to proceed expeditiously to survey and open for entry agricultural lands, whether unoccupied or under lease with the right of withdrawal, sufficient in area to provide homesteads for all such persons, together with all persons of like qualifications who shall have filed with such commissioner prior to the survey of such lands written applications for homesteads in the district designated in said applications. The lands to be so opened for settlement by said commissioner shall be either the specific tract or tracts applied for or other suitable and available agricultural lands in the same geographical district and, as far as possible, in the immediate locality of and as nearly equal to that applied for as may be available: *Provided, however,* That no leased land, under cultivation, shall be taken for homesteading until any crops growing thereon shall have been harvested.

It shall be the duty of the commissioner of public lands to cause to be surveyed and opened for homestead entry a reasonable amount of desirable agricultural lands and also of pastoral lands in various parts of the Territory for homestead purposes on or before January first, nineteen hundred and eleven, and he shall annually thereafter cause to be surveyed for homestead purposes such amount of agricultural lands and pastoral lands in various parts of the Territory as there may be demand for by persons having the qualifications of homesteaders; and in laying out any homestead the Commissioner of Public Lands shall include therein an amount, not exceeding eighty acres in area, sufficient to support thereon an ordinary family; and all necessary expenses for surveying and opening any such lands for homestead shall be paid for out of any funds of the territorial treasury derived from the sale or lease of the public lands, which funds are hereby made available for such purposes.

Nothing herein contained shall be construed to prevent said commissioner from surveying and opening for homestead purposes and as a single homestead entry public lands suitable for both agricultural and pastoral purposes, whether such lands be situated in one body or detached tracts, to the end that homesteaders may be provided with both agricultural and pastoral lands wherever there is demand therefor; nor shall the ownership of a residence lot or tract, not exceeding three acres in area, hereafter disqualify any citizen from applying for and receiving any form of homestead entry, including a homestead lease.

All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other dispositions of such land shall be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department by direction of the governor, and all patents and deeds of such land shall issue from the office of the commissioner, who shall countersign the same and keep a record thereof. Lands conveyed to the Territory in exchange for other lands that are subject to the land laws of Hawaii, as amended by this Act, shall, except as otherwise provided, have the same status and be subject to such laws as if they had previously been public lands of Hawaii. All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as

may be provided by the laws of the Territory. The commissioner is hereby authorized to perform any and all acts, prescribe forms of oaths, and, with the approval of the governor and said board, make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this section and the land laws of Hawaii into full force and effect. [31 Stat. L. 154, as amended by 35 Stat. L. 56 and 36 Stat. L. 444.]

By an Act of April 2, 1908, ch. 124, this section was amended by inserting in the first paragraph thereof the sentence beginning with the words "And no lease" and ending with the words "a provision to that effect" in lieu of the originally enacted sentence which was as follows: "And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct."

This section was again amended by an Act of May 27, 1910, ch. 258, § 5, by adding thereto all of the provisions beginning with the words "No person shall be entitled to receive any certificate," etc., to the end of the section as here given.

Rea. of July 7, 1898, No. 55, mentioned in the text is given *supra*, p. 486.

The duties of the commissioner of public lands are not prescribed by this section of the Organic Act, which does not create the office but merely continues in force, with some modifications, the laws of Hawaii, relating to public lands until Congress shall otherwise provide. There is nothing in this section that would prevent the legislature from changing the same (duties of the commissioner) or

of imposing upon the commissioner the added duty of approving a receipt presented by a claimant whose appropriation, to be paid out of moneys in the treasury of the territory, was made under "Department of Public Lands." *Lucweiko v. Pratt*, (1907) 18 Hawaii 489.

Cited without specific application in *Honolulu Rapid Transit, etc., Co. v. Territory*, (1912) 21 Hawaii 136.

COMMISSIONER OF AGRICULTURE AND FORESTRY.

SEC. 74. That the laws of Hawaii relating to agriculture and forestry, except as changed by this Act, shall continue in force, subject to modification by Congress or the legislature. In said laws "commissioner of agriculture and forestry" shall be substituted, respectively, for "bureau," "bureau of agriculture and forestry," "commissioner," "commissioners of agriculture," and "commissioners for the island of Oahu." [31 Stat. L. 155.]

SUPERINTENDENT OF PUBLIC WORKS.

SEC. 75. That there shall be a superintendent of public works, who shall have the powers and duties of the superintendent of public works and those of the powers and duties of the minister of the interior which relate to streets and highways, harbor improvements, wharves, landings, waterworks, railways, electric light and power, telephone lines, fences, pounds, brands, weights and measures, fires and fireproof buildings, explosives, eminent domain, public works, markets, buildings, parks and cemeteries, and other grounds and lands now under the control and management of the minister of the interior, and those of the powers and duties of the minister of finance and collector-general which relate to pilots and harbor masters under the laws of Hawaii, except as changed by this Act and subject to modification by the legislature. In said laws the word "legislature" shall be substituted for "councils" and the words "the circuit court" for "the Hawaiian Postal Savings Bank." [31 Stat. L. 155.]

Power of superintendent of public works over public lands.—This section gives the superintendent of public works the same limited power of disposing of lands described in the proviso of section 262, R. L. of Hawaii, that the minister of the in-

terior formerly had, and controls section 73 of the same Act in that regard. *Pratt v. Holloway*, (1906) 17 Hawaii 539. See also *McCandless v. Carter*, (1907) 18 Hawaii 221.

SUPERINTENDENT OF PUBLIC INSTRUCTION — [LABOR STATISTICS].

SEC. 76. That there shall be a superintendent of public instruction, who shall have the powers and perform the duties conferred upon and required of the minister of public instruction by the laws of Hawaii as amended by the Act, and subject to modification by the legislature.

It shall be the duty of the United States Commissioner of Labor to collect, assort, arrange, and present in reports in nineteen hundred and five, and every five years thereafter, statistical details relating to all departments of labor in the Territory of Hawaii, especially in relation to the commercial, industrial, social, educational, and sanitary condition of the laboring classes, and to all such other subjects as Congress may by law direct. The said Commissioner is especially charged to ascertain the highest, lowest, and average number of employees engaged in the various industries in the Territory, to be classified as to nativity, sex, hours of labor, and conditions of employment, and to report the same to Congress. [31 Stat. L. 155, as amended by 33 Stat. L. 164.]

This section was amended to read as above given by an Act of April 8, 1904, ch. 948. As originally enacted this section was as follows:

"SEC. 76. That there shall be a superintendent of public instruction, who shall have the powers and perform the duties conferred upon and required of the minister of public instruction by the laws of Hawaii as amended by this Act, and subject to modification by the legislature.

"It shall be the duty of the United States Commissioner of Labor to collect, assort, arrange, and present in annual reports statistical details relating to all departments of labor in the Territory of Hawaii, especially in relation to the commercial, industrial, social, educational, and sanitary condition of the laboring classes, and to all such other subjects as Congress may, by law, direct. The said commissioner is especially charged to ascertain, at as early a date as possible, and as often thereafter as such information may be required, the highest, lowest, and average number of employees engaged in the various industries in the Territory, to be classified as to nativity, sex, hours of labor, and conditions of employment, and to report the same to Congress." [31 Stat. L. 155.]

AUDITOR AND DEPUTY AUDITOR.

SEC. 77. That there shall be an auditor and deputy auditor, who shall have the powers and duties conferred upon and required of the auditor-general and deputy auditor-general, respectively, by act thirty-nine of the Session Laws, as amended by this Act, subject to modification by the legislature. In said act "officer" shall be substituted for "minister" where used without other designation. [31 Stat. L. 156.]

SURVEYOR.

SEC. 78. That there shall be a surveyor, who shall have the powers and duties heretofore attached to the surveyor-general, except such as relate to the geodetic survey of the Hawaiian Islands. [31 Stat. L. 156.]

HIGH SHERIFF.

SEC. 79. That there shall be a high sheriff and deputies, who shall have the powers and duties of the marshal and deputies of the Republic of Hawaii under the laws of Hawaii, except as changed by this Act, and subject to modification by the legislature. [31 Stat. L. 156.]

This section changed the name of marshal to that of high sheriff. *Kalaniana'ole v. Dimond*, (1904) 15 Hawaii 486.

APPOINTMENT, REMOVAL, TENURE, AND SALARIES OF OFFICERS.

SEC. 80. That the President shall nominate and, by and with the advice and consent of the Senate, appoint the chief justice and justices of the supreme court, the judges of the circuit courts, who shall hold their respective offices for the term of four years, unless sooner removed by the President; and the governor shall nominate and, by and with the advice and consent of the senate of the Territory of Hawaii, appoint the attorney-general, treasurer, commissioner of public lands, commissioner of agriculture and forestry, superintendent of public works, superintendent of public instruction, auditor, deputy auditor, surveyor, high sheriff, members of the board of health, commissioners of public instruction, board of prison inspectors, board of registration and inspectors of election, and any other boards of a public character that may be created by law; and he may make such appointments when the senate is not in session by granting commissions, which shall, unless such appointments are confirmed, expire at the end of the next session of the senate.

He may, by and with the advice and consent of the senate of the Territory of Hawaii, remove from office any of such officers.

All such officers shall hold office for four years and until their successors are appointed and qualified, unless sooner removed, except the commissioners of public instruction and the members of said boards, whose terms of office shall be as provided by the laws of the Territory of Hawaii.

The manner of appointment and removal and the tenure of all other officers shall be as provided by law; and the governor may appoint or remove any officer whose appointment or removal is not otherwise provided for.

The salaries of all officers other than those appointed by the President shall be as provided by the legislature, but those of the chief justice and the justices of the supreme court and judges of the circuit courts shall not be diminished during their term of office.

All officers appointed under the provisions of this section shall be citizens of the Territory of Hawaii.

All persons holding office in the Hawaiian Islands at the time this Act takes effect shall continue to hold their respective offices until their successors are appointed and qualified, but not beyond the end of the first session of the senate of the Territory of Hawaii unless reappointed as herein provided. *Provided, however,* That nothing in this section shall be construed to conflict with the authority and powers conferred by section fifty-six of this Act as herein amended. [31 Stat. L. 156, as amended by 33 Stat. L. 1035.]

This section was amended by an Act of March 3, 1905, ch. 1465, § 2, which added the proviso at the end thereof. Section 56 of this Act, mentioned in said proviso, is given *supra*, p. 506.

Suspension of officer.—In *In re Austin*, (1903) 15 Hawaii 114, it was held that the governor had not authority to suspend an officer who, by the terms of this section, must be appointed and may be removed by the governor by and with the advice and consent of the senate, and who is to hold for four years unless sooner removed.

Repeal.—The provisions of the Hawaiian Audit Act (Laws of 1898, Act 39) relat-

ing to the suspension of the auditor were repealed by implication by the provisions of this section, which are not only inconsistent therewith but indicate an intention to cover the whole subject. *In re Austin*, (1903) 15 Hawaii 114.

Appointment of board of medical examiners by the treasurer instead of by the governor. See *Ninomiya v. Kepoikai*, (1903) 15 Hawaii 273.

V. THE JUDICIARY

CHAPTER IV.—[THE JUDICIARY].

THE JUDICIARY.

SEC. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided. [31 Stat. L. 157.]

This is the first section of chapter IV of the Act of April 30, 1900, ch. 339. See the note to section 1 of said Act *supra*, p. 490.

Power of judges in chambers.—The power of the Hawaiian judges at chambers in proceedings not incident or ancillary to some cause pending before a court, conferred by the Hawaiian laws in force at the passage of the Organic Act, was preserved by the provision of this section of that Act, continuing in force the previous laws of Hawaii concerning "the civil courts and their jurisdiction and procedure." *Carter v. Gear*, (1905) 197 U. S. 348, 25 S. Ct. 491, 49 U. S. (L. ed.) 787, *affirming* (1904) 16 Hawaii 242.

Misdemeanors committed on naval reservations.—The territorial District Courts have jurisdiction of misdemeanors committed on land reserved for naval purposes. *Territory v. Carter*, (1908) 19 Hawaii 198.

Creation of board of commissioners of insanity.—The Hawaiian statute (Act 149) creating a board of commissioners of insanity is not in violation of this section of the Organic Act. *Matter of Atcherley*, (1909) 19 Hawaii 535.

Jurisdiction to issue writs of habeas corpus.—In *Brown v. Goto*, (1904) 16 Hawaii 263, it was contended that since the Circuit Courts had the jurisdiction to issue writs of habeas corpus when the Organic Act took effect and since that Act by this section continued the Circuit Courts, those courts must have been continued as they were then, that is with this jurisdiction, and that therefore the territorial legislature could not change them by tak-

ing away this jurisdiction. The court said: "What the full effect of the insertion of the words 'circuit courts' in this section is, we need not undertake to say. Nor is it necessary to express an opinion as to the extent of the legislative power of the territory, in regard to the composition, jurisdiction and procedure of the circuit courts. (See [1901] 23 Op. Atty.-Gen. 539.) But that the legislature may go so far as to confine the original jurisdiction in habeas corpus cases to the supreme court, its justices and the circuit judges to the exclusion of the circuit courts as such, we believe is shown by the Organic Act itself, for it provides in the same section, until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force." The Circuit Court was held to be without jurisdiction to issue a writ of habeas corpus in a case where such writ was not demandable of right.

Validity of indeterminate sentence statute as not in conflict with this section. See *Territory v. Armstrong*, (1915) 22 Hawaii 526.

Validity of territorial enactments adding one judge to the two judges of the first circuit. See *Territory v. Boyd*, (1905) 16 Hawaii 660.

The legislature has no authority to create any but inferior courts. *Territory v. Miguel*, (1907) 18 Hawaii 402.

SUPREME COURT.

SEC. 82. That the supreme court shall consist of a chief justice and two associate justices, who shall be citizens of the Territory of Hawaii and shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, and may be removed by the President: *Provided, however*, That in case of the disqualification or absence of any justice thereof, in any cause pending before the court, on the trial and determination of said cause his place shall be filled as provided by law. [31 Stat. L. 157.]

LAWS CONTINUED IN FORCE.

SEC. 83. That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only, in civil and criminal cases specified in said laws, are repealed, and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who can not understandingly speak, read, and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person shall be convicted in any criminal case except by unanimous verdict of the jury. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race.

Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries, and shall sit at such times as the circuit judges of the respective circuits shall direct; the number of grand jurors in each circuit shall be not less than thirteen, and the method of the presentation of cases to said grand jurors shall be prescribed by the supreme court of the Territory of Hawaii. The several circuit courts may subpoena witnesses to appear before the grand jury in like manner as they subpoena witnesses to appear before their respective courts. [31 Stat. L. 157.]

Grand and petit juries.—By this Act special provisions are made for impaneling grand juries, and for unanimous verdict of petit juries. *Hawaii v. Mankichi*, (1903) 190 U. S. 197, 23 S. Ct. 787, 47 U. S. (L. ed.) 1016.

See also *Territory v. Ng Kow*, (1904) 15 Hawaii 602; *Matter of Anin*, (1906) 17 Hawaii 341; *Territory v. Soga*, (1910) 20 Hawaii 71 (waiver of full legal number of 12 jurors); *Gomez v. Whitney*, (1913) 21 Hawaii 539; *Territory v. Nishimura*, (1915) 22 Hawaii 614.

The provision for the subpoena of witnesses refers to the ordinary process of subpoena and the ordinary means of compelling obedience to such process. *In re Craig*, (1911) 20 Hawaii 447.

Cited generally in *Ex p. Higashi*, (1906) 17 Hawaii 428, a case involving, *inter alia*, the constitutionality of an act empowering a magistrate to try, where defendant waives or does not demand a jury. See *Territory v. Soga*, (1910) 20 Hawaii 71; *Territory v. Holt*, (1910) 20 Hawaii 240; *In re Holt*, (1910) 20 Hawaii 255.

DISQUALIFICATION BY RELATIONSHIP, PECUNIARY INTEREST, OR PREVIOUS JUDGMENT.

SEC. 84. That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to those herein enumerated. [31 Stat. L. 157, as amended by 36 Stat. L. 447.]

This section was amended to read as above given by an Act of May 27, 1910, ch. 258, § 6. As originally enacted it was as follows: "SEC. 84. That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge or juror may have, either directly or through such relative, any pecuniary interest. No judge shall sit on an appeal, or new trial, in any case, in which he may have given a previous judgment." [31 Stat. L. 157.]

Disqualification of judges.—A justice of the Supreme Court is not disqualified from sitting on an appeal in a habeas corpus case brought to obtain the release of a person under sentence previously pronounced by him when a circuit judge. *Ex p. Mankichi*, (1901) 13 Hawaii 570.

A justice of the Supreme Court is not disqualified from sitting in a case with which he had no previous connection, merely because a question of law is involved which was involved also in certain other and distinct cases at the trial of which he presided when a circuit judge. *Ex p. Ah Oi*, (1901) 13 Hawaii 534.

A judge is not disqualified under this section from sitting at the trial of a cause upon the facts in issue by reason of having sustained a demurrer to the plaintiff's declaration, which ruling was reversed by the appellate court. *Matsumura v. Hawaii County*, (1908) 19 Hawaii 197.

A justice is not disqualified from sitting in a cause in which a corporation is a party by the fact of a relative by affinity or consanguinity within the third degree holding shares of stock in the corporation, the justice having no pecuniary interest in the issue of the case either directly or through such relative. *Ewa Plantation Co. v. Holt*, (1907) 18 Hawaii 509.

This section does not prevent a circuit judge who had ordered a nonsuit, which was set aside by the Supreme Court, from entertaining a motion for change of venue based on the ground that an impartial jury cannot be obtained in the circuit in which the action is pending. *Spreckles v. De Bolt*, (1905) 16 Hawaii 476.

An order remanding an equity cause to a judge of the Circuit Court with direction to receive evidence on an issue raised by amended pleadings filed after the close of the original hearing before said judge, and in support of which evidence was offered and rejected, does not direct a "new trial" and is not within the inhibition of this section disqualifying a judge from sitting "on an appeal, or new trial, in any case in which he may have given a previous judgment." *Hitchcock v. Humphreys*, (1902) 14 Hawaii 1.

In the following cases a justice was held not disqualified:

Matter of Davis, (1904) 15 Hawaii 377 (punishment of respondent for contempt some years previous); *Notley v. Brown*, (1906) 17 Hawaii 393 (counsel for one of the parties before appointment to the bench); *Bierce v. Hutchins*, (1907) 18 Hawaii 374 (former member of firm acting for plaintiff)—the foregoing decisions, it will be observed, were rendered prior to the amendment of 1910; *Lucas v. Lucas*, (1911) 20 Hawaii 433 (relationship by affinity to plaintiff's son not a party to the suit); *Territory v. Kapiolani*, (1911) 20 Hawaii 548 (judge counsel in former action involving title to same land); *Matter of Hitchcock*, (1911) 20 Hawaii 553 (judge prior to appointment, counsel to petitioner in guardianship proceedings); *Brewer v. Brewer*, (1911) 20 Hawaii 617 (justice related by affinity to stockholder of corporation, party to action). See also *Scott v. Stuart*, (1915) 22 Hawaii 641.

In the following case a justice was held disqualified: *Smith v. Lindsay*, (1910) 20 Hawaii 262 (relation by affinity to plaintiff suing as trustee).

Intent of this section.—In *Magoon v. Lord-Young Engineering Co.*, (1914) 22 Hawaii 245, the court said: We think the intent of Congress as expressed in section 84, which was amended after this court had held that having previously been counsel in a case did not disqualify a justice from sitting in a case (*Love v. Love*, (1905) 17 Hawaii 194; *Notley v. Brown*, (1906) 17 Hawaii 393; *Bierce v. Hutchins*, (1907) 18 Hawaii 374), was that a judge should not sit in a case where with reference to that case the relation of attorney and client had existed between him and one of the parties whether he was personally familiar with the case or had advised in regard to it or not. The law which disqualifies a judge who has been of counsel in the case intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent."

Mandamus to assign cause.—A mandamus will not lie to compel a judge to assign a cause for disqualification, when on motion he has determined his own qualification to hear the cause. *Scott v. Stuart*, (1915) 22 Hawaii 576.

VI. UNITED STATES OFFICERS

CHAPTER 5.—UNITED STATES OFFICERS.

DELEGATE TO CONGRESS.

SEC. 85. That a Delegate to the House of Representatives of the United States, to serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature.

Such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. Such election shall be held on the first Tuesday after the first Monday in November of every even year and at such places as shall be designated by the secretary of the Territory. The ballot for Delegate shall be such as the legislature of Hawaii may designate, and until provision is made by the Territorial legislature the ballot shall be of pink paper and shall be of the same general form as those used for the election of representatives to the legislature. The method of certifying the names of candidates for place on this ballot and all the conduct of the election of a Delegate shall be in conformity to the general election laws of the Territory of Hawaii. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting. In case of a vacancy occurring in the office of Delegate, the governor of the Territory is directed to call a special election to fill such vacancy: *Provided, however,* That no vacancy shall be filled which occurs within five months of the expiration of a Congressional term. The legislature of the Territory of Hawaii shall have the right to alter or amend any part of the election laws of said Territory, including those providing for an election of Delegate to Congress, and its action shall be the law, with full, binding force, until altered, amended, or repealed by Congress. [34 Stat. L. 550.]

This is the first section of chapter 5 of the Act of April 30, 1900, ch. 339. See the note to section 1 of said Act, *supra*, p. 490.

It was amended to read as above given by an Act of June 28, 1906, ch. 3582. As originally enacted it was as follows:

"SEC. 85. That a Delegate to the House of Representatives of the United States, to serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature; such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. The times, places, and manner of holding elections shall be as fixed by law. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting." [31 Stat. L. 158.]

Election laws.—The "election laws" of Hawaii referred to in the amendment to this section, were none other than such as were included in the general definition of section 1 (*supra*, p. 490). *Cooke v. Thayer*, (1914) 22 Hawaii 247.

The laws which the local legislature is given the power to amend are those which were continued in force by section 64 (*supra*, p. 508) and referred to in the amendment to this section. *Cooke v. Thayer*, (1914) 22 Hawaii 247.

FEDERAL COURT.

SEC. 86. There shall be established in the said Territory a district court, to consist of two judges, who shall reside therein and be called district judges, and who shall each receive an annual salary of six thousand dollars. The said court while in session shall be presided over by only one of said judges. The two judges shall from time to time, either by order or rules of court, prescribe at what times and in what class of cases each of them shall preside. The said two judges shall have the same powers in all matters coming before said court. The President of the United States, by and with the advice and consent of the Senate of the United States, shall

appoint two district judges, a district attorney, and a marshal of the United States for the said district, and said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President. The said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeal as provided by law, and appeals and writs of error may be taken to the Supreme Court of the United States from said district court in cases where appeals and writs of error are allowed from the district and circuit courts of the United States to the Supreme Court, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held in Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. The said district judges shall appoint a clerk of said court at a salary of three thousand dollars per annum and shall appoint a reporter of said court at a salary of one thousand two hundred dollars per annum: *Provided*, That writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars. [31 Stat. L. 158, as amended by 33 Stat. L. 1035, 35 Stat. L. 838.]

This section was amended to read as above given by an Act of March 3, 1909, ch. 269, § 1. As originally enacted it was as follows: "SEC. 86. That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said district, and said judge, attorney, and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held at Honolulu on the second Monday in April and

October and at Hilo on the last Wednesday in January of each year; and special terms may be held at such times and places in said district as the said judge may deem expedient. The said district judge shall appoint a clerk for said court at a salary of three thousand dollars per annum, and shall appoint a reporter of said court at a salary of twelve hundred dollars per annum." [31 Stat. L. 158.]

As originally enacted it was first amended by an Act of March 3, 1905, ch. 1465, § 3, 33 Stat. L. 1035, by adding thereto a proviso in the same words as the last proviso of the section as given in the text and was subsequently again amended as heretofore noted to read as set out in the text.

The provisions of the text relating to writs of error and appeals from the District Court were superseded by the Judicial Code of March 3, 1911, §§ 128 and 238. See the title JUDICIARY. See the notes to those sections for cases decided under the provisions in the text above given.

The provisions of the last words of the text relating to appeals and writs of error from the Supreme Court of the Territory of Hawaii were superseded by the Judicial Code of March 3, 1911, § 246, in title JUDICIARY, making similar provisions. See the note to that section.

By said Judicial Code, §§ 289-291, in title JUDICIARY, the Circuit Courts were abolished and their powers and duties conferred on the District Courts.

The sentence beginning "The laws of the United States relating to appeals" is identical (except that "Porto Rico" is substituted for "Territory of Hawaii") with a provision in section 34 of the Act of April 12, 1900, ch. 191, 31 Stat. L. 84, in title PORTO RICO. See the annotation to the latter section.

INTERNAL-REVENUE DISTRICT.

SEC. 87. That the Territory of Hawaii shall constitute a district for the collection of the internal revenue of the United States, with a collector, whose office shall be at Honolulu, and deputy collectors at such other places in the several islands as the Secretary of the Treasury shall direct. [31 Stat. L. 158.]

Section 88 relating to customs districts in Hawaii was as follows:

"SEC. 88. That the Territory of Hawaii shall comprise a customs district of the United States, with ports of entry and delivery at Honolulu, Hilo, Mahukona, and Kahului." [31 Stat. L. 159.]

It was superseded by the Plan for the Reorganization of the Customs Service submitted to Congress pursuant to an Act of Aug. 24, 1912, ch. 355, § 1, by virtue of which Hawaii was created a customs district with headquarters at Honolulu in which Honolulu, Hilo, Kahului, Kaloa, and Mahukona were made ports of entry. See the title CUSTOMS DUTIES.

VII. MISCELLANEOUS

CHAPTER 6.— MISCELLANEOUS.

REVENUES FROM WHARVES.

SEC. 89. That until further provision is made by Congress the wharves and landings constructed or controlled by the Republic of Hawaii on any seacoast, bay, roadstead, or harbor shall remain under the control of the government of the Territory of Hawaii, which shall receive and enjoy all revenues derived therefrom, on condition that said property shall be kept in good condition for the use and convenience of commerce, but no tolls or charges shall be made by the government of the Territory of Hawaii for the use of any such property by the United States, or by any vessel of war, tug, revenue cutter, or other boat or transport in the service of the United States. [31 Stat. L. 159.]

This is the first section of chapter 6 of the Act of April 30, 1900, ch. 339. See the note to section 1 of said Act, *supra*, p. 490.

[DISPOSITION OF HAWAIIAN POSTAGE STAMPS.]

SEC. 90. That Hawaiian postage stamps, postal cards, and stamped envelopes at the post-offices of the Hawaiian Islands when this Act takes effect shall not be sold, but, together with those that shall thereafter be received at such offices as herein provided, shall be canceled under the direction of the Postmaster-General of the United States; those previously sold and uncanceled shall, if presented at such offices within six months after this Act takes effect, be received at their face value in exchange for postage stamps, postal cards, and stamped envelopes of the United States of the same aggregate face value and, so far as may be, of such denominations as desired. [31 Stat. L. 159.]

[DISPOSITION OF PUBLIC PROPERTY CEDED TO THE UNITED STATES.]

SEC. 91. That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county, or other political subdivision thereof by direction of the governor when thereunto authorized by the legislature. [31 Stat. L. 159, as amended by 36 Stat. L. 447.]

This section was amended to read as above given by an Act of May 27, 1910, ch. 258, § 7. As originally enacted it was as follows: "Sec. 91. That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii." [31 Stat. L. 159.]

The Res. of July 7, 1898, No. 55, mentioned in the text is given *supra*, p. 486.

Further provisions relating to the disposition of ceded property were made by the Act of May 26, 1906, ch. 2561, *infra*, p. 531.

Sites for federal buildings.—The President is authorized, under this section, to take such of the public lands of Hawaii as he deems proper for the uses and purposes of the United States. Thus the Secretary of the Treasury may, if authorized by the President, accept a site for a federal building in Honolulu acquired

in exchange for public land in Hawaii and assume the custody and control thereof, no objection thereto arising under R. S. sec. 3736 (title PUBLIC CONTRACTS), or otherwise. (1903) 24 Op. Atty-Gen. 600.

Sale without authorization of Congress.—In (1905) 25 Op. Atty-Gen. 522, it was held that the sale of a steam tug

by the superintendent of public works of Hawaii, which vessel became the property of the United States upon the annexation of the Hawaiian Islands in 1898, not having been authorized by Congress, as provided in section 91, was void.

Right of territory to prevent damage to public property.—In performing the duty of maintaining, managing and caring for

the public property placed in its possession by this section, the territory may maintain a bill for injunction. *Territory v. Kerr*, (1905) 16 Hawaii 363.

Public highways.—Under this section the territory of Hawaii has the possession, use and control of the public highways. *Honolulu Rapid Transit, etc., Co. v. Territory*, (1912) 21 Hawaii 136.

[SALARIES OF OFFICERS.]

SEC. 92. That the following officers shall receive the following annual salaries to be paid by the United States: The governor, seven thousand dollars; the secretary of the Territory, four thousand dollars; the chief justice of the supreme court of the Territory, six thousand dollars; the associate justices of the supreme court, five thousand five hundred dollars each; the judges of the circuit courts, four thousand dollars each; the United States district attorney, four thousand dollars; the United States marshal, three thousand dollars. And the governor shall receive annually, in addition to his salary, the sum of five hundred dollars for stationery, postage, and incidentals; also his traveling expenses while absent from the capital on official business, and the sum of two thousand dollars annually for his private secretary. [31 Stat. L. 159, as amended by 36 Stat. L. 448.]

This section was amended to read as above given by an Act of May 27, 1910, ch. 258, § 8. As originally enacted it was as follows: "SEC. 92. That the following officers shall receive the following annual salaries, to be paid by the United States: The governor, five thousand dollars; the secretary of the Territory, three thousand dollars; the chief justice of the supreme court of the Territory, five thousand five hundred dollars, and the associate justices of the supreme court, five thousand dollars each, and the judges of the circuit courts, three thousand dollars each. The salaries of the said chief justice and the associate justices of the supreme court, and the judges of the circuit courts as above provided shall be paid by the United States; the United States district judge, five thousand dollars; the United States marshal, two thousand five hundred dollars; the United States district attorney, three thousand dollars.

"And the governor shall receive annually, in addition to his salary, the sum of five hundred dollars for stationery, postage, and incidentals; also his traveling expenses while absent from the capital on official business, and the sum of two thousand dollars annually for his private secretary." [31 Stat. L. 159.]

IMPORTS FROM HAWAII INTO THE UNITED STATES.

SEC. 93. That imports from any of the Hawaiian Islands, into any State or any other Territory of the United States, of any dutiable articles not the growth, production, or manufacture of said islands, and imported into them from any foreign country after July seventh, eighteen hundred and ninety-eight, and before this Act takes effect, shall pay the same duties that are imposed on the same articles when imported into the United States from any foreign country. [31 Stat. L. 160.]

INVESTIGATION OF FISHERIES.

SEC. 94. That the Commissioner of Fish and Fisheries of the United States is empowered and required to examine into the entire subject of fisheries and the laws relating to the fishing rights in the Territory of Hawaii, and report to the President touching the same, and to recommend such changes in said laws as he shall see fit. [31 Stat. L. 160.]

Public fisheries—police power.—The police power of the territory with reference to the public fisheries has not been restricted by the provisions of this section

and sections 95 and 96 following, so as to prevent the enactment of general laws respecting the means or methods by which fish may be taken and forbidding the use of certain kinds of nets. These sections must be read in connection with the grant of legislative power contained

in section 55, *supra*, p. 503, under which is included, as a rightful subject of legislation, the police power. *Territory v. Hoy Chong*, (1912) 21 Hawaii 39, Ann. Cas. 1915A 1155; *Territory v. Makaiwi*, (1913) 21 Hawaii 631.

REPEAL OF LAWS CONFERRING EXCLUSIVE FISHING RIGHTS.

SEC. 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested right shall be valid after three years from the taking effect of this Act unless established as hereinafter provided. [31 Stat. L. 160.]

Licenses for fishing boats.—The Hawaiian statute (Act 96, S. L. 1907) requiring a license fee of five dollars for a fishing boat with a beam of thirty inches or more is not in conflict with this section. *Territory v. Matsubara*, (1909) 18 Hawaii 641.

Section 1460, Penal Laws of Hawaii, was repealed by this section of the Organic Act, which Act covers the whole subject matter of private rights of fishery. The intent of Congress is clear to destroy, as far as it is in its power to do so, all private rights of fishery and to throw open the

fisheries to the people. *In re Fukunaga*, (1904) 16 Hawaii 306.

Henapepe river on the Island of Kauai.—A fishery claimed within the Henapepe river on the Island of Kauai, where the tide to a certain extent rises and falls, the water being a mixture of sea water brought into the river by the action of the tide and fresh water coming down the river, is not within this section and section 96 following. *Kapiolani v. Territory*, (1907) 18 Hawaii 460.

Public fisheries—police power.—See note under the preceding section 94 of this Act.

PROCEEDINGS FOR OPENING FISHERIES TO CITIZENS.

SEC. 96. That any person who claims a private right to any such fishery shall, within two years after the taking effect of this Act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established, the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated. [31 Stat. L. 160.]

"Any such fishery" means the fishery or fishing right referred to in section 95. *Kapiolani v. Territory*, (1907) 18 Hawaii 460.

Henapepe river, Island of Kauai.—See note under section 95.

Public fisheries.—See note under section 94 of this Act, *supra*, p. 524

QUARANTINE.

SEC. 97. That quarantine stations shall be established at such places in the Territory of Hawaii as the Supervising Surgeon-General of the Marine-Hospital Service of the United States shall direct, and the quarantine regulations for said islands relating to the importation of diseases from other

countries shall be under the control of the Government of the United States. The quarantine station and grounds at the harbor of Honolulu, together with all the public property belonging to that service, shall be transferred to the Marine-Hospital Service of the United States, and said quarantine grounds shall continue to be so used and employed until the station is changed to other grounds which may be selected by order of the Secretary of the Treasury.

The health laws of the government of Hawaii relating to the harbor of Honolulu and other harbors and inlets from the sea and to the internal control of the health of the islands shall remain in the jurisdiction of the government of the Territory of Hawaii, subject to the quarantine laws and regulations of the United States. [31 Stat. L. 160.]

See the titles HEALTH AND QUARANTINE; HOSPITALS AND ASYLUMS.

[AMERICAN REGISTER FOR CERTAIN VESSELS.]

SEC. 98. That all vessels carrying Hawaiian registers on the twelfth day of August, eighteen hundred and ninety-eight, and which were owned bona fide by citizens of the United States, or the citizens of Hawaii, together with the following-named vessels claiming Hawaiian register, *Star of France*, *Euterpe*, *Star of Russia*, *Falls of Clyde*, and *Wilscott*, shall be entitled to be registered as American vessels, with the benefits and privileges appertaining thereto, and the coasting trade between the islands aforesaid and any other portion of the United States, shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts. [31 Stat. L. 161.]

The use of the words "coasting trade" indicates very clearly that the words were intended to include the domestic trade of the United States upon other than interior waters. *Huus v. New York, etc., Steamship Co.*, (1901) 182 U. S. 392, 21 S. Ct. 827, 45 U. S. (L. ed.) 1146.

"Coasting trade" originally and primarily meant trade along the contiguous line of coast of the United States, but the whole subject being within the power of Congress, it is competent for Congress to extend the privileges and restrictions of that trade as it shall see fit.

Numerous decisions of the commissioner of navigation as respects trade and navigation by American vessels between the territory of Hawaii and the United States have held such trade to be a part of the coasting trade of the United States. *Bigley v. New York, etc., Steamship Co.*, (S. D. N. Y. 1900) 105 Fed. 74.

Nationalization of Hawaiian vessels.—Under this section Hawaiian vessels have always been treated as American vessels or vessels of the United States, with full rights and privileges. (1901) 23 Op. Atty.-Gen. 414.

[CROWN LAND FREE FROM TRUSTS, ETC.]

SEC. 99. That the portion of the public domain heretofore known as Crown land is hereby declared to have been, on the twelfth day of August, eighteen hundred and ninety-eight, and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law. [31 Stat. L. 161.]

[NATURALIZATION.]

SEC. 100. That for the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States,

and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this Act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.

All records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded, or issued prior to the taking effect of the naturalization Act of June twenty-ninth, nineteen hundred and six, in or from any circuit court of the Territory of Hawaii, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized. [31 Stat. L. 161, as amended by 36 Stat. L. 448.]

This section was amended by an Act of May 27, 1910, ch. 258, § 9, by adding thereto the last sentence beginning with the words "All records," etc., making it to read as given in the text.

Repeal.—The provision of this section which authorizes the naturalization as citizens of the United States of persons who had resided in Hawaii for five years prior to its taking effect, without a previous declaration of intention, was repealed by the Naturalization Act of June 29, 1906, ch. 3592, 34 Stat. L. 596 (title

NATURALIZATION), which establishes a uniform rule of naturalization throughout the United States, repealing all inconsistent Acts, and requires a declaration of intention in all cases except of persons who have served in the army or navy. *U. S. v. Rodiek*, (C. C. A. 1908) 162 Fed. 460, 89 C. C. A. 389.

[CERTIFICATES OF RESIDENCE FOR CHINESE.]

SEC. 101. That Chinese in the Hawaiian Islands when this Act takes effect may within one year thereafter obtain certificates of residence as required by "An Act to prohibit the coming of Chinese persons into the United States," approved May fifth, eighteen hundred and ninety-two, as amended by an Act approved November third, eighteen hundred and ninety-three, entitled "An Act to amend an Act entitled 'An Act to prohibit the coming of Chinese persons into the United States,' approved May fifth, eighteen hundred and ninety-two," and until the expiration of said year shall not be deemed to be unlawfully in the United States if found therein without such certificates:

Provided, however, That no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Territory, or District of the United States from the Hawaiian Islands. [31 Stat. L. 161.]

The Act of May 5, 1892, ch. 60, as amended mentioned in the text is given in the title CHINESE EXCLUSION.

Chinese immigration.—There is nothing in this Act nor in the resolution of annexation, nor in any law of Congress, which would prevent the entrance into

these islands of Chinese legally resident in the United States and holding the certificates of registration provided for by statute. (1901) 23 Op. Atty-Gen. 487.

[POSTAL SAVINGS BANKS.]

SEC. 102. That the laws of Hawaii relating to the establishment and conduct of any postal savings bank or institution are hereby abolished. And the Secretary of the Treasury, in the execution of the agreement of the United States as expressed in an Act entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States," approved July

seventh, eighteen hundred and ninety-eight, shall pay the amounts on deposit in the Hawaiian Postal Savings Bank to the persons entitled thereto, according to their respective rights, and he shall make all needful orders, rules, and regulations for paying such persons and for notifying such persons to present their demands for payment. So much money as is necessary to pay said demands is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be available on and after the first day of July, nineteen hundred, when such payments shall begin, and none of said demands shall bear interest after said date, and no deposit shall be made in said bank after said date. Said demands of such persons shall be certified to by the chief executive of Hawaii as being genuine and due to the persons presenting the same, and his certificate shall be sealed with the official seal of the Territory, and countersigned by its secretary, and shall be approved by the Secretary of the Interior, who shall draw his warrant for the amount due upon the Treasurer of the United States, and when the same are so paid no further liabilities shall exist in respect of the same against the governments of the United States or of Hawaii. [31 Stat. L. 161.]

By an Act of May 19, 1908, ch. 175, 35 Stat. L. 165, omitted as temporary only and executed, the governor was authorized to certify demands for deposits of the character mentioned in the text on the death of claimant without executor or administrator, claims not presented within two years to be barred, and the balance after the payment of all certified claims to be applied to the reduction of the public debt of Hawaii.

[SURPLUS, ETC., IN POSTAL SAVINGS BANK TO BE PAID INTO UNITED STATES TREASURY.]

SEC. 103. That any money of the Hawaiian Postal Savings Bank that shall remain unpaid to the persons entitled thereto on the first day of July, nineteen hundred and one, and any assets of said bank shall be turned over by the government of Hawaii to the Treasurer of the United States, and the Secretary of the Treasury shall cause an account to be stated, as of said date, between such government of Hawaii and the United States in respect to said Hawaiian Postal Savings Bank. [31 Stat. L. 162.]

[WHEN ACT TAKES EFFECT.]

SEC. 104. This Act shall take effect forty-five days from and after the date of the approval thereof, excepting only as to section fifty-two, relating to appropriations, which shall take effect upon such approval. [31 Stat. L. 162.]

An Act Relating to Hawaiian silver coinage and silver certificates.

[Act of Jan. 14, 1903, ch. 186, 32 Stat. L. 770.]

[SEC. 1.] [Hawaiian silver coins receivable for government dues.] That the silver coins that were coined under the laws of Hawaii, when the same are not mutilated or abraded below the standard of circulation, shall be received at the par of their face value in payment of all dues to the government of the Territory of Hawaii and of the United States, and the same shall not again be put into circulation, but they shall be recoined in the mints as United States coins. [32 Stat. L. 770.]

SEC. 2. [To be recoined in United States subsidiary coins.] That when such coins have been received by either Government they shall be transmitted to the mint at San Francisco, in sums of not less than five hundred dollars, to be recoined into subsidiary silver coins of the United States, the expense of transportation to be paid by the United States. [32 Stat. L. 770.]

SEC. 3. [Exchange for United States coins.] That any collector of customs or of internal revenue of the United States in the Hawaiian Islands shall, if he is so directed by the Secretary of the Treasury, exchange standard silver coins of the United States that are in his custody as such collector with the government of Hawaii, or with any person desiring to make such exchange, for coins of the government of Hawaii, at their face value when the same are not abraded below the lawful standard of circulation, and the Treasurer of the United States, under the direction of the Secretary of the Treasury, is authorized to deposit such silver coins of the United States as shall be necessary with the collector of customs or of internal revenue at Honolulu or at any Government depository for the purpose of making such exchange under such regulations as he may prescribe. [32 Stat. L. 771.]

SEC. 4. [Payment for mutilated coins.] That any silver coins struck by the government of Hawaii that are mutilated or abraded below such standard may be presented for recoinage at any mint in the United States by the person owning the same, or his or her agents, in sums of not less than fifty dollars, and such owner shall be paid for such coins by the superintendent of the mint the bullion value per troy ounce of the fine silver they contain in standard silver coin of the United States, and such bullion shall be coined into subsidiary coinage of the United States. [32 Stat. L. 771.]

SEC. 5. [To be legal tender until Jan. 1, 1904.] That silver coins heretofore struck by the government of Hawaii shall continue to be legal tender for debts in the Territory of Hawaii, in accordance with the laws of the Republic of Hawaii, until the first day of January, nineteen hundred and four, and not afterwards. [32 Stat. L. 771.]

SEC. 6. [Redemption of silver certificates.] That any silver certificates heretofore issued by the government of the Hawaiian Islands, intended to be circulated as money, shall be redeemed by the Territorial government of Hawaii on or before the first day of January, nineteen hundred and five, and after said date it shall be unlawful to circulate the same as money. [32 Stat. L. 771.]

SEC. 7. [Limitation of United States liability.] That nothing in this Act contained shall bind the United States to redeem any silver certificates issued by the government of Hawaii, or any silver coin issued by such government, except in the manner and upon the conditions stated in this Act for the recoinage of Hawaiian silver. [32 Stat. L. 771.]

Section 8 of this Act, making an appropriation for transporting coins, is omitted as temporary only.

An Act To provide for the disposition of certain property in the Territory of Hawaii.

[*Act of May 26, 1906, ch. 2561, 34 Stat. L. 204.*]

[**Disposal of ceded property — confirmation of former sales — proceeds.**] That all personal and movable property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation approved July seventh, eighteen hundred and ninety-eight, may be sold, leased, or otherwise disposed of in such manner as may be provided by the laws of the Territory of Hawaii: *Provided*, That all sales, leases, or other disposals of such property heretofore made by said Territory, under the authority of such laws, are hereby ratified and confirmed, and all moneys or revenues derived from sales or disposals heretofore made, or made under authority of this Act, shall remain the property of said Territory. [*34 Stat. L. 204.*]

See further the Act of April 30, 1900, ch. 339, § 91, *supra*, p. 524.

HEALTH AND QUARANTINE

- I. PUBLIC HEALTH SERVICE, 534
- II. SANITATION AND QUARANTINE, 542.

I. Public Health Service, 534.

Act of Aug. 14, 1912, ch. 288 ("Public Health Service Act"), 534.

Sec. 1. Public Health Service — Former Laws Applicable — Investigations Authorized, 534.

2. Salaries — Longevity Allowance, 534.

R. S. 4802. Former Supervising Surgeon of Former Marine-Hospital Service, 535.

Act of March 3, 1875, ch. 130, 535.

Sec. 1. Salary and Appointment of Former Supervising Surgeon General, 535.

Act of Jan. 4, 1889, ch. 19, 536.

Sec. 1. Appointment of Medical Officers — Examination, 536.

2. Appointments and Promotions in Service, 536.

Act of March 3, 1891, ch. 541, 536.

Sec. 1. Surgeons Detailed for Duty in Bureau, 536.

Act of July 31, 1894, ch. 174, 537.

Sec. 1. Detail of Additional Medical Officer and Hospital Steward at Bureau, 537.

Act of March 2, 1895, ch. 177, 537.

Sec. 1. Detail of Two Hospital Attendants for Duty in Laboratory, 537.

Act of Feb. 19, 1897, ch. 265, 537.

Sec. 1. Leaves of Absence to Medical Officers, 537.

Act of March 3, 1901, ch. 853, 538.

Sec. 1. Hygienic Laboratory, 538.

Act of July 1, 1902, ch. 1370 ("Public Health and Marine-Hospital Act"), 538.

Sec. 1. Former Public Health and Marine-Hospital Service — Officers' Titles, 538.

2. Salaries, 538.

3. Detail of Commissioned Medical Officers, 539.

4. Use of Service in Time of War, 539.

5. Hygienic Laboratory — Advisory Board, 539.

6. Chiefs of Divisions — Director of Laboratory, 540.

7. Conferences with State, etc., Boards of Health, 540.

8. Mortality, Morbidity, and Vital Statistics, 541.

9. President to Prescribe Regulations, etc. — Report, 541.

Act of Feb. 3, 1905, ch. 297, 541.

Sec. 1. Jurisdiction of Treasury Department, 541.

Act of March 3, 1905, ch. 1484, 541.

Sec. 1. Annual Estimates for Service, 541.

Act of March 4, 1913, ch. 149, 542.

Sec. 1. Pay of Director of Hygienic Laboratory, 542.

II. Sanitation and Quarantine, 542.

R. S. 4792. State Health Laws to Be Observed by United States Officers, etc., 542.

R. S. 4793. Discharge of Cargo of Vessel in Quarantine, 543.

R. S. 4794. Erection of Quarantine Warehouses, 544.

R. S. 4795. Deposit of Goods in Warehouses, 544.

R. S. 4796. Extending Time for Entry of Vessels Subject to Quarantine, 544.

R. S. 4797. Removal of Revenue Officers from Port When Contagious Disease, etc., 544.

R. S. 4798. Removal of Public Offices from the Capital, 545.

R. S. 4799. Adjournment of Courts, 545.

R. S. 4800. Removal of Prisoners, 545.

Res. of June 14, 1879, No. 6, 546.

Secretary of Navy May Place Vessels at Disposal of Quarantine Authorities, 546.

Act of Aug. 1, 1888, ch. 727, 546.

Sec. 1. Offenses against Quarantine Laws — Punishment — Duty of District Attorneys, 546.

Act of March 27, 1890, ch. 51 ("Epidemic Diseases Act"), 547.

Sec. 1. Contagious Diseases, Measures for Preventing Spread of, between States, 547.

2. Offenses by Officers or Agents, 548.

3. Offenses by Common Carriers, 548.

Act of Feb. 15, 1893, ch. 114, 548

Sec. 1. Vessels from Foreign Ports Not to Enter in Violation of This Act or State Health Laws, 548.

2. Bill of Health from Consul — Medical Officer at Consulate — Penalty for Vessel Clearing without Bill of Health — Proceedings, Exceptions, 549.

3. Quarantine Rules and Regulations, 550.

4. Duties of Former Marine Hospital Service — Consular and Sanitary Reports, 552.

5. Rules to Secure Sanitary Conditions of Vessels, etc., 553.

6. Infected Vessels, 553.

7. Immigration May Be Suspended, 554.

8. Compensation for Use of State Buildings, etc., 554.

9. National Board of Health Abolished, 554.

10. Grounds and Anchorages for Vessels — Penalty for Trespassing — Penalty for Violating Contagious Disease Regulations, 554.

11. Vessel from Foreign Port without Bill of Health — Subject to Quarantine Measures, 555.

12. Medical Officers May Administer Oaths, etc., 555.

Act of June 19, 1906, ch. 3433 ("Quarantine Act of 1906"), 555.

Sec. 1. National Quarantine — Control of Stations, etc. — Establishment of Yellow Fever Stations — Detention Stations, 555.

2. Transfer of Title from Other Departments, etc. — Purchase of Private Titles — Condemnation — Control of Stations, 556.

Sec. 3. Publication of Selection of Sites, etc.—Establishment of Stations, Disinfecting Plants, etc., 556.

4. Punishment for Unauthorized Entry or Departure from Stations — Punishment of Owners or Masters of Vessels Violating Laws, Rules, etc., 557.

5. Acceptance of State or Municipal Stations — Purchase, 557.

6. Jurisdiction of United States, 558.

Act of March 3, 1915, ch. 75, 558.

Sec. 1. Prevention of Epidemics — Appropriation — Report of Expenditures, 558.

CROSS-REFERENCES

Quarantine of Nursery Stock, see AGRICULTURE.

Quarantine of Cattle, see ANIMALS.

Viruses, Serums and Toxins, see FOOD AND DRUGS.

Food and Drug Products, see FOOD AND DRUGS; IMPORTS AND EXPORTS.

Quarantine Stations in Hawaii, see HAWAIIAN ISLANDS.

Health of Immigrants, see IMMIGRATION.

I. PUBLIC HEALTH SERVICE

An Act To change the name of the Public Health and Marine-Hospital Service to the Public Health Service, to increase the pay of officers of said service, and for other purposes.

[*Act of Aug. 14, 1912, ch. 288, 37 Stat. L. 309.*]

[**SEC. 1. [Public Health Service — former laws applicable — investigations authorized.]** That the Public Health and Marine-Hospital Service of the United States shall hereafter be known and designated as the Public Health Service, and all laws pertaining to the Public Health and Marine-Hospital Service of the United States shall hereafter apply to the Public Health Service, and all regulations now in force, made in accordance with law for the Public Health and Marine-Hospital Service of the United States shall apply to and remain in force as regulations of and for the Public Health Service until changed or rescinded. The Public Health Service may study and investigate the diseases of man and conditions influencing the propagation and spread thereof, including sanitation and sewage and the pollution either directly or indirectly of the navigable streams and lakes of the United States, and it may from time to time issue information in the form of publications for the use of the public. [37 Stat. L. 309.]

This is the first section of the "Public Health Service Act."

The original "Marine-Hospital Service" was designated the "Public Health and Marine-Hospital Service" by an Act of July 1, 1902, ch. 1370, § 1, *infra*, p. 538, and was designated the "Public Health Service" by the provisions of the text.

The Supervising Surgeon-General of the Marine-Hospital Service was designated the Surgeon-General by the Act of July 1, 1902, ch. 1370, § 1, *supra*, p. 538.

SEC. 2. [Salaries — longevity allowance.] That beginning with the first day of October next after the passage of this Act the salaries of the

commissioned medical officers of the Public Health Service shall be at the following rates per annum: Surgeon General, six thousand dollars; Assistant Surgeon General, four thousand dollars; senior surgeon, of which there shall be ten in number, on active duty, three thousand five hundred dollars; surgeon, three thousand dollars; passed assistant surgeon, two thousand four hundred dollars; assistant surgeon, two thousand dollars; and the said officers, excepting the Surgeon General, shall receive an additional compensation of ten per centum of the annual salary as above set forth for each five years' service, but not to exceed in all forty per centum: *Provided*, That the total salary, including the longevity increase, shall not exceed the following rates: Assistant Surgeon General, five thousand dollars; senior surgeon, four thousand five hundred dollars; surgeon, four thousand dollars: *Provided further*, That there may be employed in the Public Health Service such help as may be provided for from time to time by Congress. [37 Stat. L. 309.]

The provisions of the text with respect to salaries superseded those of the Act of July 1, 1902, ch. 1370, § 2, *infra*, p. 538.

Sec. 4802. [Former supervising surgeon of former marine-hospital service.] The Secretary of the Treasury shall, from time to time, appoint a surgeon to act as supervising surgeon of marine-hospital service, who shall, under the direction of the Secretary, supervise all matters connected with the marine-hospital service, and with the disbursement of the fund for the relief of sick and disabled seamen. He shall be entitled to a salary of not more than two thousand dollars a year, and to his necessary traveling expenses. And he shall make monthly reports to the Secretary of the Treasury. [R. S.]

Act of June 29, 1870, ch. 169, 16 Stat. L. 170.

This section has not been repealed, but it is now of little effect.

The provision of the text relating to the appointment of a supervising surgeon was superseded by the Act of March 3, 1875, ch. 130, § 1, given *infra*, this page.

The provisions relating to the disbursement of the fund for the relief of sick and disabled seamen were superseded by the repeal of all Acts authorizing a hospital tax for seamen by the Act of June 26, 1884, ch. 121, § 15, 23 Stat. L. 57.

The provision relating to the salary of the supervising surgeon was superseded by the Act of Aug. 14, 1912, ch. 288, § 2, *supra*, p. 534.

[SEC. 1.] [Salary and appointment of former Supervising Surgeon General.] * * * That hereafter the salary of the supervising surgeon-general of the United States marine hospital service shall be paid out of the marine hospital fund, at the rate of four thousand dollars per year; and the supervising surgeon-general shall be appointed by the president, by and with the advice and consent of the Senate. [18 Stat. L. 377.]

This is from the Sundry Civil Appropriation Act of March 3, 1875, ch. 130.

The provisions of the text relating to the marine hospital fund were superseded by the repeal of all Acts and parts of Acts creating said fund. See the notes to the preceding R. S. sec. 4802.

Provisions with respect to the salary of the supervising surgeon similar to those of the text were made by the Act of March 3, 1875, ch. 156, § 7, 18 Stat. L. 486.

An act to regulate appointments in the Marine Hospital Service of the United States.

[Act of Jan. 4, 1889, ch. 19, 25 Stat. L. 639.]

[SEC. 1.] **[Appointment of medical officers — examination.]** That medical officers of the Marine Hospital Service of the United States shall hereafter be appointed by the President, by and with the advice and consent of the Senate; and no person shall be so appointed until after passing a satisfactory examination in the several branches of medicine, surgery, and hygiene before a board of medical officers of the said service. Said examination shall be conducted according to rules prepared by the Supervising Surgeon-General, and approved by the Secretary of the Treasury and the President. [25 Stat. L. 639.]

The Marine-Hospital Service was designated the Public Health Service by the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

The Supervising Surgeon-General was designated the Surgeon-General by the Act of July 1, 1902, ch. 1370, § 1, *infra*, p. 538.

Purpose of Act.—Prior to the enactment of this statute there was no law specifically regulating the appointment of medical officers in the Marine-Hospital Service and the appointments were made in accordance with the general authority conferred on the Secretary of the Treasury to direct the affairs of the Marine-Hospital Service. The general purpose of the act was not to change the method of appointing the Supervising Surgeon-General nor to disturb the distinction recognized by the regulations of the Marine-Hospital Service of 1879 between that

officer and "the medical officers" of the service, but merely to legalize the position of the latter, to raise them to the grade of regularly commissioned officers and to fix in the law the regulations as to their promotion. (1911) 29 Op. Atty-Gen. 287.

Selection of Surgeon-General.—The President in selecting a Surgeon-General of the Public Health and Marine-Hospital Service is not restricted by law to the list of commissioned officers in the medical corps of that service. (1911) 29 Op. Atty-Gen. 287.

SEC. 2. [Appointments and promotions in service.] That original appointments in the service shall only be made to the rank of assistant surgeon; and no officer shall be promoted to the rank of passed assistant surgeon until after four years' service and a second examination as aforesaid; and no passed assistant surgeon shall be promoted to be surgeon until after due examination: *Provided*, That nothing in this act shall be so construed as to affect the rank or promotion of any officer originally appointed before the adoption of the regulations of eighteen hundred and seventy-nine; and the President is authorized to nominate for confirmation the officers in the service on the date of the passage of this act. [25 Stat. L. 639.]

See the note to the preceding section 1 of this Act.

The provision that no officer shall be promoted to the rank of passed assistant surgeon until after four years' service, applies to those who entered the service

under a regulation requiring but three years' service previous to examination for promotion. (1889) 19 Op. Atty-Gen. 296.

[SEC. 1.] **[Surgeons detailed for duty in bureau.]** Office of Supervising Surgeon General Marine Hospital Service: * * * And hereafter the Supervising Surgeon-General is hereby authorized to cause the detail of two surgeons and two passed assistant surgeons for duty in the Bureau,

who shall each receive the pay and allowances of their respective grades in the general service. [26 Stat. L. 923.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1891, ch. 541. A similar provision, but apparently not permanent, occurs in the Act of July 11, 1890, ch. 667, 26 Stat. L. 243.

The Supervising Surgeon-General was designated the Surgeon-General by the Act of July 1, 1902, ch. 1370, § 1, *infra*, p. 538, and the Marine-Hospital Service was designated the Public Health Service by the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

The status of medical officers when detailed was determined by the Act of July 1, 1902, ch. 1370, § 3, *infra*, p. 539.

[SEC. 1.] [Detail of additional medical officer and hospital steward at bureau.] * * * And hereafter the Supervising Surgeon-General of the Marine-Hospital Service is hereby authorized to cause the detail of an additional medical officer and one hospital steward for duty in the Bureau, who shall each receive the pay and allowances of his respective grade in the general service. [28 Stat. L. 179.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 31, 1894, ch. 174. The same provision also occurs in the Act of March 3, 1893, ch. 211, 27 Stat. L. 690.

As to the change in the designation of the Supervising Surgeon-General and the Marine-Hospital Service, see the note to the preceding section.

[SEC. 1.] [Detail of two hospital attendants for duty in laboratory.] * * * And hereafter the Supervising Surgeon-General of the Marine-Hospital Service is hereby authorized to cause the detail of two hospital attendants from the port of New York for duty in the laboratory of the Bureau, and who shall each receive the pay equivalent to the compensation of a first-class hospital attendant. [28 Stat. L. 780.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 2, 1895, ch. 177. The detail of one attendant was authorized by the Appropriation Act of July 16, 1892, ch. 196, 27 Stat. L. 198.

As to the change in designation of the Supervising Surgeon-General and the Marine-Hospital Service, see the note to the Act of March 3, 1891, ch. 541, § 1, *supra*, p. 536.

[SEC. 1.] [Leaves of absence to medical officers.] * * * That the Secretary of the Treasury is hereby authorized, in his discretion, to grant to the medical officers of the Marine-Hospital Service commissioned by the President, without deduction of pay, leaves of absence for the same periods of time and in the same manner as is now authorized to be granted to officers of the Army by the Secretary of War. [29 Stat. L. 554.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Feb. 19, 1897, ch. 265.

The Marine-Hospital Service is now known as the Public Health Service by virtue of the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

The Act of July 29, 1876, ch. 239, 19 Stat. L. 102, with reference to leave of absence for officers of the army, provides that "all officers on duty shall be allowed, in the discretion of the Secretary of War, sixty days' leave of absence without deduction of pay or allowance: *Provided*, That the same be taken once in two years: *And provided further*, That the leave of absence may be extended to three months, if taken once only in three years, or four months, if taken only once in four years." See WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

the public health, and not in the regular employment of the Government. The said five members shall each receive compensation of ten dollars per diem while serving in conference, as aforesaid, together with allowance for actual and necessary traveling expenses and hotel expenses while in conference. Said conference is not to exceed ten days in any one fiscal year. The term of service of the five members of said board, not in the regular employment of the Government, first appointed shall be so arranged that one of said members shall retire each year, the subsequent appointments to be for a period of five years. Appointments to fill vacancies occurring in a manner other than as above provided shall be made for the unexpired term of the member whose place has become vacant. [32 Stat. L. 713.]

See the notes to section 1 of this Act, *supra*, p. 538, as to the change in the designation of the service.

The Act of March 3, 1901, ch. 853, § 1, mentioned in the text as establishing the hygienic laboratory, is given *supra*, p. 538.

SEC. 6. [Chiefs of divisions — director of laboratory.] That there shall be appointed by the Surgeon-General, with the approval of the Secretary of the Treasury, whenever, in the opinion of the Surgeon-General, commissioned medical officers of the Public Health and Marine-Hospital Service are not available for this duty by detail, competent persons to take charge of the divisions, respectively, of chemistry, zoology, and pharmacology of the hygienic laboratory, who shall each receive such pay as shall be fixed by the Surgeon-General, with the approval of the Secretary of the Treasury. The director of the said laboratory shall be an officer detailed from the corps of commissioned medical officers of the Public Health and Marine-Hospital Service, as now provided by regulations for said detail from the Marine-Hospital Service, and while thus serving shall have the pay and emoluments of a surgeon: *Provided*, That all commissioned officers of the Public Health and Marine-Hospital Service not below the grade of passed assistant surgeon shall be eligible to assignment to duty in charge of the said divisions of the hygienic laboratory, and while serving in such capacity shall be entitled to the pay and emoluments of their rank. [32 Stat. L. 713.]

As to the change in the designation of the service, see the notes to section 1 of this Act, *supra*, p. 538.

By the Act of March 4, 1913, ch. 149, § 1, *infra*, p. 542, the salary of the director of the Hygienic Laboratory was fixed.

SEC. 7. [Conferences with State, etc., boards of health.] That when, in the opinion of the Surgeon-General of the Public Health and Marine-Hospital Service of the United States, the interests of the public health would be promoted by a conference of said service with State or Territorial boards of health, quarantine authorities, or State health officers, the District of Columbia included, he may invite as many of said health and quarantine authorities as he deems necessary or proper to send delegates, not more than one from each State or Territory and District of Columbia, to said conference: *Provided*, That an annual conference of the health authorities of all the States and Territories and the District of Columbia shall be called, each of said States, Territories, and the District of Columbia to be entitled to one delegate: *And provided further*, That it shall be the duty of the said Surgeon-General to call a conference upon the application of not

less than five State or Territorial boards of health, quarantine authorities, or State health officers, each of said States and Territories joining in such request to be represented by one delegate. [32 Stat. L. 713.]

As to the change in the designation of the service, see the notes to section 1 of this Act, *supra*, p. 538.

SEC. 8. [Mortality, morbidity, and vital statistics.] That to secure uniformity in the registration of mortality, morbidity, and vital statistics it shall be the duty of the Surgeon-General of the Public Health and Marine-Hospital Service, after the annual conference required by section seven to be called, to prepare and distribute suitable and necessary forms for the collection and compilation of such statistics, and said statistics, when transmitted to the Public Health and Marine-Hospital Bureau on said forms, shall be compiled and published by the Public Health and Marine-Hospital Service as a part of the health reports published by said service. [32 Stat. L. 714.]

As to the change in the designation of the service, see the notes to section 1 of this Act, *supra*, p. 538.

As to the collection of statistics generally, see the title CENSUS.

SEC. 9. [President to prescribe regulations, etc.—report.] That the President shall from time to time prescribe rules for the conduct of the Public Health and Marine-Hospital Service. He shall also prescribe regulations respecting its internal administration and discipline, and the uniforms of its officers and employees. It shall be the duty of the Surgeon-General to transmit annually to the Secretary of the Treasury, for transmission by said Secretary to Congress, a full and complete report of the transactions of said service, including a detailed statement of receipts and disbursements. [32 Stat. L. 714.]

As to the change in the designation of the service, see the notes to section 1 of this Act, *supra*, p. 538.

[SEC. 1.] **[Jurisdiction of Treasury Department.]** * * * Office of Surgeon-General of Public and Marine-Hospital Service * * * and said Service shall remain under the jurisdiction of the Treasury Department until otherwise hereafter specifically provided by law. [33 Stat. L. 650.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Feb. 3, 1905, ch. 297.

A similar provision was made by the Act of March 18, 1885, ch. 1904, § 1, 33 Stat. L. 104.

[SEC. 1.] **[Annual estimates for Service.]** * * * And the Secretary of the Treasury shall, for the fiscal year nineteen hundred and seven, and annually thereafter, submit to Congress, in the regular Book of Estimates, detailed estimates of the expenses of maintaining the Public Health and Marine-Hospital Service. [33 Stat. L. 1217.]

This is from the Deficiencies Appropriation Act of March 3, 1905, ch. 1484. Immediately preceding the provision given in the text was a provision repealing so much of

the Act of June 26, 1884, ch. 121, § 15, 23 Stat. L. 57, as made "a permanent appropriation of the receipts for duties on tonnage provided for by said Act for the expenses of maintaining the Marine-Hospital Service."

The Public Health and Marine-Hospital Service was designated the Public Health Service by the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

[SEC. 1.] [Pay of director of Hygienic Laboratory.] * * * Hereafter the director of the Hygienic Laboratory shall receive the pay and allowance of a senior surgeon. [37 Stat. L. 915.]

This is from the Deficiencies Appropriation Act of March 4, 1913, ch. 149.

The pay of a senior surgeon was fixed by the Act of Aug. 14, 1912, ch. 288, § 2, *supra*, p. 534.

II. SANITATION AND QUARANTINE

Sec. 4792. [State health-laws to be observed by United States officers, etc.] The quarantines and other restraints established by the health-laws of any State, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several revenue-cutters, and by the military officers commanding in any fort or station upon the sea-coast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health-laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury. But nothing in this Title shall enable any State to collect a duty of tonnage or impost without the consent of Congress. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 619.

State quarantine laws.— "While, under its power to regulate foreign and interstate commerce, the authority of Congress to establish quarantine regulations, and to protect the country as respects its commerce from contagious and infectious diseases, has never in recent years been questioned, such power has been allowed to remain in abeyance; and Congress, doubtless in view of the different requirements of different climates and localities, and of the difficulty of framing a general law upon the subject, has elected to permit the several states to regulate the matter of protecting the public health as to themselves seemed best." Congress has also confirmed such power by the provisions of this section. *Bartlett v. Lockwood*, (1896) 160 U. S. 357, 16 S. Ct. 334, 40 U. S. (L. ed.) 455. See also dissenting opinion in *Leisy v. Hardin*, (1890) 135 U. S. 100, 10 S. Ct. 681, 34 U. S. (L. ed.) 128. And see *Peete v. Morgan*, (1873) 19 Wall. 581, 22 U. S. (L. ed.) 201; *Compagnie Francaise, etc., v. Louisiana State Board of Health*, (1902) 186 U. S. 380, 22 S. Ct. 811, 46 U. S. (L. ed.) 1209;

Minneapolis, etc., R. Co. v. Milner, (W. D. Mich. 1893) 57 Fed. 276.

Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come into conflict with federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the states and has repeatedly acquiesced in the enforcement of state laws. *Minnesota Rate Cases*, (1913) 230 U. S. 352, 406, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L. R. A. (N. S.) 1151.

State quarantine laws are a constitutional exercise of the police power, and although state legislation for the protection of the public health, the public morals or the public safety is subject to the paramount authority of the United States Constitution and cannot violate rights secured or guaranteed thereby, yet the state cannot bargain or cede away the public health or morals and will not be presumed to aim so to do in assenting to any constitutional amendment. *Morgan's*

Steamship Co. v. Louisiana Board of Health, (1886) 118 U. S. 455, 6 S. Ct. 1114, 30 U. S. (L. ed.) 237; *Mugler v. Kansas*, (1887) 123 U. S. 623, 8 S. Ct. 273, 31 U. S. (L. ed.) 205; *Leisy v. Hardin*, (1889) 135 U. S. 100, 10 S. Ct. 681, 34 U. S. (L. ed.) 128.

State law requiring compensation for quarantine service.—The enactment of quarantine laws is within the province of the states, and a state statute is valid which requires that the vessels which are examined at the quarantine station shall pay the compensation which the law fixes for this service. This compensation is not objectionable as being a tonnage tax forbidden by the Constitution of the United States; a regulation of commerce exclusively within the power of Congress; or a regulation which gives a preference to one port over ports of other states. *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 455, 6 S. Ct. 1114, 30 U. S. (L. ed.) 237.

But in *Peete v. Morgan*, (1873) 19 Wall. 581, 21 U. S. (L. ed.) 201, it was held that a state statute enacting that every vessel arriving at the quarantine station should pay five dollars for the first hundred tons, and one and a half cents for each additional ton, laid a duty on tonnage and was invalid. The tax was levied whether any service was rendered or not. See, as to the validity of state statutes imposing taxes on immigrants, *Passenger Cases*, (1849) 7 How. 283, 12 U. S. (L. ed.) 702. See also *New York v. Miln*, (1837) 11 Pet. 102, 9 U. S. (L. ed.) 648.

Power of Congress.—"It may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws

on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the state on the subject are valid." *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 455, 6 S. Ct. 1114, 30 U. S. (L. ed.) 237.

The Acts of Congress empowering and directing the officers of the general government to conform to and assist in the execution of the quarantine and health laws of a state proceed upon the idea that these laws are constitutional. "But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the Acts of Congress, and are considered as flowing from the acknowledged power of a state to provide for the health of its citizens.

... But in making these provisions the opinion is unequivocally manifested, that Congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce." *Gibbons v. Ogden*, (1824) 9 Wheat. 186, 6 U. S. (L. ed.) 68. See also *Mugler v. Kansas*, (1887) 123 U. S. 623, 8 S. Ct. 273, 31 U. S. (L. ed.) 205.

Disinfecting imported rags.—The health officer of a port like New York has authority to protect the public against contagious diseases from infected vessels or imported merchandise; and if neither he nor the collector of the port orders disinfection, but the latter sends the goods to the public warehouse where the former can have them disinfected, no federal question is raised by such action. *Bartlett v. Lockwood*, (1896) 160 U. S. 357, 16 S. Ct. 334, 40 U. S. (L. ed.) 455; (1891) 130 N. Y. 340, 29 N. E. 257.

Sec. 4793. [Discharge of cargo of vessel in quarantine.] Whenever, by the health-laws of any State, or by the regulations made pursuant thereto, any vessel arriving within a collection-district of such State is prohibited from coming to the port of entry or delivery by law established for such district, and such health-laws require or permit the cargo of the vessel to be unladen at some other place within or near to such district, the collector, after due report to him of the whole of such cargo, may grant his warrant or permit for the unloading and discharge thereof, under the care of the surveyor, or of one or more inspectors, at some other place where such health-laws permit, and upon the conditions and restrictions which shall be directed by the Secretary of the Treasury, or which such collector may, for the time, deem expedient for the security of the public revenue. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 619.

Sec. 4794. [Erection of quarantine warehouses.] There shall be purchased or erected, under the orders of the President, suitable warehouses, with wharves and inclosures, where merchandise may be unladen and deposited, from any vessel which shall be subject to a quarantine, or other restraint, pursuant to the health-laws of any State, at such convenient places therein as the safety of the public revenue and the observance of such health-laws may require. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 620.

Further provisions relating to quarantine stations were made by the Act of June 19, 1906, ch. 3433, *infra*, p. 555.

This section does not authorize the President to establish a quarantine, but when this is done under the laws of any

state, the federal officers are bound to aid in its enforcement. (1829) 2 Op. Atty.-Gen. 263.

Sec. 4795. [Deposit of goods in warehouses.] Whenever the cargo of a vessel is unladen at some other place than the port of entry or delivery under the foregoing provisions, all the articles of such cargo shall be deposited, at the risk of the parties concerned therein, in such public or other warehouses or inclosures as the collector shall designate, there to remain under the joint custody of such collector and of the owner, or master, or other person having charge of such vessel, until the same are entirely unladen or discharged, and until the articles so deposited may be safely removed without contravening such health-laws. And when such removal is allowed, the collector having charge of such articles may grant permits to the respective owners or consignees, their factors or agents, to receive all merchandise which has been entered, and the duties accruing upon which have been paid, upon the payment by them of a reasonable rate of storage; which shall be fixed by the Secretary of the Treasury for all public warehouses and inclosures. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 619.

Quarantined cattle.—Under the general quarantine laws (R. S. secs. 4792–4796) cattle, as cargoes or parts of cargoes were deposited at quarantine “at the risk of

the parties concerned therein” and remained in joint custody of the collector and “the owner or master or other person.” (1895) 21 Op. Atty.-Gen. 193.

Sec. 4796. [Extending time for entry of vessels subject to quarantine.] The Secretary of the Treasury is authorized, whenever a conformity to such quarantines and health-laws requires it, and in respect to vessels subject thereto, to prolong the terms limited for the entry of the same, and the report or entry of their cargoes, and to vary or dispense with any other regulations applicable to such reports or entries. No part of the cargo of any vessel shall, however, in any case, be taken out or unladen therefrom, otherwise than is allowed by law, or according to the regulations hereinafter established. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 619.

Sec. 4797. [Removal of revenue officers from port when contagious disease, etc.] Whenever, by the prevalence of any contagious or epidemic disease in or near the place by law established as the port of entry for any

collection-district, it becomes dangerous or inconvenient for the officers of the revenue employed therein to continue the discharge of their respective offices at such port, the Secretary of the Treasury, or, in his absence, the First Comptroller, may direct the removal of the officers of the revenue from such port to any other more convenient place, within, or as near as may be to, such collection-district. And at such place such officers may exercise the same powers, and shall be liable to the same duties, according to existing circumstances, as in the port or district established by law. Public notice of any such removal shall be given as soon as may be. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 620.

Account of cost of removal of public office by reason of sickness, etc., see R. S. sec. 1776, under title PUBLIC OFFICERS AND EMPLOYEES.

Sec. 4798. [Removal of public offices from the capital.] In case of the prevalence of a contagious or epidemic disease at the seat of Government, the President may permit and direct the removal of any or all the public offices to such other place or places as he shall deem most safe and convenient for conducting the public business. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 620.

By R. S. sec. 34, given under the title CONGRESS, the President is authorized to convene Congress elsewhere than at the seat of government when rendered necessary by the prevalence of contagious diseases, etc.

Sec. 4799. [Adjournment of courts.] Whenever, in the opinion of the Chief Justice, or, in case of his death, or inability, of the senior associate justice of the Supreme Court, a contagious or epidemic sickness shall render it hazardous to hold the next stated session of the court at the seat of Government, the chief or such associate justice may issue his order to the marshal of the Supreme Court, directing him to adjourn the next session of the court to such other place as such justice deems convenient. The marshal shall thereupon adjourn the court, by making publication thereof in one or more public papers printed at the seat of Government from the time he shall receive such order until the time by law prescribed for commencing the session. The several circuit and district judges shall, respectively, under the same circumstances, have the same power, by the same means, to direct adjournments of the several circuit and district courts to some convenient place within their districts respectively. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 621; Act of March 2, 1867, ch. 156, 14 Stat. L. 433.

Sec. 4800. [Removal of prisoners.] The judge of any district court, within whose district any contagious or epidemic disease shall at any time prevail, so as, in his opinion, to endanger the lives of persons confined in the prison of such district, in pursuance of any law of the United States, may direct the marshal to cause the persons so confined to be removed to the next adjacent prison where such disease does not prevail, there to be confined until they may safely be removed back to the place of their first confinement. Such removals shall be at the expense of the United States. [R. S.]

Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 620.

Joint resolution authorizing the Secretary of the Navy to place vessels and hulks at the disposal of commissioners of quarantine or other proper persons at the ports of the United States.

[*Res. of June 14, 1879, No. 6, 21 Stat. L. 50.*]

[**Secretary of Navy may place vessels at disposal of quarantine authorities.**] That the Secretary of the Navy be, and he is hereby, authorized, in his discretion, at the request of the National Board of Health, to place gratuitously, at the disposal of the commissioners of quarantine, or the proper authorities at any of the ports of the United States, to be used by them temporarily for quarantine purposes, such vessels or hulks belonging to the United States as are not required for other uses of the national government, subject to such restrictions and regulations as the said Secretary may deem necessary to impose for the preservation thereof. [*21 Stat. L. 50.*]

The national board of health above referred to was established by the Act of March 3, 1879, ch. 202, 20 Stat. L. 484. This Act was amended in some particulars and a disbursing agent designated by the Act of July 1, 1879, ch. 61, 21 Stat. L. 47. The duties of the board were restricted by a provision in the Sundry Civil Appropriation Act of Aug. 7, 1882, ch. 433, 22 Stat. L. 315. A provision for storing the board's records occurred in the Deficiencies Appropriation Act of March 2, 1889, ch. 410, 25 Stat. L. 912. See for a full review of other legislation relative to this board, *Dunwoody v. U. S.*, (1892) 143 U. S. 578, 12 S. Ct. 465, 30 U. S. (L. ed.) 269. This board, after failing for a number of years to receive any appropriations, was finally abolished by section 9 of the Act of Feb. 15, 1893, ch. 114, given *infra*, p. 554. It is doubtful, therefore, if there is any efficacy remaining in the above resolution.

An act to perfect the quarantine service of the United States.

[*Act of Aug. 1, 1888, ch. 727, 25 Stat. L. 355.*]

[**SEC. 1.**] [**Offenses against quarantine laws — punishment — duty of district attorneys.**] That whenever any person shall trespass upon the grounds belonging to any quarantine reservation, or whenever any person, master, pilot, or owner of a vessel entering any port of the United States, shall so enter in violation of section one of the act entitled "An act to prevent the introduction of contagious or infectious diseases into the United States," approved April twenty-ninth, eighteen hundred and seventy-eight, or in violation of the quarantine regulations framed under said act, such person, trespassing, or such master, pilot, or other person in command of a vessel shall, upon conviction thereof, pay a fine of not more than three hundred dollars, or be sentenced to imprisonment for a period of not more than thirty days, or shall be punished by both fine and imprisonment, at the discretion of the court. And it shall be the duty of the United States attorney in the district where the misdemeanor shall have been committed to take immediate cognizance of the offense, upon report made to him by any medical officer of the Marine-Hospital Service, or by any officer of the customs service, or by any State officer acting under authority of section five of said act. [*25 Stat. L. 355.*]

Section 2 of this Act was as follows:

"**SEC. 2.** That as soon after the passage of this act as practicable, the Secretary of the Treasury shall cause to be established, in addition to the quarantine established by the act approved March fifth, eighteen hundred and eighty-eight, quarantine stations,

as follows: One at the mouth of the Delaware Bay; one near Cape Charles, at the entrance of the Chesapeake Bay; one on the Georgia coast; one at or near Key West; one in San Diego Harbor; one in San Francisco Harbor; and one at or near Port Townsend, at the entrance to Puget Sound; and the said quarantine stations when so established shall be conducted by the Marine-Hospital Service under regulations framed in accordance with the act of April twenty-ninth, eighteen hundred and seventy-eight." [25 Stat. L. 356.]

The Act of March 5, 1888, ch. 20, 25 Stat. L. 43, mentioned in said section 2, provided for the removal of the national quarantine station at Ship Island in the Gulf of Mexico. More general provisions relating to quarantine were made by the Act of June 19, 1906, ch. 3433, *infra*, p. 555.

Section 3 of this Act made temporary appropriations.

The Act of April 29, 1878, ch. 66, § 1, mentioned in the text, is given in the notes to the Act of Feb. 15, 1893, ch. 114, § 1, *infra*, p. 548, and reference is there made to the other sections of said Act.

As to the change in designation of the Marine-Hospital Service and the Supervising Surgeon-General, see the notes to the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

An act to prevent the introduction of contagious diseases from one State to another and for the punishment of certain offenses.

[Act of March 27, 1890, ch. 51, 26 Stat. L. 31.]

[SEC. 1.] [Contagious diseases, measures for preventing spread of, between States.] That whenever it shall be made to appear to the satisfaction of the President that cholera, yellow-fever, small-pox, or plague exists in any State or Territory, or in the District of Columbia, and that there is danger of the spread of such disease into other States, Territories, or the District of Columbia, he is hereby authorized to cause the Secretary of the Treasury to promulgate such rules and regulations as in his judgment may be necessary to prevent the spread of such disease from one State or Territory into another, or from any State or Territory into the District of Columbia, or from the District of Columbia into any State or Territory, and to employ such inspectors and other persons as may be necessary to execute such regulations to prevent the spread of such disease. The said rules and regulations shall be prepared by the Supervising Surgeon General of the Marine Hospital service under the direction of the Secretary of the Treasury. And any person who shall willfully violate any rule or regulation so made and promulgated shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars, or imprisonment for not more than two years, or both, in the discretion of the court. [26 Stat. L. 31.]

This is known as the "Epidemic Diseases Act."

As to the change in the designation of the Marine-Hospital Service and the Supervising Surgeon-General, see the notes to the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

A regulation directed against a particular race (Chinese) exclusively, when there is no pretense that previous residence, habits, exposure to disease, method of living, or physical condition has anything to do with their classification as subject to the regulation, is a denial of the equal protection of the laws, when they are denied the privilege of traveling from one place to another except upon conditions not enforced against any other class

of people, and when this privilege is denied to Chinese persons born in the United States as well as to those born elsewhere. An injunction was granted restraining the board of health and quarantine officer from inoculating the complainant and other Chinese residents against their will; from imprisoning, restraining, or confining them within the limits of the city and county; and from otherwise interfering with the exercise of their personal

liberty freely to pass from the city and county to other parts of the same state. *Wong Wai v. Williamson*, (1900) 103 Fed. 1. It was later held that the injunction had not been violated when the orders and regulations were amended so as to be applicable to all persons departing for

other states and territories. *Wong Wai v. Williamson*, (1900) 103 Fed. 384.

The Act of Feb. 15, 1893, § 3, *infra*, p. 550, does not repeal or supersede the special provisions of this statute. (1898) 22 Op. Atty.-Gen. 106.

SEC. 2. [Offenses by officers or agents.] That any officer, or person acting as an officer, or agent of the United States at any quarantine station, or other person employed to aid in preventing the spread of such disease, who shall willfully violate any of the quarantine laws of the United States, or any of the rules and regulations made and promulgated by the Secretary of the Treasury as provided for in section one of this act, or any lawful order of his superior officer or officers, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than three hundred dollars or imprisonment for not more than one year, or both, in the discretion of the court. [26 Stat. L. 32.]

SEC. 3. [Offenses by common carriers.] That when any common carrier or officer, agent, or employee of any common carrier shall willfully violate any of the quarantine laws of the United States, or the rules and regulations made and promulgated as provided for in section one of this act, such common carrier, officer, agent, or employee, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not more than five hundred dollars, or imprisonment for not more than two years, or both, in the discretion of the court. [26 Stat. L. 32.]

An act granting additional quarantine powers and imposing additional duties upon the Marine-Hospital Service.

[Act of Feb. 15, 1893, ch. 114, 27 Stat. L. 449.]

[SEC. 1.] [Vessels from foreign ports not to enter in violation of this act or State health laws.] That it shall be unlawful for any merchant ship or other vessel from any foreign port or place to enter any port of the United States except in accordance with the provisions of this act and with such rules and regulations of State and municipal health authorities as may be made in pursuance of, or consistent with, this act; and any such vessel which shall enter, or attempt to enter, a port of the United States in violation thereof shall forfeit to the United States a sum, to be awarded in the discretion of the court, not exceeding five thousand dollars, which shall be a lien upon said vessel, to be recovered by proceedings in the proper district court of the United States. In all such proceedings the United States district attorney for such district shall appear on behalf of the United States; and all such proceedings shall be conducted in accordance with the rules and laws governing cases of seizure of vessels for violation of the revenue laws of the United States. [27 Stat. L. 449.]

The provisions of the text supersede those of the Act of April 29, 1876, ch. 66, entitled "An Act to prevent the introduction of contagious or infectious diseases into the United States," section 1 of which was as follows: "That no vessel or vehicle coming from any foreign port or country where any contagious or infectious disease may exist, and

no vessel or vehicle conveying any person or persons, merchandise or animals, affected with any infectious or contagious disease, shall enter any port of the United States or pass the boundary line between the United States and any foreign country, contrary to the quarantine laws of any one of said United States, into or through the jurisdiction of which said vessel or vehicle may pass, or to which it is destined, or except in the manner and subject to the regulations to be prescribed as hereinafter provided." [20 Stat. L. 37.]

Sections 2, 3, and 4 of said Act of April 29, 1879, ch. 66, were directly repealed by the Act of June 2, 1879, ch. 11, § 9, 21 Stat. L. 7, entitled "An act to prevent the introduction of contagious or infectious diseases into the United States." Section 10 of that Act provided that "this act shall not continue in force for a longer period than four years from the date of its approval." The Act of June 2, 1879, expired therefore by limitation on June 2, 1883. In 1892 it was ruled by Attorney-General Miller that the repealed sections (2, 3, and 4) were revived by the expiration of the repealing Act by its own limitation. 20 Op. Atty-Gen. 467. See article on "Statutes and Statutory Construction," vol. 1, p. 3.

However, said sections 2, 3, and 4 were superseded by the following sections 2, 3, and 4 of the Act of Feb. 15, 1893, ch. 114, and are noted thereunder.

Section 6 of said Act repealed all laws inconsistent therewith.

See R. S. secs. 4792-4796, *supra*, p. 542 et seq.

Punishment for violation of this Act.— See section 1 of the Act of Aug. 1, 1888, ch. 727, *supra*, p. 546.

Adoption of state quarantine laws.— This statute shows clearly the intention of Congress to adopt state quarantine laws or regulations, or to recognize the

power of the states to pass them. (See notes under R. S. sec. 4792, *supra*, p. 542.) *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 455, 6 S. Ct. 1114, 30 U. S. (L. ed.) 237. See also (1892) 20 Op. Atty-Gen. 468.

SEC. 2. [Bill of health from consul—medical officer at consulate—penalty for vessel clearing without bill of health—proceedings, exceptions.] That any vessel at any foreign port clearing for any port or place in the United States shall be required to obtain from the consul, vice-consul, or other consular officer of the United States at the port of departure, or from the medical officer where such officer has been detailed by the President for that purpose, a bill of health, in duplicate, in the form prescribed by the Secretary of the Treasury, setting forth the sanitary history and condition of said vessel, and that it has in all respects complied with the rules and regulations in such cases prescribed for securing the best sanitary condition of the said vessel, its cargo, passengers, and crew; and said consular or medical officer is required, before granting such duplicate bill of health, to be satisfied that the matters and things therein stated are true; and for his services in that behalf he shall be entitled to demand and receive such fees as shall by lawful regulation be allowed, to be accounted for as is required in other cases. The President, in his discretion, is authorized to detail any medical officer of the Government to serve in the office of the consul at any foreign port for the purpose of furnishing information and making the inspection and giving the bills of health hereinbefore mentioned. Any vessel clearing and sailing from any such port without such bill of health, and entering any port of the United States, shall forfeit to the United States not more than five thousand dollars, the amount to be determined by the court, which shall be a lien on the same, to be recovered by proceedings in the proper district court of the United States. In all such proceedings the United States district attorney for such district shall appear on behalf of the United States; and all such proceedings shall be conducted in accordance with the rules and laws governing cases of seizure of vessels for violation of the revenue laws of the United States.

The provisions of this section shall not apply to vessels plying between foreign ports on or near the frontiers of the United States and ports of the

United States adjacent thereto; but the Secretary of the Treasury is hereby authorized, when, in his discretion, it is expedient for the preservation of the public health, to establish regulations governing such vessels. [27 Stat. L. 450, as amended by 28 Stat. L. 372.]

The last paragraph of this section as above given was added by the Act of April 18, 1894, ch. 300.

The Act of April 29, 1879, ch. 66, § 2, which was superseded by the provisions of the text, was as follows:

"SEC. 2. That whenever any infectious or contagious disease shall appear in any foreign port or country, and whenever any vessel shall leave any infected foreign port, or, having on board goods or passengers coming from any place or district infected with cholera or yellow fever, shall leave any foreign port, bound for any port in the United States, the consular officer, or other representative of the United States at or nearest such foreign port shall immediately give information thereof to the Supervising Surgeon-General of the Marine Hospital Service, and shall report to him the name, the date of departure, and the port of destination of such vessel; and shall also make the same report to the health officer of the port of destination in the United States, and the consular officers of the United States shall make weekly reports to him of the sanitary condition of the ports at which they are respectively stationed; and the said Surgeon-General of the Marine Hospital Service shall, under the direction of the Secretary of the Treasury, be charged with the execution of the provisions of this act, and shall frame all needful rules and regulations for that purpose, which rules and regulations, shall be subject to the approval of the President, but such rules and regulations shall not conflict with or impair any sanitary or quarantine laws or regulations of any State or municipal authorities now existing or which may hereafter be enacted." [20 Stat. L. 38.]

See the note to section 1 of the Act given in the text, *supra*, p. 548.

The rules and regulations authorized by this statute must be subject to the limitation of the provisions in section 5 of this Act, *infra*, p. 553, that they do not interfere with state laws. This does not mean that nothing can be done except what is authorized by the state law, but it is competent for the federal regulations to impose additional restrictions, as, where the local laws or rules prescribe a quarantine period which is deemed too short, a longer period may be prescribed, the regulations carefully providing that the federal jurisdiction should attach upon the expiration of state action. (1892) 20 Op. Atty-Gen. 468. See also (1892) 20 Op. Atty-Gen. 466.

Clearing—bill of health at port of departure.—The statute requires any vessel at any foreign port, clearing for any port in the United States, to obtain a bill of health at the port from which it so clears and departs, and is not complied

with by a vessel which fails to obtain a bill of health at the port of departure, but procures one at a port at which she stops on the voyage. *The Dago*, (C. C. A. 1894) 61 Fed. 986, 8 U. S. App. 612, 10 C. C. A. 224. But see *The African Prince*, (D. C. Mass. 1914) 212 Fed. 552, wherein the foregoing decision (*The Dago*, (C. C. A. 4th Cir. 1894) 61 Fed. 986, 8 U. S. App. 612, 10 C. C. A. 224) was pronounced dictum, unnecessary to the decision of the case and, as the record showed, not greatly considered. In *The African Prince* the court held that this act applies to a given case only where the vessel "cleared" from a foreign port for a port or place in the United States, and that where a vessel "sailing from" or "leaving a foreign port" calls at intermediate foreign ports before reaching the United States, she is not bound to take a bill of health from the United States authorities at every port at which she touches.

SEC. 3. [Quarantine rules and regulations.] That the Supervising Surgeon-General of the Marine Hospital Service shall, immediately after this act takes effect, examine the quarantine regulations of all State and municipal boards of health, and shall, under the direction of the Secretary of the Treasury, co-operate with and aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards and in the execution and enforcement of the rules and regulations made by the Secretary of the Treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia; and all rules and regulations

made by the Secretary of the Treasury shall operate uniformly and in no manner discriminate against any port or place; and at such ports and places within the United States as have no quarantine regulations under State or municipal authority, where such regulations are, in the opinion of the Secretary of the Treasury, necessary to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, and at such ports and places within the United States where quarantine regulations exist under the authority of the State or municipality which, in the opinion of the Secretary of the Treasury, are not sufficient to prevent the introduction of such diseases into the United States, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, the Secretary of the Treasury shall, if in his judgment it is necessary and proper, make such additional rules and regulations as are necessary to prevent the introduction of such diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia, and when said rules and regulations have been made they shall be promulgated by the Secretary of the Treasury and enforced by the sanitary authorities of the States and municipalities, where the State or municipal health authorities will undertake to execute and enforce them; but if the State or municipal authorities shall fail or refuse to enforce said rules and regulations the President shall execute and enforce the same and adopt such measures as in his judgment shall be necessary to prevent the introduction or spread of such diseases, and may detail or appoint officers for that purpose. The Secretary of the Treasury shall make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers, and crew; which shall be published and communicated to and enforced by the consular officers of the United States. None of the penalties herein imposed shall attach to any vessel or owner or officer thereof until a copy of this act, with the rules and regulations made in pursuance thereof, has been posted up in the office of the consul or other consular officer of the United States for ten days, in the port from which said vessel sailed; and the certificate of such consul or consular officer over his official signature shall be competent evidence of such posting in any court of the United States. [27 Stat. L. 450.]

The Act of April 29, 1878, ch. 66, § 3, which was in effect superseded by the provisions of the text, was as follows:

"SEC. 3. That it shall be the duty of the medical officers of the Marine-Hospital Service and of customs-officers to aid in the enforcement of the national quarantine rules and regulations established under the preceding section; but no additional compensation shall be allowed said officers by reason of such services as they may be required to perform under this act, except actual and necessary traveling expenses." [20 Stat. L. 38.]

See the note to section 1 of the Act given in the text, *supra*, p. 548.

As to the change in the designation of the Marine-Hospital Service and the Supervising Surgeon-General, see the notes to the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

State quarantine systems.—A Louisiana statute gave authority to the state board of health, in its discretion, to prohibit the introduction into any infected portion

of the state, persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease. The state Supreme Court held that it empowered the board to exclude healthy persons from a locality infected with a contagious or infectious disease, and this power was intended to apply to persons seeking to enter the infected place, whether they came from without or from within the state. Such a statute, so construed, was held not void as being an interference with interstate and foreign commerce. So far as this statute was concerned, it "did not contemplate the overthrow of the existing state quarantine systems and the abrogation of the powers on the subject of health and quarantine exercised by the states from the beginning, because the enactment of state laws on these subjects would in particular instances affect interstate and foreign commerce." *Compagnie Francaise, etc. v. Louisiana State Board of Health*, (1902) 186 U. S. 380, 22 S. Ct.

811, 46 U. S. (L. ed.) 1209. See *Louisiana v. Texas*, (1900) 176 U. S. 1, 20 S. Ct. 251, 44 U. S. (L. ed.) 347; *Minneapolis, etc., R. Co. v. Milner*, (1893) 57 Fed. 276.

Regulations.—Regulations with respect to quarantining against yellow fever, providing for an exception in the case of "vessels bound for ports in the United States north of the southern boundary of Maryland, with good sanitary condition and history, having had no sickness on board at ports of departure, *en route*, or on arrival, provided they have been five days from last infected or suspected port," were held not to constitute a discrimination within the meaning of this statute. (1896) 21 Op. Atty-Gen. 446.

The inspection of maritime quarantines, state and local as well as national, may be the proper subject of Treasury regulations. (1893) 20 Op. Atty-Gen. 645.

The Act of March 27, 1890, *supra*, p. 547, is not repealed or modified by the general provisions of this statute. (1898) 22 Op. Atty-Gen. 106.

SEC. 4. [Duties of former Marine Hospital Service—consular and sanitary reports.] That it shall be the duty of the supervising Surgeon-General of the Marine Hospital Service, under the direction of the Secretary of the Treasury, to perform all the duties in respect to quarantine and quarantine regulations which are provided for by this act, and to obtain information of the sanitary condition of foreign ports and places from which contagious and infectious diseases are or may be imported into the United States, and to this end the consular officer[s] of the United States at such ports and places as shall be designated by the Secretary of the Treasury shall make to the Secretary of the Treasury weekly reports of the sanitary condition of the ports and places at which they are respectively stationed, according to such forms as the Secretary of the Treasury shall prescribe; and the Secretary of the Treasury shall also obtain, through all sources accessible, including State and municipal sanitary authorities throughout the United States, weekly reports of the sanitary condition of ports and places within the United States, and shall prepare, publish, and transmit to collectors of customs and to State and municipal health officers and other sanitarians weekly abstracts of the consular sanitary reports and other pertinent information received by him, and shall also, as far as he may be able, by means of the voluntary co-operation of State and municipal authorities, of public associations, and private persons, procure information relating to the climatic and other conditions affecting the public health, and shall make an annual report of his operations to Congress, with such recommendations as he may deem important to the public interest. [27 Stat. L. 451.]

Sections 4 and 5 of the Act of April 29, 1878, ch. 66, which were in effect superseded by the provisions of the text, were as follows:

"SEC. 4. That the Surgeon-General of the Marine-Hospital Service shall, upon receipt of information of the departure of any vessel, goods, or passengers from infected places to any port in the United States, immediately notify the proper State or municipal and United States officer or officers at the threatened port of destination of the vessel, and shall prepare and transmit to the medical officers of the Marine-Hospital Service, to collectors of customs, and to the State and municipal health authorities in the United

States, weekly abstracts of the consular sanitary reports and other pertinent information received by him." [20 Stat. L. 38.]

"SEC. 5. That whenever, at any port of the United States, any State or municipal quarantine system may now, or may hereafter exist, the officers or agents of such system shall, upon the application of the respective State or municipal authorities, be authorized and empowered to act as officers or agents of the national quarantine system, and shall be clothed with all the powers of United States officers for quarantine purposes, but shall receive no pay or emoluments from the United States. At all other ports where, in the opinion of the Secretary of the Treasury, it shall be deemed necessary to establish quarantine, the medical officers or other agents of the Marine-Hospital Service shall perform such duties in the enforcement of the quarantine rules and regulations as may be assigned them by the Surgeon-General of that service under this act: *Provided*, That there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws." [20 Stat. L. 38.]

See the notes to section 1 of the Act given in the text, *supra*, p. 548.

As to the change in designation of the Marine-Hospital Service and the Supervising Surgeon-General, see the notes to the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

SEC. 5. [Rules to secure sanitary conditions of vessels, etc.] That the Secretary of the Treasury shall from time to time issue to the consular officers of the United States and to the medical officers serving at any foreign port, and otherwise make publicly known, the rules and regulations made by him, to be used and complied with by vessels in foreign ports, for securing the best sanitary conditions of such vessels, their cargoes, passengers, and crew, before their departure for any port in the United States, and in the course of the voyage; and all such other rules and regulations as shall be observed in the inspection of the same on the arrival thereof at any quarantine station at the port of destination, and for the disinfection and isolation of the same, and the treatment of cargo and persons on board, so as to prevent the introduction of cholera, yellow fever, or other contagious or infectious diseases; and it shall not be lawful for any vessel to enter said port to discharge its cargo, or land its passengers, except upon a certificate of the health officer at such quarantine station certifying that said rules and regulations have in all respects been observed and complied with, as well on his part as on the part of the said vessel and its master, in respect to the same and to its cargo, passengers, and crew; and the master of every such vessel shall produce and deliver to the collector of customs at said port of entry, together with the other papers of the vessel, the said bills of health required to be obtained at the port of departure and the certificate herein required to be obtained from the health officer at the port of entry; and that the bills of health herein prescribed shall be considered as part of the ship's papers, and when duly certified to by the proper consular or other officer of the United States, over his official signature and seal, shall be accepted as evidence of the statements therein contained in any court of the United States. [27 Stat. L. 451.]

See the notes to section 1 of this Act, *supra*, p. 548.

SEC. 6. [Infected vessels.] That on the arrival of an infected vessel at any port not provided with proper facilities for treatment of the same, the Secretary of the Treasury may remand said vessel, at its own expense, to the nearest national or other quarantine station, where accommodations and appliances are provided for the necessary disinfection and treatment of the vessel, passengers, and cargo; and after treatment of any infected vessel at a national quarantine station, and after certificate shall have been given by the United States quarantine officer at said station that the vessel,

cargo, and passengers are each and all free from infectious disease, or danger of conveying the same, said vessel shall be admitted to entry to any port of the United States named within the certificate. But at any ports where sufficient quarantine provision has been made by State or local authorities the Secretary of the Treasury may direct vessels bound for said ports to undergo quarantine at said State or local station. [27 Stat. L. 452.]

See the notes to section 1 of this Act, *supra*, p. 548.

SEC. 7. [Immigration may be suspended.] That whenever it shall be shown to the satisfaction of the President that by reason of the existence of cholera or other infectious or contagious diseases in a foreign country there is serious danger of the introduction of the same into the United States, and that notwithstanding the quarantine defense this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce the same is demanded in the interest of the public health, the President shall have power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate and for such period of time as he may deem necessary. [27 Stat. L. 452.]

See the notes to section 1 of this Act, *supra*, p. 548.

SEC. 8. [Compensation for use of State buildings, etc.] That whenever the proper authorities of a State shall surrender to the United States the use of the buildings and disinfecting apparatus at a State quarantine station, the Secretary of the Treasury shall be authorized to receive them and to pay a reasonable compensation to the State for their use, if, in his opinion, they are necessary to the United States. [27 Stat. L. 452.]

See the notes to section 1 of this Act, *supra*, p. 548.

SEC. 9. [National Board of Health abolished.] That the act entitled "An act to prevent the introduction of infectious or contagious diseases into the United States, and to establish a national board of health," approved March third, eighteen hundred and seventy-nine, be, and the same is hereby, repealed. And the Secretary of the Treasury is directed to obtain possession of any property, furniture, books, paper, or records belonging to the United States which are not in the possession of an officer of the United States under the Treasury Department which were formerly in the use of the National Board of Health or any officer or employee thereof. [27 Stat. L. 452.]

For review of legislation relative to national board of health, see note to Res. of June 14, 1879, No. 6, given *supra*, p. 546.

SEC. 10. [Grounds and anchorages for vessels — penalty for trespassing — penalty for violating contagious disease regulations.] That the Supervising Surgeon-General, with the approval of the Secretary of the Treasury, is authorized to designate and mark the boundaries of the quarantine grounds and quarantine anchorages for vessels which are reserved for use at each United States quarantine station; and any vessel or officer of any vessel or other person, other than State or municipal health or quarantine officers, trespassing or otherwise entering upon such grounds

or anchorages in disregard of the quarantine rules and regulations, or without permission of the officer in charge of such station, shall be deemed guilty of a misdemeanor and subject to arrest, and upon conviction thereof be punished by a fine of not more than three hundred dollars or imprisonment for not more than one year, or both, in the discretion of the court. Any master or owner of any vessel, or any person violating any provision of this Act or any rule or regulation made in accordance with this Act, relating to inspection of vessels or relating to the prevention of the introduction of contagious or infectious diseases, or any master, owner, or agent of any vessel making a false statement relative to the sanitary condition of said vessel or its contents or as to the health of any passenger or person thereon, shall be deemed guilty of a misdemeanor and subject to arrest, and upon conviction thereof be punished by a fine of not more than five hundred dollars or imprisonment for not more than one year, or both, in the discretion of the court. [31 Stat. L. 1086.]

This and the following sections 11 and 12 were added to this Act by the Act of March 3, 1901, ch. 836, 31 Stat. L. 1086.

See the notes to section 1 of this Act, *supra*, p. 548.

As to the change in designation of the Supervising Surgeon-General, see the notes to the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

Subsequent provisions relating to the establishment of quarantine stations were made by the Act of July 19, 1906, ch. 3433, *infra*, this page, which by section 4 thereof *infra*, p. 557, made punishable violations of the provisions of the text.

SEC. 11. [Vessel from foreign port without bill of health — subject to quarantine measures.] That any vessel sailing from any foreign port without the bill of health required by section two of this Act, and arriving within the limits of any collection district of the United States, and not entering or attempting to enter any port of the United States, shall be subject to such quarantine measures as shall be prescribed by regulations of the Secretary of the Treasury, and the cost of such measures shall be a lien on said vessel, to be recovered by proceedings in the proper district court of the United States and in the manner set forth above as regards vessels from foreign ports without bills of health and entering any port of the United States. [31 Stat. L. 1086.]

See note to section 10 of this Act, *supra*, this page.

SEC. 12. [Medical officers may administer oaths, etc.] That the medical officers of the United States, duly clothed with authority to act as quarantine officers at any port or place within the United States, and when performing the said duties, are hereby authorized to take declarations and administer oaths in matters pertaining to the administration of the quarantine laws and regulations of the United States. [31 Stat. L. 1086.]

See note to section 10 of this Act, *supra*, this page.

An Act To further protect the public health and make more effective the national quarantine.

[Act of June 19, 1906, ch. 3433, 34 Stat. L. 299.]

[SEC. 1.] **[National quarantine — control of stations, etc. — establishment of yellow fever stations — detention stations.]** That the Secretary of the Treasury shall have the control, direction, and management of all

quarantine stations, grounds, and anchorages established by authority of the United States, and as soon as practicable after the approval of this Act shall select and designate such suitable places for them and establish the same at such points on or near the coast line of the United States or the border of the United States and a foreign country, as in his judgment are best suited for the same and necessary to prevent the introduction of yellow fever into the United States, and, in his discretion, he may also establish at the group of islands known as the Dry Tortugas, at the western end of the Florida reef, and at such other point or points on or near the coast line of the United States (not to exceed four in the aggregate) as he deems necessary, quarantine grounds, stations, and anchorages, whereat or whereto infected vessels bound for any port in the United States may be detained or sent for the purpose of being disinfected, having their cargoes disinfected and discharged, if necessary, and their sick treated in hospitals until all danger of infection or contagion from such vessels, their cargoes, passengers, or crews has been removed. [34 Stat. L. 299.]

This is known as the "Quarantine Act of 1906."

SEC. 2. [Transfer of title from other departments, etc. — purchase of private titles — condemnation — control of stations.] That in cases in which the title to the land and water so selected and designated is in the United States it shall be the duty of the department, bureau, or official of the United States having custody or possession of such land and water, or any part thereof, not used by the Government for other purposes designated by law, or possession of said Dry Tortugas Islands, on demand of the Secretary of the Treasury, to deliver the same into his custody and possession for the use of the Public Health and Marine-Hospital Service, evidencing such delivery by a suitable instrument in writing to be delivered to the Secretary of the Treasury. That in cases in which the title to such land and water, or any part thereof, is in any other owner than the United States it shall be the duty of the Secretary of the Treasury to secure the title and possession of the same to the United States for the use of the Public Health and Marine-Hospital Service of the United States, by purchase at a reasonable price, if possible; but if, in his judgment, the price demanded for such property be excessive, he is hereby authorized to apply to the Attorney-General of the United States to cause to be instituted, in the proper tribunal, condemnation proceedings in the name of the United States for the purpose of acquiring for the United States the title and possession of such land and water, and said Attorney-General shall, as soon as possible after such application by the Secretary of the Treasury, cause such proceedings to be instituted and conducted to a conclusion, and the custody and possession of such land and water, when duly acquired in accordance with the award made in such condemnation proceedings, shall be delivered to the Secretary of the Treasury for the use of the Public Health and Marine-Hospital Service. [34 Stat. L. 299.]

The Public Health and Marine-Hospital Service was designated the Public Health Service by the Act of Aug. 14, 1912, ch. 288, § 1, *supra*, p. 534.

SEC. 3. [Publication of selection of sites, etc. — establishment of stations, disinfecting plants, etc.] That on acquiring possession of any land and water in accordance with the provisions of this Act for the purpose of

establishing thereat a quarantine station and anchorage, the Secretary of the Treasury shall cause to be published in such newspapers as he may think proper, once a week for four successive weeks, a notice of the selection and designation of such places for quarantine stations and anchorages, with a description of the boundaries of such quarantine stations and anchorages, and such rules and regulations as he shall adopt and promulgate, requiring vessels with yellow fever among their passengers or crews to go to specified quarantine stations and anchorages, to be dealt with there before visiting any port of the United States. He shall establish at such quarantine stations and anchorages all necessary instrumentalities for disinfecting vessels and their cargoes, and where the same shall be required shall erect the necessary hospital buildings and install the necessary furniture and fittings for receiving and treating the sick among the passengers and crews of vessels going to such quarantine stations and anchorages, and provide for the separation of those among their passengers and crews who are suffering from yellow fever from those who are in good health, and shall further provide for doing all things necessary to eradicate such disease from such vessels, their cargoes, passengers, and crews. [34 Stat. L. 300.]

SEC. 4. [Punishment for unauthorized entry or departure from stations — punishment of owners or masters of vessels violating laws, rules, etc.]

That any vessel, or any officer of any vessel, or other person other than State health or quarantine officers, entering within the limits of any quarantine grounds and anchorages, or any quarantine station and anchorage, or departing therefrom, in disregard of the quarantine rules and regulations or without the permission of the officer in charge of such quarantine ground and anchorage, or of such quarantine station and anchorage, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than three hundred dollars or by imprisonment for not more than one year, or both, in the discretion of the court. That any master or owner of any vessel violating any provision of this Act, or any provision of an Act entitled "An Act granting additional powers and imposing additional duties on the Marine-Hospital Service," approved February fifteenth, eighteen hundred and ninety-three, or violating any rule or regulation made in accordance with this Act or said Act of February fifteenth, eighteen hundred and ninety-three, relating to the inspection of vessels, or to the prevention of the introduction of contagious or infectious diseases into the United States, or any master, owner, or agent of any vessel making a false statement relative to the sanitary condition of such vessel or its contents, or as to the health of any passenger or person thereon shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars or imprisonment for not more than one year, or both, in the discretion of the court. [34 Stat. L. 300.]

The Act of Feb. 15, 1893, ch. 114, mentioned in the text, is given *supra*, p. 548 et seq.

SEC. 5. [Acceptance of state or municipal stations — purchase.] That in any place where a quarantine station and plant is already established by State or local authorities it shall be the duty of the Secretary of the Treasury, before selecting and designating a quarantine station and grounds and anchorage for vessels, to examine such established stations and plants,

with a view of obtaining a transfer of the site and plants to the United States, and whenever the proper authorities shall be ready to transfer the same or surrender the use thereof to the United States, the Secretary of the Treasury is authorized to obtain title thereto or possession and use thereof, and to pay a reasonable compensation therefor, if, in his opinion, such purchase or use will be necessary to the United States for quarantine purposes and the quarantine stations established by authority of this Act shall, when so established, be used to prevent the introduction of all quarantinable diseases. [34 Stat. L. 301.]

SEC. 6. [Jurisdiction of United States.] That whenever any established station, or any land or water, or any part thereof, shall be acquired by the United States under the provisions of this Act, jurisdiction over the same shall be ceded to the United States by any State in which the same is situated before any compensation therefor shall be paid. [34 Stat. L. 301.]

Section 7 made an appropriation for the purpose of carrying out the provisions of this Act. It is omitted as temporary and executed.

[SEC. 1.] [Prevention of epidemics — appropriation — report of expenditures.] * * * Prevention of epidemics: To enable the President, in case only of threatened or actual epidemic of cholera, typhus fever, yellow fever, smallpox, bubonic plague, Chinese plague or black death, or trachoma, to aid State and local boards, or otherwise, in his discretion, in preventing and suppressing the spread of the same, and in such emergency in the execution of any quarantine laws which may be then in force, \$500,000: *Provided*, That a detailed report of the expenditures hereunder shall annually hereafter be submitted to Congress. [38 Stat. L. 837.]

This is from the Sundry Civil Appropriation Act of March 3, 1915, ch. 75. Similar provisions have appeared in like Appropriation Acts for previous years, and, while the appropriation relates only to the particular fiscal year, the provisions requiring an annual report would seem to be permanent.

HEPBURN ACT

See INTERSTATE COMMERCE

HEYBURN ACT

See FOOD AND DRUGS

HOLIDAYS

Res. of Jan. 6, 1885, No. 5, 559.

Holidays with Pay for Government Employees, 559.

Res. of Feb. 23, 1887, No. 6, 559.

Holidays for per Diem Government Employees, 559.

Act of June 28, 1894, ch. 118, 560.

Labor Day a Legal Holiday, 560.

Act of Jan. 12, 1895, ch. 23, 560.

Sec. 46. Holidays for Employees of Printing Office, 560.

CROSS-REFERENCE

Meaning of Holiday as Used in the Bankruptcy Act, see BANKRUPTCY.

Joint resolution providing for the payment of laborers in Government employ for certain holidays.

[*Res. of Jan. 6, 1885, No. 5, 23 Stat. L. 516.*]

[Holidays with pay for government employees.] That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days. [*23 Stat. L. 516.*]

"Memorial" or "Decoration Day" is added to the list of holidays by *Res. of Feb. 23, 1887, No. 6, given below.*

The provisions of the text are in part superseded by the *Act of Jan. 12, 1895, ch. 23, § 46, given infra, p. 560.*

Not applicable to Philippine Islands.—(1904) 25 Op. Atty.-Gen. 127.

Joint resolution providing for the payment of per diem laborers in Government employ on "Memorial" or "Decoration Day" and the Fourth day of July of each year as on other days.

[*Res. of Feb. 23, 1887, No. 6, 24 Stat. L. 644.*]

[Holidays for per diem government employees.] That all per diem employees of the Government, on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as

“ Memorial ” or “ Decoration Day ” and the fourth of July of each year, as holiday, and shall receive the same pay as on other days. [24 Stat. L. 644.]

Not applicable to Philippine Islands.—(1904) 25 Op. Atty.-Gen. 127.

An Act Making Labor Day a legal holiday.

[Act of June 28, 1894, ch. 118, 28 Stat. L. 96.]

[Labor Day a legal holiday.] That the first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays. [28 Stat. L. 96.]

SEC. 46. [Holidays for employees of Printing Office.] The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving. [28 Stat. L. 607.]

The above section 46 is from the Act of Jan. 12, 1895, ch. 23, “providing for the public printing and binding and the distribution of public documents.” See **PUBLIC DOCUMENTS; PUBLIC PRINTING.**

The provisions of the text supersede those of the Res. of April 16, 1880, No. 22, 21 Stat. L. 304, which enumerated the holidays that should be allowed to employees of the Government Printing Office, and it apparently supersedes in part the Res. of Jan. 6, 1885, No. 5, given *supra*, p. 559, relating to the same subject.

HOMESTEADS

See ALASKA; INDIANS; PUBLIC LANDS

HOMICIDE

See PENAL LAWS

HORTICULTURAL BOARD

See AGRICULTURE

HOSPITALS AND ASYLUMS

- I. HOSPITAL RELIEF FOR SEAMEN, 568.
 - II. NAVAL HOSPITAL AND ASYLUM, 571.
 - III. ARMY AND NAVY HOSPITAL, 574.
 - IV. SOLDIERS' HOME, 574.
 - V. NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, 582.
 - VI. GOVERNMENT HOSPITAL FOR THE INSANE, 598.
 - VII. COLUMBIA INSTITUTION FOR THE DEAF, 615.
 - VIII. FREEDMEN'S HOSPITAL, 621.
 - IX. LEPROSY HOSPITAL, 622.
-

I Hospital Relief for Seamen, 568.

- R. S. 4801. *Power to Receive Gifts in Aid of Marine Hospitals*, 568.
- R. S. 4804. *Persons Employed on Canal Boats in the Coasting Trade Excluded*, 568.
- R. S. 4805. *Foreign Seamen Admitted*, 568.
- R. S. 4806. *Sale of Marine Hospitals*, 568.
- Act of March 3, 1875, ch. 156, 569*
 - Sec. 3. Meaning of Word "Seaman" as Used in Marine-Hospital Laws*, 569.
 - 4. Marine-Hospital Buildings May Be Leased*, 570.
 - 6. Sick and Disabled Seamen of Foreign Vessels, etc., May Be Admitted*, 570.
- Act of Aug. 4, 1894, ch. 213, 570.*
 - Life-Saving Service Employees to Be Admitted to Marine Hospitals*, 570.
- Act of June 23, 1913, ch. 3, 570.*
 - Sec. 1. Officers and Employees of Public Health Service*, 570.
- Act of March 3, 1915, ch. 75, 571.*
 - Sec. 1. Admission of Cases for Study*, 571.

II. Naval Hospital and Asylum, 571.

- R. S. 4807. *Superintendence of Navy Hospitals*, 571.
- R. S. 4808. *Deduction from Pay of Seamen, etc., for Navy Hospital Fund*, 571.
- R. S. 4809. *Appropriation of Fines*, 571.
- R. S. 4810. *Purchase and Erection of Navy Hospitals*, 571.
- R. S. 4811. *Government of Naval Asylum*, 572.
- R. S. 4812. *Allowance of Rations to Navy Hospitals*, 572.
- R. S. 4813. *Pension of Seamen, etc., at Naval Hospital, How Paid*, 572.
- Act of June 7, 1900, ch. 859, 573.*
 - Sec. 1. Forfeitures for Desertion to Credit of Hospital Fund*, 573.
- Act of March 4, 1911, ch. 2511, 573.*
 - Sec. 1. Officers and Men of Navy and Marine Corps — Treatment at Fort Bayard, New Mexico*, 573.

Act of Aug. 22, 1912, ch. 335, 573.

Sec. 1. Employment of Beneficiaries in Service of Home, 573.

Act of June 30, 1914, ch. 190, 573.

*Sec. 1. Disposition of Moneys of Deceased Inmates, 573.
Disposition of Pensions, 574.*

Act of March 3, 1915, ch. 83, 574.

Sec. 1. Proceeds of Sale of Material, 574.

III. Army and Navy Hospital, 574.

Act of June 30, 1882, ch. 254, 574.

Sec. 1. Army and Navy Hospital at Hot Springs, Ark., 574.

Act of March 3, 1909, ch. 252, 574.

*Sec. 1. Patients Subject to Rules and Articles for Government of
Armies, 574.*

IV. Soldiers' Home, 574.

R. S. 4814. Who May Become Members of the Soldiers' Home, 574.

R. S. 4815. Board of Commissioners of the Soldiers' Home, 575.

R. S. 4816. Officers, 575.

R. S. 4817. Sites and Buildings, 576.

R. S. 4818. Funds for Soldiers' Home, 576.

R. S. 4819. Donations for Benefit of Institution, 576.

R. S. 4820. Rights of Pensioners and Surrender of Pensions, 577.

R. S. 4821. What Persons Are Entitled to Benefits of Soldiers' Home, 577.

R. S. 4822. Who Are Excluded, 577.

R. S. 4823. Discharge, 578.

R. S. 4824. Inmates Subject to Articles of War, 578.

Act of March 3, 1883, ch. 190, 578.

*Sec. 1. Soldiers' Home, Commissioners to Make Annual Reports,
578.*

*2. Inspector-General of Army to Inspect, Make Report, etc.,
578.*

*3. Expenditures Limited, etc.—Supplies, How Purchased,
578.*

4. Pensions of Inmates, 579.

5. Uniform for Inmates Free of Cost, 579.

6. Aid by Out-door Relief to Persons Entitled to Admission, 579.

*7. Officers to Be Selected by President—Bond of Treasurer,
579.*

*8. Funds to Be Deposited in U. S. Treasury and Interest
Paid, 580.*

9. Borrowing Money on Credit of Home Prohibited, 580.

10. Board of Commissioners, of Whom to Consist, 580.

11. Repeal, 580.

Act of Jan. 16, 1891, ch. 74, 580.

Custodian of Funds, etc.—Transfer, 580.

Act of Feb. 28, 1891, ch. 385, 581.

Liquor Licenses Prohibited within One Mile of Soldiers' Home, 581.

Act of June 4, 1897, ch. 2, 581.

Medical and Hospital Supplies, 581.

Act of March 4, 1909, ch. 299, 581.

*Sec. 1. Board of Commissioners—Composition—President—
Report, 581.*

V. National Home for Disabled Volunteer Soldiers, 582.

R. S. 4825. *Organization of the National Home for Disabled Volunteer Soldiers*, 582.

R. S. 4826. *Election of Citizen Managers*, 582.

R. S. 4827. *Election of Officers of the Board of Managers*, 583.

R. S. 4828. *Expenses of Managers*, 583.

R. S. 4829. *Officers of the National Home*, 583.

R. S. 4830. *Sites for Homes May Be Purchased, and Buildings Erected*, 584.

R. S. 4831. *Funds for Support of Home*, 584.

R. S. 4832. *What Persons Are Entitled to Benefit of National Home—Assignment of Pensions*, 585.

R. S. 4833. *Outdoor Relief — if Branch Unfit for Habitation, Members May Be Transferred — Report to Congress*, 585.

R. S. 4834. *Duties of Board of Managers*, 586.

R. S. 4835. *Inmates Subject to Articles of War*, 583.

R. S. 4836. *Amendment, etc., of Laws*, 586.

Act of March 3, 1875, ch. 129, 586.

Sec. 1. Abolition of Fines as Funds — Clerks — Appropriations — Estimates — Accounts, 586.

Act of March 3, 1879, ch. 182, 587.

Sec. 1. Purchases to Be Made after Advertisements; Expenditures for New Buildings, 587.

Act of June 23, 1879, ch. 35, 588.

Sec. 1. Headstones at Central Branch, 588.

Act of Feb. 26, 1881, ch. 80, 588.

Sec. 2. Pensioners in Home, How Paid, 588.

Act of Aug. 7, 1882, ch. 433, 588.

Sec. 1. Pensions of Inmates of National Home to Be Paid to Treasurers, 588.

Act of March 3, 1885, ch. 360, 588.

Sec. 1. Annual Report, 588.

Act of July 9, 1886, ch. 756, 589.

Sec. 2. Depositories of Funds to Give Bonds, 589.

Act of March 3, 1887, ch. 362, 589.

Sec. 1. Expenditures to Be Reported to Congress — Audit — Persons Connected with Liquor Traffic Disqualified to Hold Positions, 589.

Act of Oct. 2, 1888, ch. 1069, 589.

Sec. 1. Appropriations, 589.
Estimates, 589.

Act of Feb. 8, 1889, ch. 116, 590.

Homes May be Furnished with Obsolete Cannon, 590.

Act of March 3, 1891, ch. 542, 590.

Sec. 1. Supervision of Accounts, 590.

Act of Aug. 5, 1892, ch. 380, 590.

Sec. 1. Expenses to Be in Book of Estimates — Number, Salaries, and Allowances of Officers, 590.

Act of March 3, 1893, ch. 210, 591.

Sec. 1. Supervision of Accounts, 591.

Act of Aug. 18, 1894, ch. 301, 591.

Sec. 1. Disbursements to Be Accounted for — Supplies — Post-humous Fund, 591.

Bonds of Treasurer, 591.

Receipts for Sales, 591.

Employees to Be Classified — Pay Established — No Extra Pay — No Duplicate Pay Rolls, 592.

Traveling Expenses of Officers, 592.

Managers Not to Receive Pay — Expenses — Salaries of President and Secretary, 592.

Annual Inspection — Report, 592.

Act of June 11, 1896, ch. 420, 592.

Sec. 1. Medical Supplies, 592.

Act of July 1, 1898, ch. 546, 593.

Sec. 1. Purchase and Distribution of Supplies, 593.

Act of May 26, 1900, ch. 586, 593.

Sec. 1. Obsolete Ordnance Issued to Homes, 593.

Act of June 6, 1900, ch. 785, 593.

Sec. 1. Appropriations for Buildings Available until Expended, 593

Act of June 6, 1900, ch. 791, 593.

Sec. 1. General Treasurer and Assistants — Bond, 593.

Act of March 3, 1901, ch. 853, 594.

Sec. 1. Jurisdiction over Sites Ceded to States, 594.

Accounts, How Audited, 594.

Designation of Officer to Assist Treasurer and Quartermaster at Homes — Bond, 594.

Act of June 28, 1902, ch. 1301, 595.

Sec. 1. Officers of Home to Be Persons Whose Record Would Render Them Eligible for Admission, 595.

Act of July 1, 1902, ch. 1351, 595.

Sec. 1. Payment of Pension after Death of Inmate, 595.

Act of March 3, 1903, ch. 1007, 595.

Sec. 1. Appropriations for Buildings, etc., to Be Immediately Available, 595.

Act of June 25, 1910, ch. 384, 596.

Sec. 1. Applications for Admission — Effect, 596.

Act of Aug. 27, 1888, ch. 914, 596.

Sec. 1. Aid to State or Territorial Homes, 596

Res. of Oct. 19, 1914, No. 49, 597.

Number of Managers — Quorum, 597.

Act of March 3, 1915, ch. 75, 597.

Sec. 1. Expenditure of Appropriations for New Buildings, 597.

Additional Persons Entitled to Benefits of Home, 597.

VI. Government Hospital for the Insane, 598.

R. S. 4838. *Establishment of the Government Hospital for the Insane, 598.*

R. S. 4839. *Superintendent — Appointment and Duties of Disbursing Agent — Pension Money of Inmates, 598.*

R. S. 4840. *Board of Visitors, 599.*

R. S. 4841. *President of Board of Visitors, 600.*

- R. S. 4842. *Powers and Duties of the Board of Visitors*, 600.
R. S. 4843. *Admission of Insane Persons of the Army, Navy, Marine Corps, etc.*, 600.
R. S. 4844. *Admission of the Indigent Insane of the District of Columbia*, 601.
R. S. 4845. *Order of Admission*, 601.
R. S. 4846. *Certificate of Judge or Justice*, 602.
R. S. 4847. *Application by Visitor*, 602.
R. S. 4848. *Conveyance to Hospital*, 602.
R. S. 4849. *Admission of Insane Persons Having Property*, 602.
R. S. 4850. *Admission of Nonresidents of District*, 603.
R. S. 4851. *Admission of Insane Persons Accused of Crime*, 603.
R. S. 4852. *Insane Convicts*, 603.
R. S. 4853. *Private Patients*, 604.
R. S. 4854. *Admission of Pay Patients*, 604.
R. S. 4856. *Discharge of Patients upon Bond*, 604.
R. S. 4857. *Insane Persons Not to Be Confined in Jail*, 604.
R. S. 4858. *Disbursement of Appropriations for the Insane*, 604.
- Act of June 23, 1874, ch. 465, 605.*
 Sec. 1 Insane Convicts May Be Transferred to Hospital, 605.
 2. *Accommodation of Insane Convicts in State Asylums*, 605.
 3. *Convicts Restored to Sanity to Be Returned to Prison*, 606.
- Act of March 3, 1875, ch. 156, 606.*
 Sec. 5. Admission of Patients of Public Health Service, 606.
- Act of March 3, 1877, ch. 105, 606.*
 Sec. 1. Half of Support of Indigent Insane to Be Paid by District of Columbia, 606.
 Indigent Insane Admitted Only on Order of Executive Authority of District, 606.
- Act of March 3, 1879, ch. 182, 606.*
 Sec. 1. Half of Support of Indigent Insane to Be Paid by District of Columbia, 606.
- Act of June 4, 1880, ch. 121, 607.*
 Sec. 1. Superintendent to Report Annually, 607.
- Act of July 1, 1882, ch. 263, 607.*
 Sec. 1. Supervision by Secretary of Interior, 607.
- Act of Aug. 7, 1882, ch. 433, 607.*
 Sec. 1. Sale of Surplus Products and Waste Material — Proceeds, 607.
 Admission of Inmates of National Home for Disabled Volunteers, 607.
- Act of July 7, 1884, ch. 332, 608.*
 Sec. 1. Hospital to Admit Insane of Soldiers' Home, 608.
- Act of July 1, 1898, ch. 546, 608.*
 Sec. 1. Funds of Patients — Duties of Superintendent as to — Bond, 608.
- Act of Jan. 31, 1899, ch. 78, 609.*
 Sec. 7. Return to Residence of Indigent Insane, 609.
- Act of March 3, 1901, ch. 853, 609.*
 Sec. 1. Care of Insane of Army on Pacific Coast, 609.

Act of March 3, 1903, ch. 1006, 609.

Sec. 1. Proceedings for Commitment of Indigent Insane, 609.

Act of April 27, 1904, ch. 1618, 610.

Sec. 1. Arrest and Detention of Insane Persons in District of Columbia, 610.

2. Arrest at Other than Public Places, 610.

3. Temporary Detention at Government Hospital for Insane, 611.

4. Temporary Commitment in Other Hospitals — Detention Pending Formal Commitment — Discharge — Report, 611.

5. Validity of Certificates, 612.

6. Penalty for False Testimony, 612.

7. Repeal, 612.

Act of Feb. 23, 1905, ch. 738, 613.

Sec. 1. Proceedings in Lunacy on Petition of Commissioners of District of Columbia — Jurors — Committee as Trustee — Costs and Expenses, 613.

2. Discharge of Patient as Cured — Restoration to Former Legal Status, 613.

Act of June 30, 1906, ch. 3914, 613.

Sec. 1. Disposition of Money of Deceased Inmates, 613.

Act of Feb. 1, 1907, ch. 441, 614.

Sale of Intoxicating Liquor Near Hospital, etc., 614

Act of May 11, 1908, ch. 163, 614.

Sec. 1. Care of Insane Natives of Philippine Islands, Serving in Army, 614

Act of March 4, 1911, ch. 285, 614.

Sec. 1. Salary of Superintendent, 614.

Act of Aug. 24, 1912, ch. 355, 615.

Sec. 1. Determining per Capita Cost of Patients, 615.

Act of Aug. 1, 1914, ch. 223, 615.

Sec. 1. Sale or Exchange of Condemned Equipment, etc., 615.

VII. Columbia Institution for the Deaf, 615.

R. S. 4859. Establishment of the Columbia Institution for the Deaf, 615.

R. S. 4860. Terms of Deed Made Part of Charter, 615.

R. S. 4861. Restriction on Disposal of Real Property, 615.

R. S. 4862. Election of Officers, 616.

R. S. 4863. Appointment of Government Directors, 616.

R. S. 4864. Admission of Pupils from District of Columbia, 616.

R. S. 4865. Admission of Pupils from States and Territories, 616.

R. S. 4866. Justices of the Peace to Report Deaf and Dumb Persons in District, 617.

R. S. 4867. Superintendent of Columbia Institution for Deaf to Report Annually, 617.

R. S. 4868. Annual Report of President and Directors, 617.

R. S. 4869. Education of Indigent Blind Persons, 617.

Act of June 16, 1880, ch. 235, 618.

Sec. 1. Feeble-Minded Children in District of Columbia to Be Instructed, 618.

Act of March 3, 1883, ch. 143, 618.

Sec. 1. Report of Superintendent to Be Itemized, etc., 618.

Act of March 2, 1889, ch. 411, 618.

Sec. 1. One-half of Expenses of Persons Admitted from District of Columbia to Be Borne from District Revenues, 618.

Act of Aug. 30, 1890, ch. 837, 618.

*Sec. 1. Persons Admitted from States and Territories — Limit on Number — Book of Estimates to Show Employees, 618.
Educating Feeble-Minded Children in District of Columbia — One-half Expenses from District Revenues — Annual Estimates, 619.*

Act of July 1, 1898, ch. 546, 619.

Sec. 1. Term of Office of Directors — Control of Disbursements — Accounts, 619.

Act of March 3, 1899, ch. 424, 620.

Sec. 1. District of Columbia to Pay One-half of Indefinite Appropriation, 620.

Act of June 6, 1900, ch. 791, 620.

Sec. 1. State Beneficiaries Increased, 620.

Act of March 1, 1901, ch. 670, 620.

Sec. 1. Deaf Mutes from District of Columbia to Be Admitted — Not a Charitable Institution, 620.

Act of March 3, 1905, ch. 1406, 620.

Sec. 1. Education of Colored Deaf-mute Children, 620.

Act of March 4, 1911, ch. 285, 621.

Sec. 1. Designated Columbia Institution for the Deaf, 621.

VIII. Freedmen's Hospital, 621.

R. S. 2038. Freedmen's Hospital in District of Columbia Continued, etc., 621.

Act of June 23, 1874, ch. 455, 621.

Sec. 1. To Be under Direction of Secretary of Interior, etc., 621.

Act of March 3, 1893, ch. 199, 622.

Sec. 1. Expenditures, How Supervised, 622.

Act of March 3, 1905, ch. 1483, 622.

*Sec. 1. Contracts for Care and Treatment of Persons from District of Columbia, 622.
Estimates for Expenses and Maintenance, 622.*

IX. Leprosy Hospital, 622.

Act of March 3, 1905, ch. 1443 ("Leprosy Act"), 622.

Sec. 1. Leprosy Hospital to Be Established at Molokai, Hawaii, 622.

2. Hospital Buildings, 622.

3. Treatment of Patients, 623.

4. Medical Officers, etc., 623.

6. Administration Rules, 623.

7. Extra Pay to Officers Detailed, 623.

Act of March 4, 1911, ch. 285, 623.

Sec. 1. Compensation of Officers, 623.

CROSS-REFERENCES

Care of Insane in Alaska, see *ALASKA*.

Education of the Blind, see *EDUCATION*.

Public Health Service, see *HEALTH AND QUARANTINE*.

Condemnation of Land for Building Sites, see *PUBLIC PROPERTY, BUILDINGS AND GROUNDS*.

I. HOSPITAL RELIEF FOR SEAMEN

Sec. 4801. [Power to receive gifts in aid of marine hospitals.] The President is authorized to receive donations of real or personal property, in the name of the United States, for the erection or support of hospitals for sick and disabled seamen. [*R. S.*]

Act of July 16, 1798, ch. 77, 1 Stat. L. 606.

R. S. sec. 4802, relating to the supervising general of the marine-hospital service, is placed, with other provisions relating to said service, now known as the Public Health Service, under the title *HEALTH AND QUARANTINE*.

R. S. sec. 4803 provided for the custody and appropriation of the funds collected under the provisions of law imposing a tax on seamen for hospital purposes. It was superseded by the repeal of all Acts and parts of Acts imposing taxes of this character by the Act of June 26, 1884, ch. 121, § 15, 23 Stat. L. 57.

Sec. 4804. [Persons employed on canal-boats in the coasting-trade excluded.] No person employed in or connected with the navigation, management, or use of canal-boats engaged in the coasting-trade shall by reason thereof be entitled to any benefit or relief from the marine-hospital fund. [*R. S.*]

Res. No. 27 of Feb. 10, 1871, 16 Stat. L. 595.

Members of life-saving service are admitted to the privileges of the hospitals by Act of Aug. 4, 1894, ch. 213, given *infra*, p. 570.

"Person."—It is evident that the word "person" does not include a "corporation." *Ryan v. Hook*, (1884) 34 Hun (N. Y.) 185.

Sec. 4805. [Foreign seamen admitted.] Sick foreign seamen may be admitted to the marine hospitals within the United States, if it can with convenience be done, on the application of the master of any foreign vessel to which any such seaman may belong. Each seaman so admitted shall be subject to a charge of seventy-five cents per day for each day he may remain in the hospital, which shall be paid by the master of such foreign vessel to the collector of the collection-district in which such hospital is situated. And the collector shall not grant a clearance to any foreign vessel until the money so due from her master shall be paid. The officer in charge of each hospital is hereby directed, under penalty of fifty dollars, to make out the accounts against each foreign seaman that may be placed in the hospital under his direction, and render the same to the collector. [*R. S.*]

Act of May 3, 1802, ch. 51, 2 Stat. L. 193.

See the Act of March 3, 1875, ch. 156, § 6, *infra*, p. 570, which also provides for the admission of sick and disabled seamen of foreign vessels.

Sec. 4806. [Sale of marine hospitals.] The Secretary of the Treasury is authorized to lease, or to sell at public auction, to the highest and best

bidder, for cash, after due notice in the public newspapers, such marine-hospital buildings and lands appertaining thereto as he may deem it advisable to sell, and to make, execute, and deliver all needful conveyances to the lessees or purchasers thereof respectively; and the proceeds of such leases and sales are hereby appropriated for the marine-hospital establishment. But the hospitals at Cleveland in Ohio, and Portland in Maine, shall not be sold or leased. And this section shall not be construed to authorize the Secretary of the Treasury to lease or sell any such hospital where the relief furnished to sick mariners shall show an extent of relief equal to twenty cases a day on an average for the last preceding four years, or where no other suitable and sufficient hospital accommodations can be procured upon reasonable terms for the comfort and convenience of the patients. [R. S.]

Act of April 20, 1866, ch. 63, 14 Stat. L. 40; Act of June 27, 1866, ch. 142, 14 Stat. L. 76.

See also section 4 of the Act of March 3, 1875, ch. 156, *infra*, p. 570, which provides for renting or leasing marine-hospital buildings.

SEC. 3. [Meaning of word "seaman" as used in marine-hospital laws.] That term "seaman," wherever employed in legislation relating to the marine-hospital service, shall be held to include any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation. [18 Stat. L. 485.]

This is from an Act of March 3, 1875, ch. 156, entitled "An Act to promote economy and efficiency in the marine-hospital service."

Sec. 1 of this Act provided for the preparation of a schedule of the average number of men required to operate vessels, and the collection of hospital dues from the master or owner in accordance therewith.

Sec. 2 provided for the keeping of a time book, prescribed the entries therein, and the penalties for the failure to comply with the provisions of the Act.

Both sections were repealed by an Act of June 26, 1884, ch. 121, § 15, 23 Stat. L. 57, which abolished the hospital tax on seamen and made other provisions for the support of the marine-hospital service, which were, in turn, repealed by a provision of the Act of March 3, 1905, ch. 1484, § 1, 33 Stat. L. 1217.

Secs. 4 and 6 of this Act are set out in the two paragraphs of the text following.

Sec. 5, relating to the admission of certain patients to the Government Hospital for the Insane, is given *infra*, p. 606.

Sec. 7 fixed the salary of the supervising surgeon of the marine-hospital service at \$4,000 per year. The marine-hospital service is now designated the public health service and the provisions of said sec. 7 are superseded by later Acts fixing the salaries of the officials thereof. See the title HEALTH AND QUARANTINE.

Sec. 8 repealed all Acts and parts of Acts inconsistent therewith.

The Act of June 26, 1884, ch. 121, § 15, 23 Stat. L. 57, previously mentioned, likewise repealed R. S. secs. 4585, 4586, and 4587, which provided for the collection of a hospital tax from seamen and the disposition thereof.

Seamen on board revenue cutters are clearly included in this statute. (1896) 21 Op. Atty-Gen. 340. (For provisions relating to the former revenue cutter service, see COAST GUARD.)

Employees on scows and floating dredges would seem to be clearly within the statute. (1912) 29 Op. Atty-Gen. 583.

Prior to the repeal of R. S. secs. 4585, 4586, 4587, they were noted and considered in the following cases: The J. S. Woodward, (1881) 6 Fed. 636; U. S. v.

The Ohio, (1872) 9 Phila. (Pa.) 448, 29 Leg. Int. (Pa.) 252, 27 Fed. Cas. No. 15,915; The Monadnock, (1871) 5 Ben. 357, 17 Fed. Cas. No. 9,704; U. S. v. Pennsylvania Canal Boats, (1873) 30 Leg. Int. (Pa.) 249, 27 Fed. Cas. No. 16,027; The General Cass, (1871) Brown Adm. 334, 10 Fed. Cas. No. 5,307; Buckley v. Brown, (1856) 3 Wall. Jr. C. C. 199, 4 Fed. Cas. No. 2,092; (1856) 8 Op. Atty-Gen. 238; (1870) 13 Op. Atty-Gen. 238.

SEC. 4. [Marine-hospital buildings may be leased.] That the Secretary of the Treasury may rent or lease such marine-hospital buildings, and the lands appertaining thereto, as he may deem advisable in the interests of the marine-hospital service; and the proceeds of such rents or leases are hereby appropriated for the said service. [18 Stat. L. 485.]

See the notes to the preceding sec. 3 of this Act.

See also R. S. sec. 4806, *supra*, p. 568, which provides for lease or sale of marine hospital buildings and lands.

SEC. 6. [Sick and disabled seamen of foreign vessels, etc., may be admitted.] That sick and disabled seamen of foreign vessels and of vessels not subject to hospital-dues may be cared for by the marine-hospital service at such rates and under such regulations as the Secretary of the Treasury may prescribe. [18 Stat. L. 486.]

See the notes to sec. 3 of this Act, *supra*, p. 569.

See also R. S. 4805, *supra*, p. 568, relating to the care of foreign seamen.

Officers and seamen of the revenue-cutter service.—It appears that under existing laws and a treasury regulation, approved May 20, 1889, providing that "officers and seamen of the revenue-cutter service will be admitted to care and treatment at all stations of the first class with-

out reference to length of service and without charge," the Treasury Department is obliged to extend the benefits of the marine-hospital fund to the sick and disabled officers and seamen of the revenue-cutter service. (1896) 21 Op. Atty.-Gen. 366.

An act extending the benefits of the marine hospitals to the keepers and crews of life-saving stations.

[Act of Aug. 4, 1894, ch. 213, 28 Stat. L. 229.]

[Life-Saving Service employees to be admitted to marine hospitals.] That the privilege of admission to and temporary treatment in the marine hospitals under the control of the Government of the United States be, and is hereby, extended to the keepers and crews of the Life-Saving Service under the same rules and regulations as those governing sailors and seamen, and for the purposes of this Act members of the Life-Saving Service shall be received in said hospitals and treated therein, and at the dispensaries thereof, as are seamen of American registered vessels; but this Act shall not be so construed as to compel the establishment of hospitals or dispensaries for the benefit of said keepers and crews, nor as establishing a home for the same when permanently disabled.

[SEC. 1.] [Officers and employees of Public Health Service.] * * * That hereafter commissioned officers and pharmacists, and those employees of the [Public Health] service devoting all their time to field work, shall be entitled to hospital relief when taken sick or injured in line of duty. [38 Stat. L. 24.]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

[SEC. 1.] [Admission of cases for study.] * * * That there may be admitted into said hospitals for study persons with infectious or other diseases affecting the public health, and not to exceed ten cases in any one hospital at one time; [38 Stat. L. 837.]

This is from the Sundry Civil Appropriation Act of March 3, 1915, ch. 75, following an appropriation for the maintenance of marine hospitals. Similar provisions have appeared in like appropriation acts for previous years.

II. NAVAL HOSPITAL AND ASYLUM

Sec. 4807. [Superintendence of Navy hospitals.] The Secretary of the Navy shall have the general charge and superintendence of Navy hospitals. [R. S.]

Act of Feb. 26, 1811, ch. 26, 2 Stat. L. 650; Act of July 10, 1832, ch. 194, 4 Stat. L. 573.

Sec. 4808. [Deduction from pay of seamen, etc., for Navy hospital-fund.] The Secretary of the Navy shall deduct from the pay due each officer, seaman and marine, in the Navy, at the rate of twenty cents per month for each person, to be applied to the fund for Navy hospitals. [R. S.]

Act of March 2, 1799, ch. 36, 1 Stat. L. 729; Act of Feb. 26, 1811, ch. 26, 2 Stat. L. 650.

The fund formed from the money contributions of the officers and seamen of the navy is confined, by the statute, to the erection and support of naval hospitals, and cannot be diverted for other purposes. *U. S. v. Jones*, (1854) 2 Hayw. & H. D. C. 160, 26 Fed. Cas. No. 15,493a.

Sec. 4809. [Appropriation of fines.] All fines imposed on navy officers, seamen, and marines shall be paid to the Secretary of the Navy, for the maintenance of Navy hospitals. [R. S.]

Act of Feb. 26, 1811, ch. 26, 2 Stat. L. 650; Act of July 10, 1832, ch. 194, 4 Stat. L. 573.

Sec. 4810. [Purchase and erection of Navy hospitals.] The Secretary of the Navy shall procure at suitable places proper sites for Navy hospitals, and if the necessary buildings are not procured with the site, shall cause such to be erected, having due regard to economy, and giving preference to such plans as with most convenience and least cost will admit of subsequent additions, when the funds permit and circumstances require; and shall provide, at one of the establishments, a permanent asylum for disabled and decrepit Navy officers, seamen, and marines: *Provided*, That hereafter no sites shall be procured or hospital buildings erected or extensions to existing hospitals made unless hereafter authorized by Congress: [R. S.]

This section was amended to read as above given by a provision of the Navy Appropriation Act of March 4, 1913, ch. 148, § 1, 37 Stat. L. 902. As originally enacted it was as follows:

"Sec. 4810. The Secretary of the Navy shall procure at suitable places proper sites for Navy hospitals, and if the necessary buildings are not procured with

the site, shall cause such to be erected, having due regard to economy, and giving preference to such plans as with most convenience and least cost will admit of subsequent additions, when the funds permit and circumstances require; and shall provide, at one of the establishments, a permanent asylum for disabled and decrepit Navy officers, seamen, and marines."

Act of Feb. 26, 1811, ch. 26, 2 Stat. L. 650; Act of July 10, 1832, ch. 194, 4 Stat. L. 573.

Prior to the amendment of this section, the Attorney-General ruled that the authority of the Secretary of the Navy to procure at suitable places proper sites for navy hospitals, and to cause necessary

buildings to be erected thereon, was not limited to the establishment of hospitals at places where none exist. (1908) 27 Op. Atty.-Gen. 31.

Sec. 4811. [Government of Naval Asylum.] The asylum for disabled and decrepit Navy officers, seamen, and marines shall be governed in accordance with the rules and regulations prescribed by the Secretary of the Navy. [R. S.]

Act of Feb. 26, 1811, ch. 26, 2 Stat. L. 650.

Jurisdiction over estates of beneficiaries.—Rules and regulations had been promulgated by the Secretary of the Navy providing for the disposition of the estate of beneficiaries who dwell and die in a naval asylum. When the jurisdiction of the territory occupied by the asylum had been duly ceded by the state to the United

States, proceedings of a state court granting letters of administration and escheating the estate of an intestate who had died at the asylum were void for want of jurisdiction. *Conner's Estate*, (1889) 19 Op. Atty.-Gen. 247.

Cited generally in (1889) 19 Op. Atty.-Gen. 247.

Sec. 4812. [Allowance of rations to Navy hospitals.] For every Navy officer, seaman, or marine admitted into a Navy hospital, the institution shall be allowed one ration per day during his continuance therein, to be deducted from the account of the United States with such officer, seaman, or marine. [R. S.]

Act of Feb. 26, 1811, ch. 26, 2 Stat. L. 650.

Sec. 4813. [Pension of seamen, etc., at naval hospital, how paid.] And whenever any officer, seaman, or marine entitled to a pension is admitted to the Naval Home at Philadelphia, or to a naval hospital, his pension, while he remains there, shall be deducted from his accounts and paid to the Secretary of the Navy for the benefit of the fund from which such home or hospital, respectively, is maintained; and section forty-eight hundred and thirteen of the Revised Statutes of the United States is hereby amended accordingly. [R. S.]

This section was amended to read as given in the text by an Act of May 4, 1898, ch. 234, 30 Stat. L. 377, and again by an Act of March 3, 1899, ch. 421, 30 Stat. L. 1027. As originally enacted it was as follows:

"Sec. 4813. Whenever any Navy officer, seaman, or marine, entitled to a pension, is admitted to a Navy hospital, the pension, during his continuance in the hospital, shall be paid to the Secretary of the Navy and deducted from the account of such pensioner."

Act of Feb. 26, 1811, ch. 26, 2 Stat. L. 650.

By R. S. sec. 4766 as amended by the Act of March 3, 1899, ch. 460, one-half the pension of any soldier or sailor entering either a state home for soldiers or sailors, or a National Soldiers' Home, is to be paid his wife during such residence, or, if there be no wife, to his children under sixteen years, or his permanently helpless and dependent child, if any. See PENSIONS.

[SEC. 1.] **[Forfeitures for desertion to credit of hospital fund.]** * * * That from and after July first, nineteen hundred, all forfeitures on account of desertion shall be passed to the credit of the naval hospital fund. [31 Stat. L. 697.]

This is from the Navy Appropriation Act of June 7, 1900, ch. 859.

[SEC. 1.] **[Officers and men of Navy and Marine Corps — treatment at Fort Bayard, New Mex.]** * * * That the hospital at Fort Bayard, New Mexico, for the treatment of tuberculosis, shall be opened to the treatment of the officers and men of the Navy and Marine Corps. [34 Stat. L. 1172.]

This is from the Army Appropriation Act of March 4, 1911, ch. 2511.

By the Army Appropriation Act of June 12, 1906, ch. 3078, § 1, 34 Stat. L. 255, it was provided: "That all persons admitted to treatment in the general hospital at Fort Bayard, New Mexico, shall, while patients in said hospital, be subject to the rules and articles for the government of the armies of the United States."

[SEC. 1.] **[Employment of beneficiaries in service of Home.]** * * * That for the performance of such additional services in and about the Naval Home as may be necessary the Secretary of the Navy is authorized to employ, on the recommendation of the governor, beneficiaries in said home, whose compensation shall be fixed by the Secretary and paid from the appropriation for the support of the home. [37 Stat. L. 334.]

This is from the Naval Appropriation Act of Aug. 22, 1912, ch. 335.

[SEC. 1.] **[Disposition of moneys of deceased inmates.]** * * * That hereafter all moneys belonging to a deceased beneficiary of the Naval Home or derived from the sale of his personal effects, not claimed by his legal heirs or next of kin; shall be deposited with the pay officer of the Naval Home, and if any sum so deposited has been or shall hereafter be unclaimed for a period of two years from the death of such beneficiary it shall be deposited in the Treasury to the credit of the naval pension fund: *And provided further*, That the governor of the Naval Home is hereby authorized and directed, under such regulations as may be prescribed by the Secretary of the Navy, to make diligent inquiry in every instance after the death of an inmate to ascertain the whereabouts of his heirs or next of kin: *And provided further*, That claims may be presented hereunder at any time within five years after moneys have been so deposited in the Treasury, and, when supported by competent proof in any case after such deposit in the Treasury, shall be certified to Congress for consideration: [38 Stat. L. 398.]

This and the following paragraph of this section are from the Naval Appropriation Act of June 30, 1914, ch. 130. Provisions similar to those of the foregoing paragraph were contained in the Naval Appropriation Act of Aug. 22, 1912, ch. 335, § 1, 37 Stat. L. 335.

[Disposition of pensions.] That the pensions of beneficiaries of the Naval Home shall be disposed of in the same manner as prescribed for inmates of the Soldiers' Home, as provided for in section four of the Act approved March third, eighteen hundred and eighty-three, under such regulations as the Secretary of the Navy may prescribe, except that in the case of death of any beneficiary leaving no heirs at law nor next of kin any pension due him shall, subject to the foregoing provisions, escheat to the naval pension fund. [38 Stat. L. 398.]

See the note to the preceding paragraph of this section.

The Act of March 3, 1883, ch. 130, § 4, mentioned in the text is given *infra*, p. 579.

[SEC. 1.] [Proceeds of sale of material.] * * * That all moneys derived from the sale of material at the Naval Home, which was originally purchased from moneys appropriated from the income from the naval pension fund, and all moneys derived from the rental of Naval Home property, shall be turned into the naval pension fund. [38 Stat. L. 934.]

This is from the Naval Appropriation Act of March 3, 1915, ch. 83. Similar provisions were made by the Naval Appropriation Act of June 30, 1914, ch. 130, § 1, 38 Stat. L. 398.

III. ARMY AND NAVY HOSPITAL

[SEC. 1.] [Army and Navy Hospital at Hot Springs, Ark.] Army and Navy hospital at Hot Springs, Arkansas, * * * which hospital, when in a condition to receive patients, shall be subject to such rules, regulations, and restrictions as shall be provided by the President of the United States. [22 Stat. L. 121.]

This is from the Army Appropriation Act of June 30, 1882, ch. 254. The above provision follows an appropriation of one hundred thousand dollars for the erection of the hospital.

[SEC. 1.] [Patients subject to rules and articles for government of armies.] * * * That hereafter all persons admitted to treatment in the Army and Navy General Hospital at Hot Springs, Arkansas, shall, while patients in said hospital, be subject to the rules and articles for the government of the armies of the United States: [38 Stat. L. 748.]

This is from the Army Appropriation Act of March 3, 1909, ch. 252.

IV. SOLDIERS' HOME

Sec. 4814. [Who may become members of the Soldiers' Home.] All soldiers of the Army of the United States, and all soldiers who have been, or may hereafter be, of the Army of the United States, and who have contributed, or may hereafter contribute, according to section forty-eight hundred and nineteen, to the support of the Soldiers' Home hereby created, and

the invalid and disabled soldiers, whether regulars or volunteers, of the war of eighteen hundred and twelve, and of all subsequent wars, shall, under the restrictions and provisions which follow, be members of the Soldiers' Home, with all the rights annexed thereto. [*R. S.*]

Act of March 3, 1851, ch. 25, 9 Stat. L. 595; Act of March 3, 1859, ch. 83, 11 Stat. L. 434.

R. S. sec. 4819, above mentioned, is given *infra*, p. 576.

To those who are contributors, under the provisions of section 4819, *infra*, p. 576, the doors of the home are at once thrown open, but to those who are noncontributors they are closed, except on prescribed conditions, as under section 4820, *infra*, p. 577,

noncontributing pensioners shall surrender their pensions to the home during the time they remain therein and voluntarily receive its benefits. *Bowen's Case*, (1878) 14 Ct. Cl. 162, *affirmed* (1879) 100 U. S. 508, 25 U. S. (L. ed.) 631.

Sec. 4815. [Board of commissioners of the Soldiers' Home.] The Commissary-General of Subsistence, the Surgeon-General, and the Adjutant-General shall constitute a board of commissioners for the Soldiers' Home, any two of whom shall be a quorum for the transaction of business, whose duty it shall be to examine and audit the accounts of the treasurer quarter-yearly, and to visit and inspect the Soldiers' Home at least once in every month. The majority shall also have power to establish, from time to time, regulations for the general and internal direction of the institution, to be submitted to the Secretary of War for approval; and may do any other acts necessary for the government and interests of the same, as authorized by this chapter. [*R. S.*]

Act of March 3, 1851, ch. 25, 9 Stat. L. 595; Act of March 3, 1859, ch. 83, 11 Stat. L. 434.

"This chapter," above mentioned, is chapter 2 of title LIX of the Revised Statutes, embracing sections 4814-4824.

So much of the foregoing section as prescribes the composition of the board of commissioners and the quorum thereof was superseded by the provisions of the Act of March 3, 1883, ch. 130, § 10, *infra*, p. 580, and the Act of March 4, 1909, ch. 299, § 1, *infra*, p. 581.

Regulations cannot be made by the board of commissioners authorizing the governor of the home to arrest and detain persons not inmates of the home for crimes committed within the limits of the home, except under special circumstances when, at common law, any person may make an arrest without warrant or precept. (1893) 20 Op. Atty.-Gen. 514.

A regulation may be made investing the

governor with authority to expel from the home grounds persons, not inmates of the home, offending against good order and decency. (1893) 20 Op. Atty.-Gen. 514.

The Secretary of War is invested with discretionary power to approve or disapprove recommendations made by the board of commissioners of the Soldiers' Home. (1882) 17 Op. Atty.-Gen. 449.

Sec. 4816. [Officers.] The officers of the Soldiers' Home shall consist of a governor, a deputy governor, and a secretary, for each separate site of the home, the latter to be also treasurer; and the officers shall be taken from the Army, and appointed or removed, from time to time, as the interests of the institution may require, by the Secretary of War, on the recommendation of the board of commissioners. [*R. S.*]

Act of March 3, 1851, ch. 25, 9 Stat. L. 595.

By the Act of March 3, 1883, ch. 130, § 7, *infra*, p. 579, officers were to be selected by the President.

"The interests of the institution" mentioned in the section are committed jointly to the secretary and commissioners, and

the secretary has a discretion in passing upon the recommendations of the commissioners. (1882) 17 Op. Atty.-Gen. 449.

Sec. 4817. [Sites and buildings.] The commissioners of the Soldiers' Home, by and with the approval of the President, shall procure for immediate use, at a suitable place or places, a site or sites for the Soldiers' Home, and if the necessary buildings cannot be procured with the sites, to [shall?] have the same erected, having due regard to the health of the locations, facility of access, and economy, and giving preference to such places as, with the most convenience and least cost, will accommodate the persons entitled to the benefits of the Soldiers' Home. [R. S.]

Act of March 3, 1851, ch. 25, § Stat. L. 597.

See the Act of March 3, 1883, ch. 130, § 3, *infra*, p. 578.

Sec. 4818. [Funds for Soldiers' Home.] For the support of the Soldiers' Home the following funds are set apart, and are hereby appropriated: All stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the re-imbursement of Government, or of individuals; all forfeitures on account of desertion; and all moneys belonging to the estates of deceased soldiers, which are or may be unclaimed for the period of three years subsequent to the death of such soldiers, to be repaid by the commissioners of the institution, upon the demand of the heirs or legal representatives of the deceased. [R. S.]

Act of March 3, 1851, ch. 25, § Stat. L. 596; Act of July 5, 1862, ch. 133, 12 Stat. L. 508.

Similar provisions constituting a permanent appropriation for the Soldiers' Home were contained in R. S. 3689 given under the title *ESTIMATES, APPROPRIATIONS, AND REPORTS*.

A provision of the Legislative, Executive, and Judicial Appropriation Act of July 16, 1892, ch. 196, § 1, was as follows: "... That hereafter the adjustment of the accounts of the Soldiers' Home, under section forty-eight hundred and eighteen, of the Revised Statutes, in the offices of the Second Comptroller and Second Auditor, shall be limited to those originating subsequent to March third, eighteen hundred and eighty-one." [27 Stat. L. 193.]

"All moneys belonging to the estates of deceased soldiers."—*Extra pay* to be paid under the provisions of the Acts of July 19, 1848, and February 19, 1879, to the officers and soldiers indicated therein, is a gratuity in respect of past service, and on the death of the officer or soldier without receiving the same, does not form a part of his estate and pass to the Soldiers'

Home under this section, but goes to the relatives of the deceased under the provisions of those statutes. (1879) 16 Op. Atty-Gen. 408.

Bounty-land warrants belonging to the estates of deceased soldiers are not "funds" to which the Soldiers' Home is entitled under this section. (1881) 17 Op. Atty-Gen. 157.

Sec. 4819. [Donations for benefit of institution.] * * * The commissioners are also authorized to receive all donations of money or property made by any person for the benefit of the institution, and hold the same for its sole and exclusive use. [R. S.]

As originally enacted this section was as follows:

"Sec. 4819. There shall be deducted from the pay of every non-commissioned officer, musician, artificer, and private of the Army of the United States the sum of twelve and a half cents per month, which sum so deducted shall, by the Pay Department of the Army, be passed to the credit of the commissioners of the Soldiers' Home. The commissioners are also authorized to receive all donations of money or property made by any person for the benefit of the institution, and hold the same for its sole and exclusive use. But the deduction of twelve and a half cents per month from the pay of non-commissioned officers, musicians, artificers, and privates of regiments of volunteers, or other corps or regiments raised for a limited period, or for a temporary purpose or purposes, shall only be made with their consent."

Act of March 3, 1851, ch. 25, § Stat. L. 596; Act of March 3, 1859, ch. 83, 11 Stat. L. 434.

By an Act of June 12, 1906, ch. 3078, § 1, 34 Stat. L. 242, there was repealed so much of said section "as requires that twelve and one-half cents per month be deducted from the pay of retired enlisted men of the Army and passed to the credit of the commissioners of the Soldiers' Home in the District of Columbia." By an Act of May 11, 1908, ch. 163, § 1, 35 Stat. L. 110, there was repealed so much of said section "as pertains to the deduction of twelve and one-half cents per month from the pay of every soldier of the Regular Army for the benefit of the Soldiers' Home." The unrepealed part of said section is given in the text.

Sec. 4820. [Rights of pensioners and surrender of pensions.] The fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home shall not preclude him from admission thereto. But all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits. [R. S.]

Act of March 3, 1851, ch. 25, 9 Stat. L. 596; Act of March 3, 1859, ch. 83, 11 Stat. L. 434.

Subsequent provisions relating to pensions of inmates of the Soldiers' Home were made by the Act of March 3, 1883, ch. 130, § 4, *infra*, p. 579.

The words "such pensioners" have reference to the pensioners designated in the first part of the section, and refer to pensioners on account of wounds who have not contributed. The surrender of the pension on admission to the home is not required from those who are entitled to admission under R. S. sec. 4814, *supra*, p. 574, and

have contributed to the home under the provisions of section 4819, *supra*. Bowen's Case, (1878) 14 Ct. Cl. 162, *affirmed* (1879) 100 U. S. 508, 25 U. S. (L. ed.) 631. See also *Hamilton v. Rathbone*, (1899) 175 U. S. 414, 20 S. Ct. 155, 44 U. S. (L. ed.) 219.

Sec. 4821. [What persons are entitled to benefits of Soldiers' Home.] The following persons, members of the Soldiers' Home, according to section forty-eight hundred and fourteen, shall be entitled to the rights and benefits herein conferred, and no others:

First. Every soldier of the Army of the United States who has served, or may serve, honestly and faithfully twenty years in the same.

Second. Every soldier and every discharged soldier, whether regular or volunteer, who has suffered, or may suffer, by reason of disease or wounds incurred in the service and in the line of his duty, rendering him incapable of further military service, if such disability was not occasioned by his own misconduct.

Third. The invalid and disabled soldiers, whether regulars or volunteers, of the war of eighteen hundred and twelve and of all subsequent wars. [R. S.]

Act of March 3, 1851, ch. 25, 9 Stat. L. 596; Act of March 3, 1859, ch. 83, 11 Stat. L. 434.

See R. S. sec. 4814, *supra*, p. 574, for provisions as to who may become members of the Soldiers' Home.

Sec. 4822. [Who are excluded.] The benefits of the Soldiers' Home shall not be extended to any soldier in the regular or volunteer service, convicted of felony or other disgraceful or infamous crimes of a civil nature after his admission into the service of the United States; nor shall any one who has been a deserter, mutineer, or habitual drunkard be received, without such evidence of subsequent service, good conduct, and reformation of character, as is satisfactory to the commissioners. [R. S.]

Act of March 3, 1851, ch. 25, 9 Stat. L. 596.

Sec. 4823. [Discharge.] Any soldier admitted into the Soldiers' Home for disability who recovers his health, so as to become fit again for military service, if under fifty years of age, shall be discharged. [R. S.]

Act of March 3, 1851, ch. 25, 9 Stat. L. 596.

Sec. 4824. [Inmates subject to articles of war.] All persons admitted into the Soldiers' Home shall be subject to the Rules and Articles of War in the same manner as soldiers in the Army. [R. S.]

Act of March 3, 1859, ch. 83, 11 Stat. L. 434.

See ARTICLES OF WAR.

Authority of governor of home.— Under this section and R. S. sec. 4835, *infra*, p. 586, the governor of the Soldiers' Home, to maintain discipline, may promulgate such special orders as he deems proper, including an order forbidding the inmates to

frequent a public place where they are permitted to obtain liquor, or are afforded degrading and immoral amusements, or exposed to improper temptations. *Rowan v. Butler*, (1908) 171 Ind. 28, 85 N. E. 714.

An act prescribing regulations for the Soldiers' Home located at Washington, in the District of Columbia, and for other purposes.

[Act of March 3, 1883, ch. 130, 22 Stat. L. 564.]

[SEC. 1.] [Soldiers' Home, commissioners to make annual reports.] That the board of commissioners of the Soldiers' Home shall every year report in writing to the Secretary of War, giving a full statement of all receipts and disbursements of money, of the manner in which the funds are invested[,] of any changes in the investments and the reasons therefor, of all admissions and discharges, and generally of all facts that may be necessary to a full understanding of the condition and management of the Home. The Secretary of War shall have power to call for and require any omitted facts which in his judgment should be stated to be added. This annual report shall be, by the Secretary of War, together with the report of the inspecting officer hereinafter provided for, transmitted to Congress at the first session thereafter, and he shall also cause the same to be published in orders to the Army, a copy thereof to be deposited in each garrison and post library. [22 Stat. L. 564.]

An annual report by the president of the board of commissioners was required by the provisions of the Act of March 4, 1909, ch. 299, § 1, *infra*, p. 581.

SEC. 2. [Inspector-General of Army to inspect, make report, etc.] That the Inspector General of the Army shall, in person, once in each year thoroughly inspect the Home, its records, accounts, management, discipline, and sanitary condition, and shall report thereon in writing, together with such suggestions as he desires to make. [22 Stat. L. 564.]

SEC. 3. [Expenditures limited, etc. — supplies, how purchased.] That no new buildings shall be erected or new grounds purchased, nor shall any expenditure of more than five thousand dollars be made, until the action of the board thereon shall be approved by the Secretary of War. All supplies

that can be purchased upon contract shall be so purchased, after due notice by advertisement, of the lowest responsible bidder. Such bidder shall give bond, with proper security, for the performance of his contract. [22 Stat. L. 564.]

SEC. 4. [Pensions of inmates.] That any inmate of the Home who is receiving a pension from the government, and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives his money a written direction to that effect, to have his pension, or any part of it, paid to such child, wife, or parent. The pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. The board of commissioners may from time to time pay over to any inmate such part of his pension-money as they think best for his interest and consistent with the discipline and good order of the Home, but such pensioner shall not be entitled to demand or have the same so long as he remains an inmate of the Home. In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home. [22 Stat. L. 564.]

The provisions of the text practically supersede R. S. sec. 4820, *supra*, p. 577.

SEC. 5. [Uniform for inmates free of cost.] That a suitable uniform shall be furnished to every inmate of the Home, without cost to him. [22 Stat. L. 565.]

SEC. 6. [Aid by out-door relief to persons entitled to admission.] That the board of commissioners are authorized to aid persons who are entitled to admission to the Home, by out-door relief, in such manner and to such an extent as they may deem proper; but such relief shall not exceed the average cost of maintaining an inmate of the Home. [22 Stat. L. 565.]

Further provisions relating to "out-door relief" were made by the Act of Jan. 16, 1891, ch. 74, *infra*, p. 580.

SEC. 7. [Officers to be selected by President—bond of treasurer.] That the Governor and all other officers of the Home shall be selected by the President of the United States, and the Treasurer of the Home shall be required to give a bond in the penal sum of twenty thousand dollars for the faithful performance of his duty. [22 Stat. L. 565.]

This supersedes so much of R. S. sec. 4816, *supra*, p. 575, as provides for the selection of the officers by the Secretary of War.

Furnishing supplies to officers.—The board of commissioners possess authority to permit the governor, deputy governor, and treasurer, who are retired officers of the army, and who reside at the home and have its affairs in charge, to make use of ordinary supplies of fuel, light, forage, milk, ice, or vegetables, produced at or obtained for the uses of the home, and may

pay the treasurer, out of the funds of the home, a salary for his services, notwithstanding such officers are retired officers of the army, and are permitted by statute to receive from the government only the pay and emoluments allowed by law to retired officers. (1892) 20 Op. Atty-Gen. 350.

SEC. 8. [Funds to be deposited in U. S. treasury and interest paid.] That all funds of the Home not-needed for current use, and which are not now invested in United States registered bonds, shall, as soon as received, or as soon as present investments can be converted into money without loss, be deposited in the Treasury of the United States to the credit of the Home, as a permanent fund, and shall draw interest at the rate of three per centum per annum, which shall be paid quarterly to the treasurer of the Home; and the proceeds of such registered bonds, as they are paid, shall be deposited in like manner. No part of the principal sum so deposited shall be withdrawn for use except upon a resolution of the board of commissioners stating the necessity and approved by the Secretary of War. [22 Stat. L. 565.]

See the Act of Jan. 16, 1891, ch. 74, *infra*, this page, authorizing the Treasurer of the United States to receive and keep on deposit funds of the Soldiers' Home.

SEC. 9. [Borrowing money on credit of Home prohibited.] That no officers of the Home shall borrow any money on the credit of the Home for any purpose, nor shall any pledge of any of its property or securities for any purpose be valid. [22 Stat. L. 565.]

SEC. 10. [Board of Commissioners, of whom to consist.] That the Board of Commissioners of the Soldiers' Home shall hereafter consist of the General in Chief commanding the Army[,], the Surgeon General, the Commissary General, the Adjutant General, the Quartermaster General, the Judge Advocate General and the Governor of the Home, and the General in Chief shall be President of the Board, and any four of them shall constitute a quorum for the transaction of business. [22 Stat. L. 565.]

This supersedes that part of R. S. sec. 4815, *supra*, p. 575, which deals with the board and the quorum thereof and is itself in part superseded by the Act of March 4, 1909, ch. 299, § 1, *infra*, p. 581.

Officer pro tem.—When the place of any chief of bureau named in this section has been temporarily filled under R. S. sec. 178 (title EXECUTIVE DEPARTMENTS), the person so temporarily acting may perform the duties of such officer as a member of the board of commissioners of the Soldiers' Home, just as he performs the other duties of the officer in whose stead he is acting. (1901) 23 Op. Atty-Gen. 473. See also (1892) 20 Op. Atty-Gen. 483.

SEC. 11. [Repeal.] That all laws and parts of laws relating to the Soldiers' Home now in force and not inconsistent with this act are continued in force, and such as are inconsistent herewith are to that extent repealed. [22 Stat. L. 565.]

Section 12 of this Act making appropriations to adjust accounts is omitted as temporary only.

An act to authorize the Treasurer of the United States to receive and keep on deposit funds of the Soldiers' Home in the District of Columbia.

[Act of Jan. 16, 1891, ch. 74, 26 Stat. L. 718.]

[Custodian of funds, etc. — transfer.] That the Treasurer of the United States be, and he is hereby, authorized and directed to receive and keep on deposit, subject to the checks or drafts of the treasurer of the Soldier's

Home in the District of Columbia, all funds which may now be under the control of the said Treasurer of the Soldier's Home, or may hereafter be furnished him or in any manner come into his possession for use in defraying the current expenses of maintaining the said Soldiers' Home, and, upon the request of said treasurer of the Soldiers' Home, there shall be transferred, from funds to his credit with the United States Treasurer, and placed to his credit with the assistant treasurer of the United States in New York City, New York, such sums as he may require monthly or quarterly for payments on account of "out-door relief" to members of said Soldiers' Home residing at a distance therefrom. [26 Stat. L. 718.]

See the Act of March 3, 1883, ch. 130, § 8, *supra*, p. 580, which provided also for the deposit of funds to the credit of the Soldiers' Home.

An act to prohibit the granting of liquor licenses within one mile of the Soldiers' Home.

[Act of Feb. 28, 1891, ch. 385, 26 Stat. L. 797.]

[Liquor licenses prohibited within one mile of Soldiers' Home.] That on and after the passage of this act no license for the sale of intoxicating liquor at any place within one mile of the Soldiers' Home property in the District of Columbia shall be granted. [26 Stat. L. 797.]

[Medical and hospital supplies.] * * * Soldiers' Home, District of Columbia: That hereafter, upon proper application therefor, the Medical Department of the Army is authorized to sell medical and hospital supplies at its contract prices to the Soldiers' Home in the District of Columbia. [30 Stat. L. 54.]

This is from the Sundry Civil Appropriation Act of June 4, 1897, ch. 2.

[SEC. 1.] [Board of commissioners—composition—president—report.] * * * That hereafter the government and control of the United States Military Prison shall, under the Secretary of War, be vested in the Board of Commissioners of the United States Soldiers' Home, which board shall consist as at present of the Surgeon-General, the Commissary-General, the Adjutant-General, the Quartermaster-General, the Chief of Engineers, the Judge-Advocate-General, and the Governor of the Home, and the president of said board, who shall be the senior in rank of the members thereof, shall submit annually to the Secretary of War, for transmission to Congress, a full statement of the financial and other affairs of both the home and the prison for the preceding fiscal year. [38 Stat. L. 1004.]

This is from the Sundry Civil Appropriation Act of March 4, 1909, ch. 299, following an appropriation for the military prison at Fort Leavenworth, Kansas.

The provisions of the text superseded in part R. S. 4815, *supra*, p. 575, and the Act of March 3, 1883, ch. 130, § 10, *supra*, p. 580, relating to the composition of the board of commissioners.

V. NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS

Sec. 4825. [Organization of the National Home for Disabled Volunteer Soldiers.] The President, Secretary of War, Chief Justice, and such other persons as have been or from time to time may be associated with them, shall constitute a board of managers of an establishment for the care and relief of the disabled volunteers of the United States Army, to be known by the name and style of "The National Home for Disabled Volunteer Soldiers," and have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 10; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

The Act of March 21, 1866, ch. 21, from which the foregoing section was in part drawn is known as the "National Soldiers' Home Act."

Instrumentality of United States government.—"A consideration of the provisions of the act of Congress of March 21, 1866, which created and provided for the perpetual maintenance of the National Home for Disabled Volunteer Soldiers, as a great national charity to be supported by appropriations from the national treasury, together with an examination of the many subsequent acts of Congress which have explicitly defined the purposes, limited the powers, regulated the management, and controlled the expenditures of the home, leads us to the conclusion that the essential character and functions of this 'establishment' are those of an agency—an instrumentality of the United States government." King, J., in *Brooks Hardware Co. v. Greer*, (1913) 111 Me. 78, 87 Atl. 889, 46 L. R. A. (N. S.) 301.

Not "soldiers' home."—The National Home for Disabled Volunteer Soldiers is not one of the institutions known as a regularly constituted "soldiers' home," and legislative provisions relating to and making appropriations for "soldiers' homes" have no reference to the institution established by this statute. (1872) 14 Op. Atty.-Gen. 14.

Extra compensation of officer.—A special building committee of a soldiers' home has no authority to contract with one of the officers of the institution to receive extra compensation for services rendered during the construction of new buildings, when, by the by-laws, he could not receive, in addition to his salary or stated pay, "perquisites, fees, allowances, or advan-

tages." *Yates v. National Home, etc.*, (1880) 103 U. S. 674, 26 U. S. (L. ed.) 452.

Trustee process does not lie against the National Home for Disabled Volunteer Soldiers in an action brought in a state court, as it has no place of business "within the state" where the land in use by it has been ceded to the United States. *Brooks Hardware Co. v. Greer*, (1913) 111 Me. 78, 87 Atl. 889, 46 L. R. A. (N. S.) 301.

Liability to action for tort.—The National Home for Disabled Volunteer Soldiers, being a charitable institution engaged as an agency of the federal government in the discharge of a governmental function, is not subject to suit in an action sounding in tort to recover damages for the alleged unlawful and wrongful or negligent acts of its officers in diverting and polluting the waters of a spring situated on lands of another, the power "to sue and be sued in courts of law and equity" conferred on the corporation by this section being limited to matters within the scope of the other corporate powers with which it is vested. *Lyle v. National Home for Disabled Volunteer Soldiers*, (1909) 170 Fed. 842.

Jurisdiction of state courts.—The governor of a soldiers' home is not subject to the jurisdiction of the state, regarding his administrative acts performed by the authority of the board of managers of the home. *Ohio v. Thomas*, (1899) 173 U. S. 276, 19 S. Ct. 453, 43 U. S. (L. ed.) 699.

Sec. 4826. [Election of citizen managers.] Nine managers of the National Home for Disabled Volunteers shall be elected from time to time, as vacancies occur, by joint resolution of Congress. They shall all be citizens of the United States, and all residents of States which furnished organized bodies of soldiers to aid in suppressing the rebellion commenced in

eighteen hundred and sixty-one; and no two of them shall be residents of the same State, and no person who gave aid or countenance to the rebellion shall ever be eligible. The term of office of these managers shall be for six years, and until a successor is elected. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 10; Act of March 12, 1867, ch. 1, 15 Stat. L. 1; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

The text provides for nine managers. This number was increased to ten by an Act of March 2, 1887, ch. 316, 24 Stat. L. 444, to eleven by a Res. of March 3, 1891, No. 21, 26 Stat. L. 1117, reduced to five by an Act of June 23, 1913, ch. 3, 38 Stat. L. 43, and increased to seven by a Res. of Oct. 19, 1914, No. 49, *infra*, p. 597.

Eligibility of managers.—The question whether a congressman can be appointed a member of the board of managers of the Soldiers' Home, and become local manager of one of the homes, is wholly a matter for the decision of Congress itself. There is no constitutional objection to the elec-

tion of a member of Congress as a member of the board of managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to sound public policy. (1907) 26 Op. Atty-Gen. 457.

Sec. 4827. [Election of officers of the board of managers.] The twelve managers of the National Home for Disabled Volunteer Soldiers shall elect from their own number a president, who shall be the chief executive officer of the board, two vice-presidents, and a secretary. Seven of the board, of whom the president or one of the vice-presidents shall be one, shall form a quorum for the transaction of business at any meeting of the board. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 10; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

As to the number of managers see the notes to R. S. 4826, *supra*, this page.

Sec. 4828. [Expenses of managers.] No member of the board of managers of the National Home shall receive any compensation as such member. But the traveling and other actual expenses of a member incurred while upon the business of the home may be paid, and any member of the board having other duties connected with the home may receive a reasonable compensation therefor, to be determined by the board. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 10; Act of March 12, 1867, ch. 1, 15 Stat. L. 1; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

Compensation to managers for any duty connected with home allowed by this section is forbidden by the provision from the Act of Aug. 18, 1894, ch. 301, given *infra*, p. 591. The president and secretary of the board are, however, allowed salaries.

Traveling expenses of officers not managers, see provision from Act of Aug. 18, 1894, ch. 301, *infra*, p. 591.

Sec. 4829. [Officers of the National Home.] The officers of the National Home shall consist of a governor, a deputy governor, a secretary, a treasurer, and such other officers as the managers may deem necessary. They shall be appointed from honorably discharged soldiers who served as mentioned in the following section; and they may be appointed and removed, from time to time, as the interests of the institution may require, by the Board of Managers. *Provided*, That surgeons, assistant surgeons, and other medical officers of the National Home for Disabled Volunteer Soldiers, and the several branches thereof, may be appointed from others than those who have been disabled in the military service of the United States. [R. S.]

Originally this section was as follows:

"SEC. 4829. The officers of the National Home shall consist of a governor, a deputy governor, a secretary, and a treasurer, and such other officers as the managers may

deem necessary. They shall be appointed from disabled officers who served as mentioned in the following section; and they may be appointed and removed from time to time, as the interests of the institution may require, by the board of managers." Act of March 21, 1866, ch. 21, 14 Stat. L. 11; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

A substitute for this section was enacted by the Act of April 11, 1892, ch. 40, 27 Stat. L. 15. This substitute is all of that part of the section as given in the text preceding the proviso.

The Act of Feb. 9, 1897, ch. 205, 29 Stat. L. 517, further amended this "section forty-eight hundred and twenty-nine," without reference to the prior amendment, by adding the sentence commencing with the word "Provided."

Provisions relating to the eligibility of officers were made by the Act of June 28, 1902, ch. 1301, § 1, *infra*, p. 595, and the Act of March 3, 1887, ch. 362, *infra*, p. 589.

Sec. 4830. [Sites for homes may be purchased, and buildings erected.]

The board of managers shall have authority to procure from time to time, at suitable places, sites for military homes for all persons serving in the Army of the United States at any time in the war of the rebellion, not otherwise provided for, who have been or may be disqualified for procuring their own support by reason of wounds received or sickness contracted while in the line of their duty during the rebellion; and to have the necessary buildings erected, having due regard to the health of location, facility of access, and capacity to accommodate the persons entitled to the benefits thereof. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 10; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

By the Act of July 19, 1897, ch. 9, 30 Stat. L. 121, provisions relating to the condemnation of land for sites for public buildings were made applicable to this board of managers. See the title PUBLIC PROPERTY, BUILDINGS AND GROUNDS.

Allowance of interest in decree against home.—A decree allowing interest on an amount found due a contractor upon two contracts for the construction of buildings for the National Home is not erroneous by virtue of such allowance. *National Home for Disabled Volunteer Soldiers v. Parrish*, (1913) 229 U. S. 494, 33 S. Ct. 944, 57 U. S. (L. ed.) 1296, *affirming* (C. C. A. 6th Cir. 1912) 194 Fed. 940, 114 C. C. A. 576, wherein the court said: "It is urged that interest is not recoverable against the United States in the absence of some statutory provision or authorized stipulation, and that, as the Home is a governmental agency, a like exemption applies to it. It is quite true that the United States cannot be subjected to the payment of interest unless there be an authorized engagement to pay it or a statute permitting its recovery. . . . But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest

is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the treasury. . . . Without now attempting to lay down a rule for all governmental agencies, we think the exemption of the United States is not applicable to the Home. It is a distinct corporate entity, invested with powers, duties and responsibilities which, in the judgment of Congress, required that it be given power to sue in its own name and be subjected to liability to be sued. Although under the ultimate supervision of Congress, it has a board of managers which exercises a general control over its affairs, and has a corps of other officers of its own, who are in immediate charge of its activities. It makes contracts and incurs contractual liabilities in its own name, expends and disburses the moneys available for its support and maintenance, and in general occupies a position which takes it without the reasons underlying the Government's exemption from interest."

Sec. 4831. [Funds for support of home.] For the establishment and support of the National Home for Disabled Volunteer Soldiers there shall be appropriated all stoppages or fines adjudged against such officers and soldiers by sentence of court-martial or military commission, over and above the amounts necessary for the re-imbursement of the Government or of individuals; all forfeitures on account of desertion from such service; and all

moneys due such deceased officers and soldiers, which now are or may be unclaimed for three years after the death of such officers and soldiers, to be repaid upon the demand of the heirs or legal representatives of such deceased officers or soldiers. The board of managers are also authorized to receive all donations of money or property made by any person or persons for the benefit of the home, and to hold or dispose of the same for its sole and exclusive use. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 10; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

See the provisions of the Act of March 3, 1875, ch. 129, § 1, *infra*, p. 586.

Sec. 4832. [What persons are entitled to benefit of National Home — assignment of pensions.] The following persons only shall be entitled to the benefits of the National Home for Disabled Volunteer Soldiers, and may be admitted thereto, upon the recommendation of three of the board of managers, namely: All officers and soldiers who served in the late war for the suppression of the rebellion, and the volunteer soldiers and sailors of the war of eighteen hundred and twelve and of the Mexican war, and not provided for by existing laws, who have been or may be disabled by wounds received or sickness contracted in the line of their duty; and such of these as have neither wife, child, nor parent dependent upon them, on becoming inmates of this home, or receiving relief therefrom, shall assign thereto their pensions when required by the board of managers, during the time they shall remain therein or receive its benefits. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 11; Res. No. 45 of Feb. 28, 1871, 16 Stat. L. 599; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

Provisions extending the benefits of the Home to additional classes were made by the Act of May 26, 1900, ch. 586, § 1, 31 Stat. L. 217; the Act of Jan. 28, 1901, ch. 184, § 5, 31 Stat. L. 745; the Act of May 27, 1908, ch. 200, § 1, 35 Stat. L. 372; and the Act of March 4, 1909, ch. 299, § 1, 35 Stat. L. 1012. The provisions of all of these Acts were embodied in, and they were superseded by, the Act of March 3, 1915, ch. 75, § 1, *infra*, p. 597.

Further provisions relating to pensions were made by the Act of Feb. 26, 1881, ch. 80, § 2, *infra*, p. 588; the Act of Aug. 7, 1882, ch. 433, *infra*, p. 588; and the Act of July 1, 1902, ch. 1351, *infra*, p. 595.

"The assignment of the pension certificate does not give to the managers a right to collect or receive the pension therein mentioned for any period of time other than while the pensioner is an inmate of the home." (1879) 16 Op. Atty.-Gen. 377.

Such provisions do not include arrears of pensions that may be due to the inmates under the Pension Act of Jan. 25, 1879, ch. 23 (see title PENSIONS). (1879) 16 Op. Atty.-Gen. 374.

Sec. 4833. [Outdoor relief — if branch unfit for habitation, members may be transferred — report to Congress.] The Managers of the National Home for Disabled Volunteer Soldiers are authorized to aid persons who are entitled to its benefits by outdoor relief, in such manner and to such extent as they may deem proper, but such relief shall not exceed the average cost of maintaining an inmate of the Home: *Provided*, That in the event that buildings at any Branch of the Home shall be destroyed by fire or rendered unfit for habitation because of pestilence or by the elements, then and in that event the Board of Managers shall have authority to remove the members of said Branch so afflicted or destroyed to any other Branch not so affected, and to do this they may use any funds appropriated for the Home, notwithstanding they may have been specifically appropriated for other

purposes, to the extent that such funds shall be necessary to effect such a transfer and the maintenance and support thereafter of said members so transferred, and shall report their doings therein to the Congress and their expenditures as in other cases of expenditures: *Provided further*, That the appropriations for any fiscal year shall not be exceeded. [R. S.]

This section was amended to read as above given by the Act of Aug. 23, 1894, ch. 316, 28 Stat. L. 492.

Originally this section was as follows:

"Sec. 4833. The managers of the National Home for Disabled Volunteers are authorized to aid persons who are entitled to its benefits by outdoor relief in such manner and to such extent as they may deem proper; but such relief shall not exceed the average cost of maintaining an inmate of the home." Act of March 21, 1866, ch. 21, 14 Stat. L. 11; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

R. S. sec. 3678 requires appropriations to be applied solely to the objects for which they are made. See *ESTIMATES, APPROPRIATIONS, AND REPORTS*.

Sec. 4834. [Duties of board of managers.] The board of managers shall make an annual report of the condition of the National Home for Disabled Volunteer Soldiers to Congress on the first Monday of every January; and the board shall examine and audit the accounts of the treasurer and visit the home quarterly. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 11; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

Authority of governor of home, see note under R. S. sec. 4824, *supra*, p. 578.

Sec. 4835. [Inmates subject to articles of war.] All inmates of the National Home for Disabled Volunteer Soldiers shall be subject to the Rules and Articles of War, and in the same manner as if they were in the Army. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 11; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

See *ARTICLES OF WAR*.

Cited generally in (1878) 16 Op. Atty.-Gen. 13.

Sec. 4836. [Amendment, etc., of laws.] Congress may at any time alter, amend, or repeal the laws relating to the National Home for Disabled Volunteer Soldiers. [R. S.]

Act of March 21, 1866, ch. 21, 14 Stat. L. 11; Act of Jan. 23, 1873, ch. 51, 17 Stat. L. 417.

[SEC. 1.] **[Abolition of fines as funds — clerks — appropriations — estimates — accounts.]** * * * That so much of the act entitled "An act to incorporate a National Military and Naval Asylum for the relief of totally disabled officers and men of the volunteer forces of the United States," approved March third, eighteen hundred and sixty-five, and of all acts amendatory thereof, as provides "that for the establishment and support of said asylum there shall be appropriated all stoppages or fines adjudged against officers and soldiers by sentence of court-martial or military commission, over and above the amounts necessary for the re-imbursment of the Government or of individuals; all forfeitures on account of desertion from the service; and all moneys due deceased officers and soldiers which now are or may be unclaimed for three years after the death of such

officers and soldiers," be, and the same is hereby, repealed, to take effect on and after the first day of April, eighteen hundred and seventy-five.

And from and after April first, eighteen hundred and seventy-five, no clerk shall be employed or paid in any Department of the Government for services rendered under any provision of said act of March third, eighteen hundred and sixty-five, or the acts amendatory thereof.

And from and after the first day of April, eighteen hundred and seventy-five, no money shall be appropriated or drawn for the support and maintenance of what is now designated by law as the "National Home for Disabled Volunteer Soldiers," except by direct and specific annual appropriations by law.

And it shall be the duty of the managers of said home, on or before the first day of August in each year, to furnish, to the Secretary of War, estimates, in detail, for the support of said home for the fiscal year commencing on the first day of July thereafter; and the Secretary of War shall annually include such estimates in his estimates for his Department. And no moneys shall, after the first day of April, eighteen hundred and seventy-five, be drawn from the Treasury for the use of said home, except in pursuance of quarterly estimates, and upon quarterly requisitions by the managers thereof upon the Secretary of War, based upon such quarterly estimates, for the support of said home for not more than three months next succeeding such requisition. And no money shall be drawn or paid upon any such requisition while any balance heretofore drawn or received by said home, or for its use, from the Treasury, under the laws now or heretofore existing, and now held under investment or otherwise, shall remain unexpended.

And the managers of said home shall, at the commencement of each quarter of the year, render to the Secretary of War an account of all their receipts and expenditures for the quarter immediately preceding, with the vouchers for such expenditures; and all such accounts and vouchers shall be authenticated by the officers of said home thereunto duly appointed by said managers, and audited, and allowed, as required by law for the general appropriations and expenditures of the War Department. [18 Stat. L. 359.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1875, ch. 129. The provisions of the Acts above referred to are incorporated into R. S. sec. 4831, *supra*, p. 584.

For an opinion on forfeiture of bounty for desertion being payable to the National Asylum, see (1870) 13 Op. Atty.-Gen. 188.

[SEC. 1.] [Purchases to be made after advertisement; expenditures for new buildings.] Support of National Home for Disabled Volunteer Soldiers: * * * That all purchases of supplies exceeding the sum of one thousand dollars at any one time shall be made upon public tender after due advertisement, and that the expenditure for new buildings shall be expressly authorized in writing: [20 Stat. L. 390.]

This is from the Sundry Civil Appropriation Act of March 3, 1870, ch. 182.

[SEC. 1.] [Headstones at Central Branch.] For maintaining and improving national cemeteries. * * * And the Board of Managers of the National Home for Disabled Volunteer Soldiers may charge the regulation stone to be used in the Central Branch at a cost not exceeding one dollar and fifty cents additional for each one. [21 Stat. L. 33.]

This is from the Army Appropriation Act of June 23, 1879, ch. 35.

SEC. 2. [Pensioners in home, how paid.] All persons payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasury or treasurers of said home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children or in default of either to his legal representatives. [21 Stat. L. 350.]

The above section 2 is from the Pension Appropriation Act of Feb. 26, 1881, ch. 80. It is "continued in force" by the provision from the Act of Aug. 7, 1882, ch. 433, given *infra*, this page.

[SEC. 1.] [Pensions of inmates of National Home to be paid to treasurers.] * * * That all pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurers of said home, to be applied by such treasurers as provided by law, under the rules and regulations of said home. Said payments shall be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof on the day to which said pension is drawn. The treasurers of said home, respectively, shall give security, to the satisfaction of the managers of said home, for the payment and application by them of all arrears of pension and pension-moneys they may receive under the aforesaid provisions. And section two of the act entitled "An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for deficiencies, and for other purposes," approved February twenty-sixth, eighteen hundred and eighty-one, is hereby revived and continued in force. [22 Stat. L. 322.]

This is from the Sundry Civil Appropriation Act of Aug. 7, 1882, ch. 433. The Act of Feb. 26, 1881, ch. 80, § 2, continued in force by the provisions of the text is given *supra*, this page.

[SEC. 1.] [Annual report.] * * * And hereafter there shall annually be submitted to the Secretary of War a detailed statement of the expenses

of the Board of Managers of the National Home for Disabled Volunteer Soldiers, who shall submit the same to Congress at the beginning of each session thereof. [23 Stat. L. 510.]

This is from the Sundry Civil Appropriation Act of March 3, 1885, ch. 360.

SEC. 2. [Depositories of funds to give bonds.] That from and after the passage of this act it shall be the duty of the Secretary of the Treasury to require from the president and cashier of all banks used as depositories by the treasurer of the Home a deposit of bonds sufficient in amount to fully secure all moneys pertaining to said Home left on deposit with any such bank. [24 Stat. L. 129.]

The above section 2 is from the Act of July 9, 1886, ch. 756, to reimburse the National Home for losses, etc.

[SEC. 1.] [Expenditures to be reported to Congress — audit — persons connected with liquor traffic disqualified to hold positions.] * * * And hereafter the detailed statement of the expenses of the Board of Managers of the National Home for Disabled Volunteer Soldiers shall be reported direct to Congress in the annual report of the Board of Managers. But all of the expenditures of the said Home, including the expenses of the Board of Managers, shall be made subject to the general laws governing the disbursement of public moneys, so far as the same can be made applicable thereto, and shall be audited by the proper accounting officers of the Treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury: *Provided further*, That no person shall be eligible to or hold any position or employment in the government or management of any home who is interested in or connected with, directly or indirectly, any brewery, dram-shop, or distillery in the State where such home is located. [24 Stat. L. 539.]

This is from the Sundry Civil Appropriation Act of March 3, 1887, ch. 362.

[SEC. 1.] [Appropriations.] * * * Hereafter the provisions of section thirty-six hundred and ninety and thirty-six hundred and ninety-one of the Revised Statutes of the United States shall apply to all appropriations made for the maintenance of the National Home for Disabled Volunteer soldiers: [25 Stat. L. 543.]

This and the following paragraph of this section are from the Sundry Civil Appropriation Act of Oct. 2, 1888, ch. 1069.

R. S. secs. 3690 and 3691 mentioned in the text are given under the title **ESTIMATES, APPROPRIATIONS, AND REPORTS.**

[Estimates.] * * * That it shall be the duty of the managers of said Home, on or before the first day of October in each year, to furnish to the Secretary of War estimates, in detail, for the support of said Home for

the fiscal year commencing on the first day of July thereafter, and the Secretary of War shall annually include such estimates in his estimates for his Department. [25 Stat. L. 543.]

See the note to the preceding paragraph of this section.

Estimates for the support of the home were required to be submitted by items by the Act of March 3, 1879, ch. 182, 20 Stat. L. 390, and the Act of Aug. 4, 1886, ch. 902, 24 Stat. L. 251.

An act to authorize the furnishing of obsolete serviceable cannon to Soldiers Homes.

[Act of Feb. 8, 1889, ch. 116, 25 Stat. L. 657.]

[Homes may be furnished with obsolete cannon.] That the Secretary of War be, and hereby is, authorized and directed, subject to such regulations as he may prescribe, to deliver to any of the "National Homes for Disabled Volunteer Soldiers" already established or hereafter established and to any of the State Homes for soldiers and sailors or either now or hereafter duly established and maintained under State authority, such obsolete serviceable cannon, bronze or iron, suitable for firing salutes, as may be on hand undisposed of, not exceeding two to any one Home. [25 Stat. L. 657.]

See the later provision from the Act of May 26, 1900, ch. 586, given *infra*, p. 593.

[SEC. 1.] [Supervision of accounts.] National Home for Disabled Volunteer Soldiers: * * * That the accounts relating to the expenditure of said sums, as also all receipts by said Home from whatever source, shall, in addition to the supervision now provided for, be reported to and supervised by the Secretary of War. [26 Stat. L. 984.]

This is from the Sundry Civil Appropriation Act of March 3, 1891, ch. 542.

The provision from the Act of March 3, 1893, ch. 210, given *infra*, p. 591, also provides for the supervision of accounts by the Secretary of War.

[SEC. 1.] [Expenses to be in book of estimates — number, salaries, and allowances of officers.] * * * That hereafter the statement of expenses of the Board of Managers of the National Home for Disabled Volunteer Soldiers shall each year be submitted in the annual book of estimates and shall be made to show the amount of salary or compensation paid to each of the officers and employees of said Board, and there shall also be submitted therewith a statement showing the number of officers appointed at each of the Branch Homes under Section four thousand eight hundred and twenty-nine of the Revised Statutes, the amount of salary or compensation paid to each, and the amount of allowance to each, if any, for contingent or other expenses. [27 Stat. L. 384.]

This is from the Sundry Civil Appropriation Act of Aug. 5, 1892, ch. 380.

[SEC. 1.] [Supervision of accounts.] War Department. Office of the Inspector-General: * * * the Secretary of War shall hereafter exercise the same supervision over all receipts and disbursements on account of the volunteer soldiers' homes as he is required by law to apply to the accounts of disbursing officers of the Army. [27 Stat. L. 653.]

This is from the Deficiencies Appropriation Act of March 3, 1893, ch. 210.
See the Act of March 3, 1891, ch. 542, § 1, *supra*, p. 590.

[SEC. 1.] [Disbursements to be accounted for — supplies — posthumous fund.] National Home for Disabled Volunteer Soldiers. * * * That all amounts disbursed from the appropriation of a Branch Home shall be disbursed and accounted for monthly to the general treasurer by the treasurer of that Branch, except such expenditures for services, stationery, tableware, clothing and bedding as may be required by the Board of Managers to be legally made by the general treasurer, and all such stationery, tableware, clothing and bedding as may be required for each Branch Home shall be shipped directly from the place of purchase or manufacture to such Branch Home; and all disbursements shall be made in conformity with Sections thirty-six hundred and seventy-eight and thirty-six hundred and seventy-nine, Revised Statutes: *Provided further*, That the balance of the posthumous fund, including the amount invested in bonds pertaining to that fund, that may be in the hands of the treasurer of any Branch of the Home on July first, eighteen hundred and ninety-four, shall be transferred to the appropriation for "current expenses, eighteen hundred and ninety-five," of that Branch Home, and thereafter all receipts on account of the effects of deceased members shall be credited to the appropriation for "current expenses" of the fiscal year during which such amounts were received, and all repayments of such amounts shall be made from and charged to the like appropriation for the fiscal year in which such repayments shall be made. [28 Stat. L. 411.]

The provisions of the text and the following six paragraphs of this section are from the Sundry Civil Appropriation Act of Aug. 18, 1894, ch. 301.

R. S. secs. 3678, 3679, above mentioned, provide that appropriations shall be applied to the objects for which made, and that no sum in excess of the appropriation shall be expended or contract made involving payment in excess of the appropriation. These sections are given under the title ESTIMATES, APPROPRIATIONS, AND REPORTS.

Further provisions relating to the purchase and shipping of supplies were made by the Act of July 1, 1898, ch. 546, § 1, *infra*, p. 593.

[Bonds of treasurer.] The general treasurer shall give good and sufficient bond to the United States in a sum not less than one hundred thousand dollars, as the Secretary of War may direct, and to be approved by him, faithfully to account for all public moneys and property which he may receive, and the treasurers of the several Branch Homes shall give good and sufficient bonds to the general treasurer in such sums as he may require, and to be approved by him, faithfully to account for all moneys and property which they may receive. [28 Stat. L. 412.]

See the notes to the preceding paragraph of this section.

[Receipts for sales.] That all sums received from sales of subsistence stores or other property of the National Home for Disabled Volunteer

Soldiers shall be taken up by the disbursing officer under the proper current appropriation and be available for disbursement on account of that appropriation. [28 Stat. L. 412.]

See the notes to the first paragraph of this section, *supra*, p. 591.

[Employees to be classified — pay established — no extra pay — no duplicate pay rolls.] That the Board of Managers shall classify all the officers and employees of the National Home for Disabled Volunteer Soldiers and establish a rate of pay and allowance for each class, and the rate so established shall not be increased by fees, perquisites, allowances, or advantages under any pretense whatever; and no employee shall be borne on more than one pay roll or voucher. [28 Stat. L. 412.]

See the notes to the first paragraph of this section, *supra*, p. 591.

[Traveling expenses of officers.] That when an officer of the National Home for Disabled Volunteer Soldiers, not a member of the Board of Managers thereof, travels under orders on business for the Home he shall be allowed seven cents in lieu of all other expenses for each mile actually traveled, distance to be computed by the most direct through route. [28 Stat. L. 412.]

See the notes to the first paragraph of this section, *supra*, p. 591.

[Managers not to receive pay — expenses — salaries of president and secretary.] That hereafter no members of the Board of Managers of the National Home for Disabled Volunteer Soldiers shall receive any compensation or pay for any services or duties connected with the Home; but the traveling and other actual expenses of a member, incurred while upon the business of the Home, may be reimbursable to such member: *Provided*, That the president and secretary of the Board of Managers may receive a reasonable compensation for their services as such officers, not exceeding four thousand dollars and two thousand dollars, respectively, per annum. [28 Stat. L. 412.]

See the notes to the first paragraph of this section, *supra*, p. 591.

[Annual inspection — report.] That hereafter, once in each fiscal year, the Secretary of War shall cause a thorough inspection to be made of the National Home for Disabled Volunteer Soldiers, its records, disbursements, management, discipline, and condition, such inspection to be made by an officer of the Inspector-General's Department, who shall report thereon in writing, and said report shall be transmitted to Congress at the first session thereafter. [28 Stat. L. 412.]

See the notes to the first paragraph of this section, *supra*, p. 591.

[Sec. 1.] [Medical supplies.] * * * That hereafter upon proper application therefor, the Medical Department of the Army is authorized to sell medical and hospital supplies at its contract prices to the National Home for Disabled Volunteer Soldiers. [29 Stat. L. 445.]

This is from the Sundry Civil Appropriation Act of June 11, 1896, ch. 420.

[SEC. 1.] **[Purchase and distribution of supplies.]** * * * Hereafter all supplies for the National Home for Disabled Volunteer Soldiers shall be purchased, shipped, and distributed as may be directed by the Board of Managers. [30 Stat. L. 640.]

This is from the Sundry Civil Appropriation Act of July 1, 1898, ch. 546.

[SEC. 1.] **[Obsolete ordnance issued to Homes.]** * * * That hereafter the Chief of Ordnance is authorized to issue such obsolete or condemned ordnance, gun carriages, and ordnance stores as may be needed for ornamental purposes to the Homes for Disabled Volunteer Soldiers, the Homes to pay for transportation out of any appropriation for current expenses. [31 Stat. L. 216.]

This is from the Army Appropriation Act of May 26, 1900, ch. 586.

A similar provision, but without the word "hereafter," is contained in the Act of March 3, 1899, ch. 423, 30 Stat. L. 1073.

See the Act of Feb. 8, 1889, ch. 116, *supra*, p. 590.

[SEC. 1.] **[Appropriations for buildings available until expended.]** * * * That appropriations made for the fiscal year nineteen hundred, or that may hereafter be made, for the construction of buildings at any of the branches of the National Home for Disabled Volunteer Soldiers shall continue available until expended. [31 Stat. L. 294.]

This is from the Deficiencies Appropriation Act of June 6, 1900, ch. 785, and follows appropriations for the National Home for Disabled Volunteer Soldiers.

[SEC. 1.] **[General Treasurer and assistants—bond.]** * * * For salaries for officers and employees of the Board of Managers, and for outdoor relief and incidental expenses, namely:

For president of the Board of Managers, four thousand dollars; secretary of the Board of Managers, two thousand dollars; general treasurer, who shall not be a member of the Board of Managers, three thousand five hundred dollars; inspector-general, two thousand five hundred dollars; assistant general treasurer and assistant inspector-general, who shall hereafter, in the necessary absence or inability of the general treasurer, from any cause whatever, perform his duties and give bond to the general treasurer for the faithful performance of such duties, but the general treasurer shall in every respect be responsible, on his bond, to the United States for any default on the part of such assistant general treasurer and assistant inspector-general, two thousand dollars. [31 Stat. L. 636.]

This is from the Sundry Civil Appropriation Act of June 6, 1900, ch. 791.

The above paragraph seems to be in effect a substitute for the provision in the Sundry Civil Appropriation Act of July 1, 1898, ch. 546, which reads as follows:

"National Home for Disabled Volunteer Soldiers. . . . general treasurer, who shall not be a member of the Board of Managers, . . . and the general treasurer may hereafter designate a clerk in his office who, in the necessary absence or inability of the general treasurer from any cause whatever, shall perform his duties, and the general treasurer

may require the said clerk, when so designated, to give bonds for the faithful performance of such duties during the absence or inability of the general treasurer, but the general treasurer shall in every respect be responsible, on his bond, to the United States for any default of such clerk; . . . [30 Stat. L. 640.]

The salaries of the officers are dependent on the annual appropriation Acts, and were fixed for the fiscal year ending June 30, 1916, by the Sundry Civil Appropriation Act of March 3, 1915, ch. 75, § 1, 38 Stat. L. 852.

[SEC. 1.] **[Jurisdiction over sites ceded to States.]** * * * That the jurisdiction over the places purchased and used for the location of the Branches of the National Home for Disabled Volunteer Soldiers, under and by the authority of an Act of Congress approved March twenty-first, eighteen hundred and sixty-six, in Milwaukee County, State of Wisconsin, and upon which said Branch Home is located, and by authority of an Act of Congress, approved July fifth, eighteen hundred and eighty-eight, in the county of Leavenworth, State of Kansas, and upon which said Branch Home is located, is hereby ceded to the respective States in which said Branches are located and relinquished by the United States, and the United States shall claim or exercise no jurisdiction over said places after the passage of this Act: *Provided*, That nothing contained herein shall be construed to impair the powers or rights heretofore conferred upon or exercised by the Board of Managers of the National Home for Disabled Volunteer Soldiers in and on said places. [31 Stat. L. 1175.]

The provisions of this and the two following paragraphs of the text are from the Act of March 3, 1901, ch. 853.

The Act of March 21, 1866, ch. 21, mentioned in the text is embodied in R. S. secs. 4825-4836 given in this subdivision, *supra*, p. 552 et seq.

The Act of July 5, 1884, ch. 223, 23 Stat. L. 120 (erroneously referred to above as that of July 5, 1888), authorizes a branch home which was located at Leavenworth, Kan.

State jurisdiction.—Federal officers who are discharging their duties in a state and who are engaged in superintending the internal government and management of a federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by federal

authority, notwithstanding the state may have jurisdiction over the place or ground where the institution is located. The provisions of a state statute relating to the sale of oleomargarine do not apply to the management of a soldiers' home. *Ohio v. Thomas*, (1899) 173 U. S. 276, 19 S. Ct. 453, 43 U. S. (L. ed.) 699. See *In re Kelly*, (1895) 71 Fed. 545.

[Accounts, how audited.] * * * That the accounts relating to the expenditure of all public moneys appropriated for the support and maintenance of the National Home for Disabled Volunteer Soldiers shall be audited by the Board of Managers of said Home in the same manner as is provided for the accounts of the various Departments of the United States Government, and thereupon immediately transmitted directly to the proper accounting officers of the Treasury Department for final audit and settlement. [31 Stat. L. 1178.]

See the notes to the preceding paragraph of this section.

[Designation of officer to assist treasurer and quartermaster at Homes — bond.] * * * Hereafter the Board of Managers of the National Home for Disabled Volunteer Soldiers may, in their discretion, designate and

authorize an officer at each or any of the several Branches of the National Home for Disabled Volunteer Soldiers to perform such duties in connection with the offices of the treasurer and quartermaster at any such Branch as they may direct, and in the necessary absence or inability of either of said officers from any cause whatever to have power to act in their places and perform all of the duties connected with the said respective offices. All officers so designated and authorized to act as provided hereunder shall give bond to the general treasurer of the National Home for Disabled Volunteer Soldiers in such amount as he may require, and to be approved by him, faithfully to account for all public moneys and property which they may receive. [31 Stat. L. 1178.]

See the notes to the first paragraph of this section, *supra*, p. 594.

[SEC. 1.] [Officers of Home to be persons whose record would render them eligible for admission.] Hereafter the officers of the National Home for Disabled Volunteer Soldiers, and officers under the Board of Managers thereof, shall be appointed, so far as may be practicable, from persons whose military or naval service would render them eligible, if disabled and not otherwise provided for, for admission to the Home, and they may be appointed, removed, and transferred, from time to time, as the interests of the institution may require, by the Board of Managers. [32 Stat. L. 472.]

This is from the Sundry Civil Appropriation Act of June 28, 1902, ch. 1301. See R. S. sec. 4829, *supra*, p. 583.

[SEC. 1.] [Payment of pension after death of inmate.] Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home for which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death. [32 Stat. L. 564.]

This is from the Deficiencies Appropriation Act of July 1, 1902, ch. 1351.

[SEC. 1.] [Appropriations for buildings, etc., to be immediately available.] * * * Appropriations herein, or that may hereafter be made, for construction of buildings and appurtenances at any of the Branches of the National Home for Disabled Volunteer Soldiers, shall be available immediately after the approval of the Act containing the same. [32 Stat. L. 1137.]

This is from the Sundry Civil Appropriation Act of March 3, 1903, ch. 1007.

[Sec. 1.] **[Applications for admission — effect.]** * * * Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided. [36 Stat. L. 736.]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384.

An act to provide aid to State or Territorial homes for the support of disabled soldiers and sailors of the United States.

[Act of Aug. 27, 1888, ch. 914, 25 Stat. L. 450.]

[Sec. 1.] **[Aid to State or Territorial homes.]** That all States or Territories which have established, or which shall hereafter establish, State homes for disabled soldiers and sailors of the United States who served in the war of the rebellion, or in any previous war, who are disabled by age, disease, or otherwise, and by reason of such disability are incapable of earning a living, provided such disability was not incurred in service against the United States, shall be paid for every such disabled soldier or sailor who may be admitted and cared for in such home at the rate of one hundred dollars per annum.

The number of such persons for whose care any State or Territory shall receive the said payment under this act shall be ascertained by the Board of Managers of the National Home for Disabled Volunteer Soldiers, under such regulations as it may prescribe, but the said State or Territorial homes shall be exclusively under the control of the respective State or Territorial authorities, and the Board of Managers shall not have nor assume any management or control of said State or Territorial homes. The Board of Managers of the National Home shall, however, have power to have the said State or Territorial homes inspected at such times as it may consider necessary, and shall report the result of such inspections to Congress in its annual report. [25 Stat. L. 450.]

Appropriation Acts "for continuing aid to state or territorial homes" in conformity with this Act have contained for many years the proviso, "That one-half of any sum or

sums retained by State Homes on account of pensions received from inmates shall be deducted from the aid herein provided for." See 32 Stat. L. 472; 32 Stat. L. 15; 31 Stat. L. 1178; 31 Stat. L. 1028; 31 Stat. L. 636; 31 Stat. L. 13; 30 Stat. L. 1227; 30 Stat. L. 1113; 30 Stat. L. 668; 30 Stat. L. 640; 30 Stat. L. 121; 30 Stat. L. 54; 29 Stat. L. 448; 29 Stat. L. 284; 29 Stat. L. 22; 28 Stat. L. 955, etc.

The Sundry Civil Appropriation Act of March 3, 1915, ch. 75, § 1, 38 Stat. L. 853, contained, as did similar Acts for several preceding years, provisions: "That no part of the foregoing appropriations shall be expended for any purpose at any branch of the National Home for Disabled Volunteer Soldiers that maintains or permits to be maintained on its premises a bar, canteen, or other place where beer, wine, or other intoxicating liquors are sold. . . . That for any sum or sums collected in any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained."

Section 2 of this Act, making appropriations, is omitted as temporary.

Joint Resolution For the appointment of five members of the Board of Managers of the National Home for Disabled Volunteer Soldiers.

[*Res. of Oct. 19, 1914, No. 49, 38 Stat. L. 780.*]

[**Number of managers—quorum.**] * * * Said board, after the passage of this resolution, shall be composed of seven members, and four members shall constitute a quorum for the transaction of business at any regular or special meeting thereof. [38 Stat. L. 780.]

The part of the foregoing Resolution omitted consisted of the names and terms of these appointed members of the board of managers of the National Home for Disabled Volunteer Soldiers, and to which the words "Said board" refer. See R. S. 4826, *supra*, p. 582, and the notes thereto.

[**Sec. 1.**] [**Expenditure of appropriations for new buildings.**] * * * That no part of the appropriation for repairs for any of the branch homes shall be used for the construction of any new building; [38 Stat. L. 850.]

This and the following paragraph of this section are from the Sundry Civil Appropriation Act of March 3, 1915, ch. 75.

[**Additional persons entitled to benefits of Home.**] * * * The following persons only shall hereafter be entitled to the benefits of the National Home for Disabled Volunteer Soldiers, and may be admitted thereto upon the order of a member of the board of managers, namely: All honorably discharged officers, soldiers, and sailors who served in the regular or volunteer forces of the United States in any war in which the country has been engaged, including the Spanish-American War, the provisional army (authorized by Act of Congress approved March second, eighteen hundred and ninety-nine), in any of the campaigns against hostile Indians, or who have served in the Philippines, in China, or in Alaska, who are disabled by disease, wounds, or otherwise, and who have no adequate means of support, and who are not otherwise provided for by law, and by reason of such disability are incapable of earning their living. [38 Stat. L. 853.]

See the note to the preceding paragraph of this section.

For earlier provisions relating to this subject see R. S. sec. 4832, *supra*, p. 585, and the notes thereto.

VI. GOVERNMENT HOSPITAL FOR THE INSANE

Sec. 4838. [Establishment of the Government Hospital for the Insane.] There shall be in the District of Columbia a Government Hospital for the Insane, and its objects shall be the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and of the District of Columbia. [R. S.]

Act of March 3, 1855, ch. 199, 10 Stat. L. 682.

By a provision of the Sundry Civil Appropriation Act of July 1, 1916, the Government Hospital for the Insane was designated as Saint Elizabeth's Hospital. See Pamph. Supp. No. 8, Fed. Stat. Ann. 63; 1918 Supp. Fed. Stat. Ann.

Indigent persons not of the army or navy, and not residents of the District of Columbia at the time they become insane, are not entitled to admission into the government hospital. (1855) 7 Op. Atty.-Gen. 450.

The Act of June 6, 1900, creating a board of charities for the District of Columbia, does not affect the supervision or jurisdiction of the Secretary of the Interior over this institution. (1900) 23 Op. Atty.-Gen. 287.

Sec. 4839. [Superintendent — appointment and duties of disbursing agent — pension money of inmates.] The chief executive officer of the Government Hospital for the Insane shall be a superintendent, who shall be appointed by the Secretary of the Interior, shall be entitled to a salary of four thousand dollars a year, and shall give bond for the faithful performance of his duties in such sum and with such securities as may be required by the Secretary of the Interior. The superintendent shall be a well-educated physician, possessing competent experience in the care and treatment of the insane; he shall reside on the premises and devote his whole time to the welfare of the institution; he shall, subject to the approval of the board of visitors, appoint a responsible disbursing agent for the institution, who shall give a bond satisfactory to the Secretary of the Interior, and the said superintendent shall engage and discharge all needful and useful employees in the care of the insane and all laborers on the farm and determine their wages and duties; he shall also be an ex officio secretary of the board of visitors. The said disbursing agent, under the direction of the superintendent, shall have the custody of and pay out all moneys appropriated by Congress for the Government Hospital for the Insane, or otherwise received for the purposes of the hospital, and all moneys received by the superintendent in behalf of the hospital or its patients, and keep an accurate account or accounts thereof. The said disbursing agent shall deposit in the Treasury of the United States, under the direction of the superintendent, all funds now in the hands of the superintendent or which may hereafter be intrusted to him by or for the use of patients, which shall be kept in a separate account; and the said disbursing agent is authorized to draw therefrom, under the direction of the said superintendent, from time to time, under such regulations as the Secretary of the Interior may prescribe, for the use of such patients, but not to exceed for any one patient the amount intrusted to the superintendent on account of such patient. During the time that any pensioner shall be an inmate of the Government Hospital for the Insane, all money due or becoming due upon his or her pension shall be paid by the pension agent to the superintendent or disbursing agent of the hospital, upon a certificate by such superintendent that the pensioner is an inmate of the hospital and is living, and such pension money shall be by said superintendent or

disbursing agent disbursed and used, under regulations to be prescribed by the Secretary of the Interior, for the benefit of the pensioner, and, in case of a male pensioner, his wife, minor children, and dependent parents, or, if a female pensioner, her minor children, if any, in the order named, and to pay his or her board and maintenance in the hospital, the remainder of such pension money, if any, to be placed to the credit of the pensioner and to be paid to the pensioner or the guardian of the pensioner in the event of his or her discharge from the hospital; or, in the event of the death of said pensioner while an inmate of said hospital, shall, if a female pensioner, be paid to her minor children, and, in the case of a male pensioner, be paid to his wife, if living; if no wife survives him, then to his minor children; and in case there is no wife nor minor children, then the said unexpended balance to his or her credit shall be applied to the general uses of said hospital: *Provided*, That in the case of any pensioner transferred to the hospital from the National Home for Disabled Volunteer Soldiers any pension money to his credit at said Home at the time of his said transfer shall be transferred with him to said hospital and placed to his credit therein, to be expended as hereinbefore provided, and in case of his return from said hospital to the Home any balance to his credit at said hospital shall in like manner be transferred to said Home, to be expended in accordance with the rules established in regard thereto, and this provision shall also be applicable to all unexpended pension money heretofore paid to the officers of said hospital on account of pensioners who were but are not now inmates thereof. [R. S.]

As originally enacted this section was as follows:

"SEC. 4839. The chief executive officer of the Hospital for the Insane shall be a superintendent, who shall be appointed by the Secretary of the Interior, and shall be entitled to a salary of two thousand five hundred dollars a year, and shall give bond for the faithful performance of his duties, in such sum and with such securities as may be required by the Secretary of the Interior. The superintendent shall be a well-educated physician, possessing competent experience in the care and treatment of the insane; he shall reside on the premises, and devote his whole time to the welfare of the institution; he shall, subject to the approval of the visitors, engage and discharge all needful and usual employes in the care of the insane, and all laborers on the farm, and determine their wages and duties; he shall be the responsible disbursing agent of the institution, and shall be ex-officio secretary of the board of visitors."

Act of March 3, 1855, ch. 199, 10 Stat. L. 682.

It was amended to read as given in the text by an Act of Feb. 2, 1909, ch. 58, § 1, 35 Stat. L. 592, entitled "An Act to provide for a disbursing officer for the Government Hospital for the Insane." Section 2 of said Act repealed all provisions of law inconsistent therewith.

So much of the text as fixed the salary of the superintendent at \$4,000 was superseded by the Act of March 4, 1911, ch. 285, § 1, *infra*, p. 614, fixing said salary at \$5,000.

This section as amended superseded a provision of the Act of Feb. 20, 1905, ch. 593, 33 Stat. L. 731, amending the Act of Aug. 7, 1882, ch. 433, § 1, *infra*, p. 607, and given in the notes to the last cited Act.

Sec. 4840. [Board of visitors.] Nine citizens of the District of Columbia, to be appointed by the President, shall constitute a board of visitors of the Hospital for the Insane. The term of office of three visitors shall expire biennially on the thirtieth day of June in every alternate year, dating from the thirtieth day of June, eighteen hundred and fifty-seven. Should any vacancy occur by death, resignation, or otherwise, it shall be filled by appointment for the unexpired term of such visitor. The office of visitor shall be honorary and without compensation. [R. S.]

Act of March 3, 1855, ch. 199, 10 Stat. L. 682.

Sec. 4841. [President of board of visitors.] The board of visitors shall select from their number a president, to preside at their meetings for one year, or until a successor is elected. [R. S.]

Act of March 3, 1855, ch. 199, 10 Stat. L. 682.

Sec. 4842. [Powers and duties of the board of visitors.] The board of visitors, subject to the approval of the Secretary of the Interior, may make any needful by-laws for the government of themselves, and of the superintendent and his employés, and of the patients, not inconsistent with law; they shall visit the hospital at stated periods, and exercise so careful a supervision over its expenditures and general operations that the Government and community may have confidence in the correctness of its management; they shall make annually to the Secretary of the Interior a report for the preceding fiscal year setting forth the condition and wants of the institution. [R. S.]

Act of March 3, 1855, ch. 199, 10 Stat. L. 682.

Hospital to be under supervision of Secretary of Interior, see provision from the Act of July 1, 1882, ch. 263, *infra*, p. 607.

Sec. 4843. [Admission of insane persons of the Army, Navy, Marine Corps, etc.] The superintendent, upon the order of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Treasury, respectively, shall receive, and keep in custody until they are cured, or removed by the same authority which ordered their reception, insane persons of the following descriptions:

First. Insane persons belonging to the Army, Navy, Marine Corps, and revenue-cutter service.

Second. Civilians employed in the Quartermaster's, Pay, and Subsistence Departments of the Army who may be, or may hereafter become, insane while in such employment.

Third. Men who, while in the service of the United States, in the Army, Navy, or Marine Corps, have been admitted to the hospital, and have been thereafter discharged from it on the supposition that they have recovered their reason, and have, within three years after such discharge, become again insane from causes existing at the time of such discharge, and have no adequate means of support.

Fourth. Indigent insane persons who have been in either of the said services and been discharged therefrom on account of disability arising from such insanity.

Fifth. Indigent insane persons who have become insane within three years after their discharge from such service, from causes which arose during and were produced by said service. [R. S.]

Act of June 1, 1860, ch. 66, 12 Stat. L. 23; Act of July 13, 1866, ch. 179, 14 Stat. L. 93.

The paragraph numbered "second" of the above section was amended to read as here given by the Act of Feb. 9, 1900, ch. 13, 31 Stat. L. 7. The amendment consisted in adding the word "pay" after the word "quartermaster's."

Insane inmates of the Soldiers' Home were to be admitted by a provision of the Act of July 7, 1884, ch. 332, *infra*, p. 608.

Inmates of the National Home for Disabled Volunteers may be admitted by virtue of the Act of Aug. 7, 1882, ch. 433, § 1, given as amended, *infra*, p. 607.

Patients of the Marine-Hospital Service, now the Public Health Service, may be admitted under the Act of March 3, 1875, ch. 156, § 5, *infra*, p. 606.

These provisions supersede those of the Act of June 16, 1880, ch. 235, § 1, 21 Stat. L. 275, which restricted admissions to such persons as were entitled to treatment therein under title LIX, ch. 4, of the Revised Statutes, being sections 4838-4858 thereof, and the Act of March 3, 1875, ch. 156, *infra*, p. 606.

Provisions for the care of the insane of the army on the Pacific coast were made by the Act of March 3, 1901, ch. 853, § 1, *infra*, p. 609.

Provisions for the care of insane natives of the Philippine Islands serving in the army were made by the Act of May 11, 1908, ch. 163, § 1, *infra*, p. 614.

The revenue-cutter service is now combined with the life-saving service and known as the Coast Guard. See COAST GUARD.

Seamen of the revenue-cutter service.—It cannot be inferred from the terms of this section expressly providing for insane persons belonging to the revenue-cutter service, that sick seamen of the revenue-cutter service are not included in section 3 of the Act of March 3, 1875, *supra*, p. 569. The statutes "plainly indicate a general policy on the part of the government to extend benefits of the hospital service to all persons, whether in the navy, marine, or revenue service." (1896) 21 Op. Atty.-Gen. 340.

A volunteer who becomes insane more than three years after discharge is entitled to admission to the asylum, whether or not he is an inmate of a volunteer soldiers' home when he becomes insane, when, under the terms of an appropria-

tion act, provision is made for the support, etc., of the insane of the army, navy, revenue-cutter, and volunteer service. (1873) 14 Op. Atty.-Gen. 225. See also (1896) 21 Op. Atty.-Gen. 340.

Discharge from military service.—It was not the intention of Congress that the discharge of an insane soldier from the military service on the ground of his insanity, made after his commitment to the hospital, should of itself operate to authorize his discharge from the hospital. The statute gives no authority to the superintendent to discharge a patient for the reason that by his intermediate discharge from the army, he has ceased to be a soldier of the United States. *U. S. v. Frizzell*, (1901) 19 App. Cas. (D. C.) 48.

Sec. 4844. [Admission of the indigent insane of the District of Columbia.] All indigent insane persons residing in the District of Columbia at the time they became insane shall be entitled to the benefits of the Hospital for the Insane and shall be admitted on the authority of the Secretary of the Interior, which he may grant after due process of law showing the person to be insane and unable to support himself and family, or himself, if he has no family, under the visitation of insanity. [R. S.]

Act of March 3, 1855, ch. 199, 10 Stat. L. 683.

The authority of the Secretary of the Interior was superseded by that of the executive authority of the District of Columbia by the Act of March 3, 1877, ch. 105, § 1, *infra*, p. 606.

See the Act of Jan. 31, 1899, ch. 78, § 7, *infra*, p. 609, and the notes thereto, and the Act of Feb. 23, 1905, ch. 738, § 1, *infra*, p. 613.

"Due process of law," the finding of the statutory facts, does not compel the secretary to admit a person, nor does it conclude his judgment as to the facts found, nor will it justify him in granting admission to a person not otherwise entitled to admission, as, for example, where the person is not a resident of the

District of Columbia. "The secretary, if he sees fit, may require that any and all other facts, necessary to entitle a party to admission, shall be established by legal proofs; or he may decide them on his own judgment as the administrative superior of the hospital." (1855) 7 Op. Atty.-Gen. 450.

Sec. 4845. [Order of admission.] The Secretary of the Interior may grant an order for the admission into the hospital of any insane person not charged with a breach of the peace, when he shall receive the certificate, as provided in the next section, of any judge of the supreme court for the District of Columbia, or of any justice of the peace of the District, and an application in writing, as provided in the next section, by a member of the board of visitors, requesting that such order may be issued. [R. S.]

Act of Feb. 28, 1861, ch. 60, 12 Stat. L. 177; Act of March 3, 1863, ch. 91, 12 Stat. L. 763.

Sec. 4846. [Certificate of judge or justice.] It must appear by the certificate aforesaid that two respectable physicians, residents of the District, appeared before said judge or justice and deposed, in writing sworn to and subscribed by them, that they knew the person alleged to be insane; that, from personal examination, they believed such person to be in fact insane, and a fit subject for treatment in said hospital, and that said person was a resident of the District at the time he or she was seized with the mental disorder under which he or she then labored. And it must further appear by such certificate that two respectable householders, resident of the District, appeared before said judge or justice and deposed, in writing sworn to and subscribed by them, that they knew the person alleged to be insane, and that, from a personal examination of his or her affairs, they believed said person to be unable, under the visitation of insanity, to support himself, or herself, and family, in case such person have a family, or to support himself or herself alone, in case such person have no family, and unable to pay his or her board and other expenses in the hospital. The affidavits of said physicians and householders shall accompany the certificate of said judge or justice of the peace. [R. S.]

Act of Feb. 28, 1861, ch. 60, 12 Stat. L. 177.

Sec. 4847. [Application by visitor.] The application by a member of the board of visitors must be made within five days after the date of the affidavits aforesaid, and it must appear therein that the visitor made the application after an inspection of the affidavits and certificate. It shall be the duty of such visitor to withhold his application, if he has reason to doubt the indigence of the party in whose behalf the application is desired, until his doubt is removed by satisfactory testimony. [R. S.]

Act of Feb. 28, 1861, ch. 60, 12 Stat. L. 177.

Sec. 4848. [Conveyance to hospital.] The order of the Secretary of the Interior, granted upon the certificate of a judge or justice and the application of a member of the board of visitors, shall authorize any police officer or constable to assist in carrying such indigent insane person to the hospital, whenever such assistance is represented to be necessary by the person holding the order; but all the expenses of witnesses before the judge or justice of the peace, and of carrying such patient to the hospital, shall be borne by his friends, or by the local authorities of the District. [R. S.]

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 157.

As to the authority of the Secretary of the Interior see the notes to R. S. sec. 4844, *supra*, p. 601.

Sec. 4849. [Admission of insane persons having property.] Whenever it appears in the case of any insane person whose insanity commenced while he was a resident of the District of Columbia that he is able to defray a portion, but not the whole of the expenses of his support and treatment in the Government Hospital for the Insane, the board of visitors of the hospital is authorized to inquire into the facts of the case; and if it appears to the board, upon such inquiry, that such insane person has property and no family, or has more property than is required for the support of his family, then, as a condition upon which such insane person, admitted or to be admitted upon the order of the Secretary of the Interior, shall receive

or continue to receive the benefits of the hospital, there shall be paid to the superintendent from the income, property, or estate of such insane person such portion of his expenses in the hospital as a majority of the board shall determine to be just and reasonable, under all the circumstances. [R. S.]

Act of Feb. 28, 1861, ch. 60, 12 Stat. L. 177.

Further provisions relating to insane persons who have property were made by the Act of Feb. 23, 1905, ch. 738, § 1, *infra*, p. 613.

The Secretary of War has nothing to do with the commitment of pay patients to the hospital, and no pay patient could be held on his commitment. U. S. v. Frizzell, (1901) 19 App. Cas. (D. C.) 48.

Sec. 4850. [Admission of nonresidents of District.] Any indigent insane person who did not reside in the District at the time he became insane may, in like manner, upon the certificate of a judge or justice and the application of a member of the board of visitors, be admitted into the hospital upon the application of the governor of the District, and at the expense of the District during the continuance of such insane person therein, it being hereby designed to give the superintendent thereof authority to take charge of such insane person until the governor can discover who his friends are, or whence he came, with a view to the return of such person to such friends, or to the place of his residence, and thus relieve the District of the expense and charge of such indigent insane non-resident. [R. S.]

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 157.

The office of governor of the District of Columbia is abolished. See Act of June 20, 1874, ch. 337, 18 Stat. L. 116.

Return of nonresident patients was provided for by section 7 of the Act of Jan. 31, 1899, ch. 78, *infra*, p. 609.

Sec. 4851. [Admission of insane persons accused of crime.] If any person, charged with crime, be found, in the court before which he is so charged, to be an insane person, such court shall certify the same to the Secretary of the Interior, who may order such person to be confined in the Hospital for the Insane, and, if he be not indigent, he and his estate shall be charged with expenses of his support in the hospital. [R. S.]

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 158.

Further provisions for the care and custody of insane convicts were made by the Act of June 23, 1874, ch. 465, *infra*, p. 605.

Courts of District of Columbia.—While the language of this section is general, the generality of its language is, by the force of the title and the accompanying provisions, limited to the courts of the District of Columbia. The mere fact that an insane resident of a state has been indicted for an offense in a court of the

United States does not render him a proper subject for the issue of an order for his maintenance in the hospital. (1881) 17 Op. Atty-Gen. 211.

For a commitment made upon the order of the Secretary of the Interior pursuant to this section, see *Ex p. Dries*, (1894) 3 App. Cas. (D. C.) 165.

Sec. 4852. [Insane convicts.] Any person becoming insane during the continuance of his sentence in the United States penitentiary shall have the same privilege of treatment in the hospital during the continuance of his mental disorder as is granted in the preceding section to persons who escape the consequences of criminal acts by reason of insanity, unless it be the

opinion, both of the physician to the penitentiary and the superintendent of the hospital, that such insane convict is so depraved and furious in his character as to render his custody in the hospital insecure, and his example pernicious. [R. S.]

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 158.

See the Act of June 23, 1874, ch. 465, providing for the care and custody of insane convicts, *infra*, p. 605.

Sec. 4853. [Private patients.] Whenever there are vacancies, private patients from the District may be received at a rate of board to be determined by the visitors, to be in no case less than the actual cost of their support. [R. S.]

Act of March 3, 1855, ch. 199, 10 Stat. L. 683.

Sec. 4854. [Admission of pay patients.] The independent or pay patients may be received into the hospital for the insane on the certificate of two respectable physicians of the District, stating that they have personally examined the patient, and believe him to be insane at the time of giving the certificate, and a fit subject for treatment in the institution, accompanied by a written request for the admission from the nearest relatives, legal guardian, or friend of the patient, where he may remain until restored to reason. The friends of the patient shall comply with the regulations of the hospital in respect to payment of board, and in all other respects. The request for admission must be made within five days of the date of the certificate of insanity. [R. S.]

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 158.

R. S. sec. 4855. This section was as follows:

"SEC. 4855. When any person confined in the Hospital for the Insane charged with crime and subject to be tried therefor, or convicted of crime and undergoing sentence therefor, shall be restored to sanity, the superintendent of the hospital shall give notice thereof to the judge of the criminal court, and deliver him to the court in obedience to the proper precept."

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 158.

It was superseded by the Act of June 23, 1874, ch. 465, § 3, *infra*, p. 606.

Sec. 4856. [Discharge of patients upon bond.] If any person will give bond with sufficient security, to be approved by the supreme court of the District of Columbia, or by any judge thereof in vacation, payable to the United States, with condition to restrain and take care of any independent or indigent insane person not charged with a breach of the peace, whether in the hospital or not, until the insane person is restored to sanity, such court or judge thereof may deliver such insane person to the party giving such bond. [R. S.]

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 158.

Sec. 4857. [Insane persons not to be confined in jail.] No insane person not charged with any breach of the peace shall ever be confined in the United States jail in the District of Columbia. [R. S.]

Act of Feb. 7, 1857, ch. 36, 11 Stat. L. 157.

Sec. 4858. [Disbursement of appropriations for the insane.] All appropriations of money by Congress for the support of the Hospital for

the Insane shall be drawn from the Treasury on the requisition of the Secretary of the Interior, and shall be disbursed and accounted for in all respects according to the laws regulating ordinary disbursements of public money. [R. S.]

Act of March 3, 1855, ch. 199, 10 Stat. L. 683.

An act to provide for the care and custody of persons convicted in the courts of the United States who have or may become insane while imprisoned.

[Act of June 23, 1874, ch. 465, 18 Stat. L. 251.]

[SEC. 1.] [Insane convicts may be transferred to hospital.] That upon the application of the Attorney-General the Secretary of the Interior be, and he is hereby, authorized and directed to transfer to the Government Hospital for the Insane in the District of Columbia all persons who, having been charged with offenses against the United States, are in the actual custody of its officers, and all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any State prison or penitentiary of any State or Territory, and who during the term of their imprisonment have or shall become and be insane. [18 Stat. L. 251, as amended by 22 Stat. L. 330.]

This section was amended to read as above given by the Act of Aug. 7, 1882, ch. 433.

Originally this section was as follows:

"That upon the application of the Attorney-General, the Secretary of the Interior be, and he is hereby, authorized and directed to transfer to the Insane Asylum in the District of Columbia all persons who have been or shall be convicted of any offense in any court of the United States, and imprisoned in any State prison or penitentiary of any State or Territory, and who, during the term of their imprisonment, have or shall become and be insane." [18 Stat. L. 251.]

See R. S. sec. 4851, *supra*, p. 603, for prior provisions relative to admission to the hospital of insane persons accused of crime, and R. S. sec. 4852, *supra*, p. 603, which deals with insane convicts.

SEC. 2. [Accommodation of insane convicts in state asylums.] That in all cases where any person convicted in a court of the United States shall, while imprisoned under such conviction in any State prison or penitentiary, become and be insane, and there shall not be accommodation for such insane person at the Insane Asylum of the District of Columbia, or if for other reasons the Attorney-General is of opinion that such insane person should be placed at a State insane asylum rather than at said District Asylum, then the Attorney-General shall have power in his discretion to contract with any State insane or lunatic asylum, within the State in which such convict is imprisoned, for his care and custody while remaining so insane; and in all cases where such convicts shall have heretofore been, or shall hereafter be, transferred to a State asylum for insane convicts, in accordance with the laws of such State, the Attorney-General is hereby authorized and directed to compensate the said asylum, or the proper authorities controlling the same, for the care and custody of such insane convicts, until their removal or discharge, in such amounts as he shall deem just and reasonable; but no contract shall be made or compensation paid for the care

of such insane person[s] beyond their respective terms of imprisonment. [18 Stat. L. 251.]

SEC. 3. [Convicts restored to sanity to be returned to prison.] That whenever such insane convict shall be restored to sanity, after he or she shall have been transferred under the provisions of this act, he or she shall be returned to the prison or penitentiary from which the transfer was made, provided the term of imprisonment shall not have expired. The questions of sanity in all cases arising under this act shall be determined in accordance with the rules and regulations of existing laws, State or national, on that subject, applicable to the prison, penitentiary, or asylum where such convict shall be confined. [18 Stat. L. 252.]

The provisions of the text supersede those of R. S. sec. 4855, noted *supra*, p. 604.

SEC. 5. [Admission of patients of Public Health Service.] That insane patients of said service shall be admitted into the Government Hospital for the Insane upon the order of the Secretary of the Treasury, and shall be cared for therein until cured or until removed by the same authority; and the charge for each such patient shall not exceed four dollars and fifty cents a week, which charge shall be paid out of the marine-hospital fund. [18 Stat. L. 486.]

This is from an Act of March 3, 1875, ch. 156. See the notes to section 3 of said Act under subdivision I of this title, *supra*, p. 569.

The words "said service" in the text refer to the "Marine-Hospital Service," which is now known as the "Public Health Service," by virtue of the Act of Aug. 14, 1912, ch. 288, § 1, 37 Stat. L. 309. See the title HEALTH AND QUARANTINE.

See the notes to R. S. sec. 4843, *supra*, p. 600.

[SEC. 1.] [Half of support of indigent insane to be paid by District of Columbia.] * * * One half of the expense of the indigent persons who may be hereafter admitted from the District of Columbia shall be paid from the treasury of said District. [19 Stat. L. 347.]

This and the following paragraph of this section are from the Sundry Civil Appropriation Act of March 3, 1877, ch. 105.

Provisions similar to those of the text were made by the Act of July 31, 1876, ch. 246, 19 Stat. L. 108.

See the Act of March 3, 1879, ch. 182, § 1, *infra*, this page.

[Indigent insane admitted only on order of executive authority of District.] Government Hospital for the Insane. * * * indigent persons who may be hereafter admitted from the District of Columbia * * * *Provided*, That hereafter such indigent persons shall be admitted only upon order of the executive authority of the said District. [19 Stat. L. 347.]

See the notes to the preceding paragraph of this section.

[SEC. 1.] [Half of support of indigent insane to be paid by District of Columbia.] Current expenses, Government Hospital for the Insane: * * * *Provided*, That one half of the expense of the indigent patients from the

District of Columbia shall be reported to the Treasury Department, and charged against the appropriations to be paid toward the expenses of the District by the general government, without regard to the date of their admission. [20 Stat. L. 395.]

This is from the Sundry Civil Appropriation Act of March 3, 1879, ch. 182.
See the first paragraph of section 1 of the Act of March 3, 1877, ch. 105, *supra*, p. 606.

[SEC. 1.] [Superintendent to report annually.] * * * And hereafter the Superintendent of the Government Hospital for the Insane shall make a report to Congress annually at the beginning of each regular session, which shall show in detail the receipts and expenditures for all purposes connected with the hospital for the fiscal year preceding such session. [21 Stat. L. 156.]

This is from the Act of June 4, 1880, ch. 121, making appropriations for the expenses of the government of the District of Columbia for the ensuing fiscal year.

[SEC. 1.] [Supervision by Secretary of Interior.] The supervision heretofore exercised by the Secretary of the Interior over the Government Hospital for the Insane shall be continued, and the officers of said hospital shall report to him as heretofore, anything in this act to the contrary notwithstanding. [22 Stat. L. 137.]

This is from the District of Columbia Appropriation Act of July 1, 1882, ch. 263. Similar provisions were contained in the Act of March 3, 1881, ch. 134, 21 Stat. L. 460.

[SEC. 1.] [Sale of surplus products and waste material — proceeds.] Government Hospital for the Insane. * * * that hereafter the surplus products and waste material of the hospital may be sold or exchanged for the benefit of the hospital, and proceeds to be used and accounted for the same as its other funds: [22 Stat. L. 330.]

This and the following paragraph are from the Sundry Civil Appropriation Act of Aug. 7, 1882, ch. 433.

Provisions for the sale or exchange of condemned equipment were made by the Act of Aug. 1, 1914, ch. 223, § 1, *infra*, p. 615.

[Admission of inmates of National Home for Disabled Volunteers.] * * * That in addition to the persons now entitled to admission to said hospital, any inmate of the National Home for Disabled Volunteer Soldiers, who is now or may hereafter become insane shall, upon an order of the president of the board of managers of the said National Home, be admitted to said hospital and treated therein. [22 Stat. L. 330, as amended by 33 Stat. L. 731.]

See the note to the preceding paragraph of this section. As originally enacted the words given in the text were followed by a provision as follows: "and if any inmate so admitted from said National Home is or thereafter becomes a pensioner, and has neither wife, minor child, nor parent dependent on him, in whole or in part, for

support, his arrears of pension and his pension money accruing during the period he shall remain in said hospital shall be applied to his support in said hospital, and be paid over to the proper officer of said institution for the general uses thereof."

By an Act of Feb. 20, 1905, ch. 593, 33 Stat. L. 731, entitled "An Act Relating to the payment and disposition of pension money due to inmates of the Government Hospital for the Insane," the entire proviso was struck out and another enacted in lieu thereof. This, however, did not change the first part of the amended Act, but re-enacted it as given in the text, substituting for the second part thereof, noted above, the following provision: "During the time that any pensioner shall be an inmate of the Government Hospital for the Insane all money due or becoming due upon his or her pension shall be paid by the pension agent to the superintendent of the hospital, upon a certificate by such superintendent that the pensioner is an inmate of the hospital and is living, and such pension money shall be by said superintendent disbursed and used, under regulations to be prescribed by the Secretary of the Interior, for the benefit of the pensioner, and, in the case of a male pensioner, his wife, minor children, and dependent parents, or, if a female pensioner, her minor children, if any, in the order named, and to pay his or her board and maintenance in the hospital; the remainder of such pension money, if any, to be placed to the credit of the pensioner; and to be paid to the pensioner or the guardian of the pensioner in the event of his or her discharge from the hospital; or, in the event of the death of said pensioner while an inmate of said hospital, shall, if a female pensioner, be paid to her minor children, and, in the case of a male pensioner, be paid to his wife, if living; if no wife survives him, then to his minor children; and in case there is no wife nor minor children, then the said unexpended balance to his or her credit shall be applied to the general uses of said hospital: *Provided further*, That in the case of pensioners transferred to the hospital from the National Home for Disabled Volunteer Soldiers, any pension money to his credit at said Home at the time of his said transfer shall be transferred with him to said hospital and placed to his credit therein, to be expended as hereinbefore provided; and in case of his return from said hospital to the Home, any balance to his credit at said hospital shall, in like manner, be transferred to said Home, to be expended in accordance with the rules established in regard thereto. This provision shall also be applicable to all unexpended pension money heretofore paid to the officers of the said hospital on account of pensioners who were but are not now inmates thereof."

This last part of the amending Act was superseded by the re-enactment of substantially the same provisions in the Act of Feb. 2, 1909, ch. 58, § 1, amending R. S. sec. 4839 and given, as incorporated therein, *supra*, p. 598.

See the notes to R. S. sec. 4843, *supra*, p. 600.

[SEC. 1.] [Hospital to admit insane of Soldiers' Home.] * * * And in addition to the persons now entitled to admission to the Government Hospital for the Insane, any inmate of the Soldiers' Home who is now or may hereafter become insane shall, upon an order of the president of the Board of Commissioners of the Soldiers' Home, be admitted to said hospital and treated therein; and the expenses of maintaining any such person shall be paid from the Soldiers' Home fund. [23 Stat. L. 213.]

This is from the Sundry Civil Appropriation Act of July 7, 1884, ch. 332. See the notes to R. S. sec. 4843, *supra*, p. 600.

[SEC. 1.] [Funds of patients — duties of superintendent as to — bond.] * * * The superintendent of the Government Hospital for the Insane shall deposit in the Treasury of the United States, in his name as agent, all funds now in his hands or which may hereafter be intrusted to him by or for the use of patients, which shall be kept as a separate account; and he is hereby authorized to draw therefrom on his order; from time to time, under such regulations as the Secretary of the Interior may prescribe, for the use of such patients, but not to exceed for any one patient the amount

intrusted to the superintendent on account of such patient; and he shall give a separate bond, satisfactory to the said Secretary, for the faithful performance of his duties in respect to these funds as herein provided. [30 Stat. L. 623.]

This is from the Sundry Civil Appropriation Act of July 1, 1898, ch. 546.

SEC. 7. [Return to residence of indigent insane.] That it shall be the duty of the Commissioners of the District of Columbia, so soon as practicable, to return to their places of residence or to their friends all indigent insane persons not residing in the District at the time they became insane who are now detained in the Government Hospital for the Insane, or who shall be committed to the said hospital to be temporarily cared for, as provided in section forty-eight hundred and fifty of the Revised Statutes of the United States, and all necessary expenses incurred by the Commissioners in ascertaining the locality where such persons or their friends belong and in returning them to such locality shall be defrayed by the District of Columbia. [30 Stat. L. 811.]

This is from an Act of Jan. 31, 1899, ch. 78, entitled "An Act To change the proceedings for admission to the Government Hospital for the Insane in certain cases, and for other purposes." The other sections 1-6 regulated the procedure for admission of patients to said hospital and section 8 repealed all inconsistent laws. These sections 1-6 and 8 were expressly repealed by the Act of March 3, 1903, ch. 1006, § 1, *infra*, this page.

[SEC. 1.] [Care of insane of Army on Pacific coast.] * * * The Secretary of War may, in his discretion, contract for the care, maintenance, and treatment of the insane of the Army, and inmates of the National Home for Disabled Volunteer Soldiers on the Pacific coast at any State asylum in California, in all cases which he is now authorized by law to cause to be sent to the Government Hospital for the Insane in the District of Columbia. [31 Stat. L. 1163.]

This is from the Sundry Civil Appropriation Act of March 3, 1901, ch. 853. See the notes to R. S. sec. 4843, *supra*, p. 600.

[SEC. 1.] [Proceedings for commitment of indigent insane.] * * * That hereafter proceedings by the Commissioners of the District of Columbia to commit indigent insane persons, and insane persons having violent or dangerous tendencies, to the Government Hospital for the Insane shall be taken in the equity court of said District, and shall be in conformity with the law in force in said District on the thirtieth day of January, eighteen hundred and ninety-nine.

That sections one, two, three, four, five, six, and eight of the Act of Congress approved January thirty-first, eighteen hundred and ninety-nine, entitled "An Act to change the proceedings for admission to the Government Hospital for the Insane in certain cases, and for other purposes," and

all other Acts or parts of Acts inconsistent herewith, be, and the same are hereby, repealed. [32 Stat. L. 1043.]

This is from the Deficiencies Appropriation Act of March 3, 1903, ch. 1006.

As to the provisions repealed by the text see the notes to the Act of Jan. 31, 1899, ch. 78, § 7, *supra*, p. 609.

Further provisions with respect to the commitment of indigent insane persons were made by the Act of Feb. 23, 1905, ch. 738, § 1, *infra*, p. 613.

An Act To authorize the apprehension and detention of insane persons in the District of Columbia, and providing for their temporary commitment in the Government Hospital for the Insane, and for other purposes.

[Act of April 27, 1904, ch. 1618, 33 Stat. L. 316.]

[SEC. 1.] **[Arrest and detention of insane persons in District of Columbia.]** That any member of the Metropolitan police of the District of Columbia or any other officer in said District authorized to make arrests is hereby authorized and empowered to apprehend and detain, without warrant, any insane person or person of unsound mind found on any street, avenue, alley, or other public highway, or found in any public building or other public place within the District of Columbia; and it shall be the duty of the policeman or officer so apprehending or detaining any such person to immediately file his affidavit with the major and superintendent of said Metropolitan police that he believes said person to be insane or of unsound mind, incapable of taking care of himself or herself or his or her property, and if permitted to remain at large or to go unrestrained in the District of Columbia the rights of persons and of property will be jeopardized or the preservation of public peace imperiled and the commission of crime rendered probable: *Provided, however,* That it shall be the duty of the major and superintendent of the said Metropolitan police to forthwith notify the husband or wife or some near relative or friend of the person so apprehended and detained whose address may be known to the said major and superintendent or whose address can by reasonable inquiry be ascertained by him. [33 Stat. L. 316.]

SEC. 2. **[Arrest at other than public places.]** That the major and superintendent of said Metropolitan police is hereby authorized to order the apprehension and detention, without warrant, of any indigent person alleged to be insane or of unsound mind or any alleged insane person of homicidal or otherwise dangerous tendencies found elsewhere in the District of Columbia than in the places mentioned in section one hereof whenever two or more responsible residents of the District of Columbia shall make and file affidavits with said major and superintendent of the Metropolitan police setting forth that they believe the person therein named to be insane or of unsound mind, the length of time they have known such person, that they believe such person to be incapable of managing his or her own affairs, and that such person is not fit to be at large or to go unrestrained, and if such person is permitted to remain at liberty in the

District of Columbia the rights of persons and of property will be jeopardized or the preservation of public peace imperiled and the commission of crime rendered probable, and that such person is a fit subject for treatment on account of his or her mental condition: *Provided, however,* That before the major and superintendent of the said Metropolitan police shall order the apprehension and detention of any person upon the affidavits of the aforesaid residents or in case of arrest as provided in section one, he shall, in addition thereto, require the certificate of at least two physicians who shall certify that they have examined the person alleged to be insane or of unsound mind, and that such person should not be allowed to remain at liberty and go unrestrained, and that such person is a fit subject for treatment on account of his or her mental condition. [33 Stat. L. 317.]

SEC. 3. [Temporary detention at Government Hospital for Insane.] That the Commissioners of the District of Columbia are hereby authorized to place in the Government Hospital for the Insane in said District, and the superintendent of said hospital is hereby authorized to receive, upon the written request of the said Commissioners, for a period of time not exceeding thirty days, indigent persons alleged to be insane or of unsound mind, residents of or found within the District of Columbia, and alleged insane persons of homicidal or otherwise dangerous tendencies, residents of or found within the said District, so apprehended and detained as provided in sections one and two of this Act, pending the formal commitment of such persons to said hospital as provided by law, or their transportation to their homes when their places of residence are ascertained by the proper officials charged by law with that duty. [33 Stat. L. 317.]

SEC. 4. [Temporary commitment in other hospitals — detention pending formal commitment — discharge — report.] That the Commissioners of the District of Columbia may authorize the temporary commitment of any of the above-mentioned insane persons or persons of unsound mind so apprehended and detained as provided in sections one and two of this Act (for a period of time not exceeding thirty days) in any other hospital in said District which, in the judgment of the health officer of said District, is properly constructed and equipped for the reception and care of such persons, and the official in charge of which, for the time being, is willing to receive such persons pending the temporary commitment or the formal commitment of such persons, as provided by law, to the Government Hospital for the Insane or to any other hospital or insane asylum; or any such alleged insane person or person of unsound mind apprehended under sections one and two of this Act may be detained in any police station or house of detention in said District pending the completion of arrangements for his or her temporary detention in the Government Hospital for the Insane or any other hospital or insane asylum; and such persons may be detained in any police station or house of detention in said District until formally committed to the Government Hospital for the Insane or any other hospital or asylum, in the manner provided by law, in case he or she can not be provided for by the said Government Hospital for the Insane and no

arrangement can be made for his or her temporary detention in any other hospital or asylum: *Provided, however,* That if, pending the formal commitment of such alleged insane person or person of unsound mind to the Government Hospital for the Insane or to any other hospital or asylum, the superintendent of said Government Hospital for the Insane, in the case of the commitment of a person to said hospital under the provisions of this Act, or if two or more physicians in regular attendance at any other hospital or asylum where any person is committed under the provisions of this Act, or if two or more surgeons of the police and fire departments, in the case of any person detained at any police station house or house of detention under the provisions of this Act, shall certify in writing to the Commissioners of the District of Columbia that such person is not insane or that he or she has recovered his or her reason, the official in charge of the Government Hospital for the Insane or the hospital or asylum in which such person is confined, or the major and superintendent of said Metropolitan police, if such person be confined in a police station house or in a house of detention, shall discharge such alleged insane person or person of unsound mind forthwith and immediately report such action to the Commissioners of the District of Columbia. [33 Stat. L. 317.]

SEC. 5. [Validity of certificates.] That for the purposes of this Act no certificate as to the sanity or the insanity of any person shall be valid which has been issued (a) by a physician who has not been regularly licensed to practice medicine in the District of Columbia, unless he be a commissioned surgeon of the United States Army, Navy, or Public Health and Marine-Hospital Service; or (b) by a physician who is not a permanent resident of the District of Columbia; or (c) by a physician who has not been actively engaged in the practice of his profession for at least three years; or (d) by a physician who is related by blood or by marriage to the person whose mental condition is in question. Nor shall any certificate alleging the insanity of any person be valid which has been issued by a physician who is financially interested in the hospital or asylum in which the alleged insane person is to be confined, or who is professionally or officially connected therewith. [33 Stat. L. 318.]

SEC. 6. [Penalty for false testimony.] That any person who makes an affidavit, as required by section one or two of this Act, by which he or she secures or attempts to secure the apprehension, detention, or restraint of any other person in the District of Columbia without probable cause for believing such person to be insane or of unsound mind, or any physician who knowingly makes any false certificate as to the sanity or insanity of any other person shall, upon conviction thereof, be fined not more than five hundred dollars or imprisoned not more than three years, or both. [33 Stat. L. 318.]

SEC. 7. [Repeal.] That all Acts and part of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed. [33 Stat. L. 318.]

An Act To change the lunacy proceedings in the District of Columbia where the Commissioners of said District are the petitioners, and for other purposes.

[*Act of Feb. 23, 1905, ch. 738, 33 Stat. L. 740.*]

[SEC. 1.] [Proceedings in lunacy on petition of Commissioners of District of Columbia — jurors — committee as trustee — costs and expenses.] That hereafter the proceedings instituted upon petition of the Commissioners of the District of Columbia to determine the mental condition of alleged indigent insane persons and persons alleged to be insane, with homicidal or otherwise dangerous tendencies, shall be according to the provisions of the code of law for the District of Columbia relating to lunacy proceedings: *Provided*, That the jury to be used in case the said Commissioners are the petitioners shall be impaneled by the United States marshal for said District, upon order of the court, from the jurors in attendance upon the criminal courts of said District, who shall perform such services in addition to and as part of their duties in said criminal courts: *Provided further*, That during such time as jurors are not in attendance upon said criminal courts the court may direct the said marshal to impanel the jurors in attendance upon the police court of said District, who shall perform such duties in addition to and as part of their duties in said police court; or the said court may direct a special jury to be summoned for such inquisitions. In case any such person adjudged to be of unsound mind has property, real or personal, the equity court of said District shall have full power in the same cause to appoint a committee or trustee of the person and estate of such person, according to the provisions of said code, and such committee or trustee shall reimburse, out of the funds of the lunatic, the District of Columbia for all court costs expended or incurred by it and for all moneys by it expended or costs incurred in caring for and treating such insane person up to the time of such appointment. [33 Stat. L. 740.]

The provisions of the text relating to juries superseded somewhat similar provisions of the Act of July 7, 1898, ch. 571, 30 Stat. L. 666.

See the Act of March 3, 1903, ch. 1006, § 1, *supra*, p. 609.

SEC. 2. [Discharge of patient as cured — restoration to former legal status.] That in case any person adjudged to be of unsound mind in the District of Columbia who is committed to the Government Hospital for the Insane, or any other institution, recovers his or her reason, and who is discharged from such institutions as cured, the superintendent of said Government Hospital for the Insane, or the official in charge of any such other institution where such person has been under treatment and has been so discharged, shall immediately thereafter file with the clerk of the supreme court of the District of Columbia his sworn statement that such person, in his opinion, was at the time of his discharge of sound mind, and such statement shall be sufficient to authorize the court to pass an order declaring such person to be restored to his or her former legal status as a person of sound mind. [33 Stat. L. 740.]

[SEC. 1.] [Disposition of money of deceased inmates.] * * * All moneys belonging to deceased inmates of the Government Hospital for the

Insane and deposited in the Treasury by the superintendent as agent prior to February twentieth, nineteen hundred and five, shall, if unclaimed by the legal heirs of such inmate within the period of five years from the date of the passage of this Act, be covered into the Treasury, and all moneys so deposited by the superintendent as agent after February twentieth, nineteen hundred and five, and belonging to inmates who have died since that time, or may hereafter die, shall likewise be covered into the Treasury unless claimed by his or her legal heirs within five years from the death of the inmate. And the superintendent of the Government Hospital for the Insane is hereby authorized and directed, under such regulations as may be prescribed by the Secretary of the Interior, to make diligent inquiry in every instance after the death of an inmate to ascertain the whereabouts of his or her legal heirs. Claims may be presented hereunder at any time, and when established by competent proof in any case more than five years after the death of an inmate shall be certified to Congress for consideration. [34 Stat. L. 730.]

This is from Sundry Civil Appropriation Act of June 30, 1906, ch. 3914.

An Act To prohibit the sale of intoxicating liquors near the Government Hospital for the Insane and the Home for the Aged and Infirm.

[Act of Feb. 1, 1907, ch. 441, 34 Stat. L. 870.]

[Sale of intoxicating liquor near Hospital, etc.] That it shall be unlawful to sell, either by wholesale or retail, intoxicating liquor of any kind at any point between the Government Hospital for the Insane and the Home for the Aged and Infirm, or within a radius of one-half mile of the boundaries of either of the said properties. [34 Stat. L. 870.]

[SEC. 1.] [Care of insane natives of Philippine Islands, serving in army.] * * * That hereafter the Secretary of War may, in his discretion, contract for the care, maintenance, and treatment of the insane natives of the Philippine Islands serving in the Army of the United States at any asylum in the Philippine Islands in all cases which he is now authorized by law to cause to be sent to the Government Hospital for the Insane in the District of Columbia. [35 Stat. L. 122.]

This is from the Army Appropriation Act of May 11, 1908, ch. 163.
See the notes to R. S. sec. 4843, *supra*, p. 600.

[SEC. 1.] [Salary of Superintendent.] * * * The salary of the superintendent of the hospital is hereby fixed at five thousand dollars per annum. [38 Stat. L. 1422.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.
By R. S. sec. 4839 the salary of the superintendent was fixed at \$2,500. It was increased to \$4,000 by an Act of March 3, 1881, ch. 132, § 1, 21 Stat. L. 427, and by an Act of Feb. 2, 1909, ch. 58, § 1, amending R. S. sec. 4839, *supra*, p. 598, and again increased by the provisions of the text.

[SEC. 1.] [Determining per capita cost of patients.] * * * Hereafter in determining the per capita cost of maintenance and treatment of patients in the Government Hospital for the Insane the expenditures for repair of buildings, roadways, and walks shall be included. [37 Stat. L. 461.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

[SEC. 1.] [Sale or exchange of condemned equipment, etc.] * * * Authority is granted to sell or exchange condemned typewriting machines, laundry machinery, and other equipment, applying the proceeds therefrom to replacing new equipment for the Government Hospital for the Insane. [38 Stat. L. 649.]

This is from the Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223.

The sale of surplus products and waste material was authorized by the Act of Aug. 7, 1882, ch. 433, § 1, *supra*, p. 588.

VII. COLUMBIA INSTITUTION FOR THE DEAF

Sec. 4859. [Establishment of the Columbia Institution for the Deaf.] The corporation created by the act of February sixteen, eighteen hundred and fifty-seven, under the name of the "Columbia Institution for the Instruction of the Deaf and Dumb," shall have perpetual succession, and be capable to take, hold, and enjoy lands, tenements, hereditaments, and personal property, to use a common seal, and to alter the same at pleasure. But no real or personal property shall be held by the corporation, except such as may be necessary to the maintenance and efficient management of the institution. [R. S.]

Act of Feb. 16, 1857, ch. 46, 11 Stat. L. 161; Act of Feb. 23, 1865, ch. 50, 13 Stat. L. 436.

The Columbia Institution for the Deaf and Dumb was to be known and designated as the Columbia Institution for the Deaf by a provision of the Act of March 4, 1911, ch. 285, § 1, *infra*, p. 621.

This institution is under the supervision of the Secretary of the Interior, and is subject to the provisions of R. S. sec. 3709 (title PUBLIC CONTRACTS) requiring all purchases and contracts for supplies or services to be made after advertising. (1897) 22 Op. Atty.-Gen. 1. But see (1896) 21 Op. Atty.-Gen. 349.

The Act of June 6, 1900, ch. 807, 31 Stat. L. 664, creating a board of charities for the District of Columbia, does not affect the supervision or jurisdiction of the Secretary of the Interior over this institution. (1900) 23 Op. Atty.-Gen. 287.

Sec. 4860. [Terms of deed made part of charter.] The terms and conditions of the deed of transfer of the funds and property of Washington's Manual-Labor School and Male Orphan Asylum Society of the District of Columbia shall be as obligatory upon the Columbia Institution for the Instruction of the Deaf and Dumb as if they formed a part of its charter. [R. S.]

Act of June 13, 1880, ch. 120, 12 Stat. L. 30.

Sec. 4861. [Restriction on disposal of real property.] No part of the real or personal property now held or hereafter acquired by the Columbia

Institution for the Instruction of the Deaf and Dumb shall be devoted to any other purpose than the education of the deaf and dumb, nor shall any portion of the real estate be aliened, sold, or conveyed, except under the authority of a special act of Congress. [R. S.]

Act of July 27, 1868, ch. 262, 15 Stat. L. 233.

Sec. 4862. [Election of officers.] The Columbia Institution for the Instruction of the Deaf and Dumb shall be managed as provided for in its present constitution, and such additional regulations as may from time to time be found necessary; but as soon as sufficient contributions shall have been paid in to authorize an election according to the provisions of the constitution, the provisional officers therein named shall give notice of a general meeting to the contributors for the election of officers, and the officers elected at such general meeting shall hold their offices for one year and until their successors shall be elected as in the constitution provided; and the constitution may be altered consistently with law, in the manner therein provided. [R. S.]

Act of Feb. 16, 1857, ch. 46, 11 Stat. L. 161.

Sec. 4863. [Appointment of Government directors.] In addition to the directors whose appointment has heretofore been provided for by law, there shall be three other directors of the Columbia Institution for the Instruction of the Deaf and Dumb, appointed in the following manner: One Senator by the President of the Senate, and two Representatives by the Speaker of the House. These directors shall hold their offices for the term of a single Congress; and be eligible to a re-appointment. [R. S.]

Act of July 27, 1868, ch. 262, 15 Stat. L. 233.

The directors under this section remain in office until the appointment of their successors, according to a provision contained in the Act of July 1, 1898, ch. 546, given *infra*, p. 619.

Sec. 4864. [Admission of pupils from District of Columbia.] Whenever the Secretary of the Interior is satisfied, by evidence produced by the President of the Columbia Institution for the Instruction of the Deaf and Dumb, that any deaf and dumb person of teachable age, properly belonging to the District of Columbia, is in indigent circumstances and cannot command the means to secure an education, it shall be his duty to authorize such person to enter the institution for instruction. [R. S.]

Act of Feb. 16, 1857, ch. 46, 11 Stat. L. 162; Act of July 27, 1868, ch. 262, 15 Stat. L. 233.

By the Act of June 16, 1880, ch. 235, § 1, *infra*, p. 618, provision is made for the instruction of feeble-minded children.

Sec. 4865. [Admission of pupils from States and Territories.] Deaf mutes, not exceeding forty in number, residing in the several States and Territories, applying for admission to the collegiate department of the Columbia Institution for the Instruction of the Deaf and Dumb, shall be received on the same terms and conditions as those prescribed by law for residents of the District of Columbia, at the discretion of the president of the institution; but no student coming from either of the States shall be

supported by the United States during any portion of the time he remains therein. [R. S.]

Act of March 2, 1867, ch. 167, 14 Stat. L. 464; Act of July 15, 1870, ch. 292, 16 Stat. L. 291, 294.

The number admissible from states and territories was increased by provisions from the Acts of Aug. 30, 1890, ch. 837, given *infra*, p. 618, and June 6, 1900, ch. 791, given *infra*, p. 620.

Sec. 4866. [Justices of the peace to report deaf and dumb persons in District.] It shall be the duty of the justices of the peace for the District of Columbia to ascertain the names and residences of all deaf and dumb persons within their respective districts; who of them are of teachable age, and also who of them are in indigent circumstances; and to report the same to the president of the Columbia Institution for the Instruction of the Deaf and Dumb. [R. S.]

Act of Feb. 16, 1857, ch. 46, 11 Stat. L. 162.

Sec. 4867. [Superintendent of Columbia Institution for Deaf to report annually.] The superintendent of the Columbia Institution for the Instruction of the Deaf and Dumb shall, at the commencement of every December session of Congress, make a full and complete statement of all the expenditures made by virtue of any appropriations by Congress, including the amounts and the rates paid to the superintendent, and for teachers. [R. S.]

Act of July 27, 1868, ch. 262, 15 Stat. L. 234.

The report of the institution was required to be itemized by the Act of March 3, 1883, ch. 143, § 1, *infra*, p. 618.

Sec. 4868. [Annual report of president and directors.] It shall be the duty of the president and directors of the Columbia Institution for the Instruction of the Deaf and Dumb to report to the Secretary of the Interior the condition of the institution on the first day of July in each year, embracing in the report the number of pupils of each description received and discharged during the preceding year, and the number remaining in the institution; also the branches of knowledge and industry taught, and the progress made therein; also a statement showing the receipts of the institution, and from what sources, and its disbursements, and for what objects. [R. S.]

Act of Feb. 16, 1857, ch. 46, 11 Stat. L. 162.

See the note to the preceding R. S. sec. 4867.

The accounts of the Columbia Institution for the Deaf and Dumb are within the jurisdiction of the Department of the

Interior, and therefore under the auditor for the Interior Department. (1897) 22 Op. Atty.-Gen. 1.

Sec. 4869. [Education of indigent blind persons.] Whenever the Secretary of the Interior is satisfied, by evidence produced by the president of the Columbia Institution for the Instruction of the Deaf and Dumb, that any blind person of teachable age cannot command the means to secure an education, he may cause such person to be instructed in some institution for the education of the blind, in Maryland, or some other State, at a cost not greater for each pupil than is, or may be for the time being, paid by

such State, and to cause the same to be paid out of the Treasury of the United States. [R. S.]

Act of Feb. 16, 1857, ch. 46, 11 Stat. L. 162; Act of Feb. 23, 1865, ch. 50, 13 Stat. L. 436.

Education of the blind generally, see the title EDUCATION.

See the provisions from the Act of March 3, 1899, ch. 424, § 1, *infra*, p. 620.

[SEC. 1.] **[Feeble-minded children in District of Columbia to be instructed.]** Columbia Institution for the Deaf and Dumb. * * * That when any indigent applicant for admission to the institution, belonging to the District of Columbia, and being of teachable age, is found on examination by the president of the institution to be of feeble mind, and hence incapable of receiving instruction among children of sound mind, the Secretary of the Interior may cause such person to be instructed in some institution for the education of feeble-minded children in Pennsylvania, or some other State, at a cost not greater for each pupil than is, or may be for the time being, paid by such State for similar instruction. [21 Stat. L. 275.]

This is from the Sundry Civil Appropriation Act of June 16, 1880, ch. 235.

Provisions were made for the expense of educating feeble-minded children by the second paragraph of the Act of Aug. 30, 1890, ch. 837, § 1, given *infra*, p. 619.

[SEC. 1.] **[Report of superintendent to be itemized, etc.]** Columbia Institution for the Deaf and Dumb: * * * Hereafter the report of said institution shall contain an itemized statement of all employees, the salaries or wages respectively, each of them, and also of all other expenses of said institution. [22 Stat. L. 625.]

This is from the Sundry Civil Appropriation Act of March 3, 1883, ch. 143.

An annual report was required by R. S. sec. 4867, *supra*, p. 617.

[SEC. 1.] **[One-half of expenses of persons admitted from District of Columbia to be borne from District revenues.]** Columbia Institution for the Deaf and Dumb: * * * That one half of all expenses attending the instruction of deaf and dumb persons admitted to said institution from the District of Columbia, under section forty-eight hundred and sixty-four of the Revised Statutes, shall be paid from the revenues of the District of Columbia and one-half of the Treasury of the United States, and hereafter estimates for such expenses shall each year be submitted in the regular estimates for the expenses of the government of the District of Columbia: [25 Stat. L. 962.]

This is from the Sundry Civil Appropriation Act of March 2, 1889, ch. 411.

[SEC. 1.] **[Persons admitted from states and territories — limit on number — book of estimates to show employees.]** Columbia Institution

for the Deaf and Dumb. * * * That deaf-mutes, not exceeding sixty in number, admitted to this institution from the several States and Territories under section forty-eight hundred and sixty-five of the Revised Statutes, shall have the expenses of their instruction in the collegiate department paid from this appropriation, together with so much of the expense of their support when indigent and while in the institution as may be authorized by the board of trustees, with the approval of the Secretary of the Interior; and hereafter there shall not be admitted to said institution under section forty-eight hundred and sixty-five of the Revised Statutes, nor shall there be maintained after such admission, at any one time from any State or Territory exceeding three deaf mutes while there are applications pending from deaf-mutes, citizens of States or Territories having less than three pupils in said institution: *Provided further*, That hereafter there shall be included in the annual Book of Estimates a statement showing the number of persons employed each year in this institution and the compensation paid to each. [26 Stat. L. 392.]

The provisions of the text and those of the following paragraph of the section are from the Sundry Civil Appropriation Act of Aug. 30, 1890, ch. 837.

R. S. sec. 4865 mentioned in the text is given *supra*, p. 616.

The number of beneficiaries was increased from sixty to one hundred by the Act of June 6, 1900, ch. 791, § 1, *infra*, p. 620.

[Educating feeble-minded children in District of Columbia — one-half expenses from District revenues — annual estimates.] To enable the Secretary of the Interior to provide for the education of feeble-minded children belonging to the District of Columbia as provided for in the act approved June sixteenth, eighteen hundred and eighty, three thousand four hundred dollars. One-half of this sum shall be paid out of the revenues of the District of Columbia and one-half out of the Treasury of the United States, and hereafter the estimates for this expense shall each year be submitted in the annual estimates for the expenses of the government of the District of Columbia. [26 Stat. L. 393.]

See the note to the preceding paragraph of this section.

The Act of June 18, 1880, ch. 235, § 1, mentioned in the text, is given *supra*, p. 618.

[Sec. 1.] [Term of office of directors — control of disbursements — accounts.] Current expenses of the Columbia Institution for the Deaf and Dumb: * * * That directors appointed under the provisions of section forty-eight hundred and sixty-three of the Revised Statutes of the United States shall remain in office until the appointment and acceptance of office of their successors; and the directors of the institution shall have control of the disbursement of all moneys appropriated by Congress for the benefit of said institution, accounts for which shall be settled and adjusted at the Treasury Department as required by the provisions of section two hundred and thirty-six of the Revised Statutes. [30 Stat. L. 624.]

This is from the Sundry Civil Appropriation Act of July 1, 1898, ch. 546.

R. S. sec. 4863 mentioned in the text and in part superseded thereby is given *supra*, p. 616.

The provisions of the text superseded those of the Act of March 3, 1897, ch. 837, 29 Stat. L. 681, which required, as did several preceding Acts, the disbursements to be accounted for through the Department of the Interior.

R. S. sec. 236 mentioned in the text requires accounts to be adjusted in the Department of the Treasury. See the title **TREASURY DEPARTMENT**.

[SEC. 1.] **[District of Columbia to pay one-half of indefinite appropriation.]** * * * Hereafter one-half of the indefinite appropriation to pay for the instruction of the indigent blind children of the District of Columbia, formerly instructed in the Columbia Institution for the Instruction of the Deaf, Dumb, and Blind, shall be paid out of the revenues of the District of Columbia and the other half out of the Treasury of the United States. [30 Stat. L. 1101.]

This is from the Sundry Civil Appropriation Act of March 3, 1899, ch. 424.

The "indefinite appropriation" mentioned in the text was made by R. S. sec. 3689, but was repealed by the Act of May 26, 1908, ch. 198, 35 Stat. L. 295. See the title **ESTIMATES, APPROPRIATIONS AND REPORTS**.

See the notes to R. S. sec. 4869, *supra*, p. 617.

[SEC. 1.] **[State beneficiaries increased.]** Current expenses of the Columbia Institution for the Deaf and Dumb. * * * That the number of beneficiaries in said institution, authorized by the Act of August thirtieth, eighteen hundred and ninety, to be received from the several States and Territories, is hereby increased from sixty to one hundred. * * * [31 Stat. L. 620.]

This is from the Sundry Civil Appropriation Act of June 6, 1900, ch. 791.

The number of admissions was first fixed by R. S. sec. 4865, *supra*, p. 616, and increased by the Act of Aug. 30, 1890, ch. 837, § 1, *supra*, p. 618, mentioned in the text.

[SEC. 1.] **[Deaf mutes from District of Columbia to be admitted — not a charitable institution.]** Columbia Institution for the Deaf and Dumb: * * * *Provided*, That hereafter all deaf mutes of teachable age, of good mental capacity, and properly belonging to the District of Columbia shall be received and instructed in said institution, their admission thereto being subject to the approval of the superintendent of public schools in the District of Columbia. And said institution shall not be regarded nor classified as an institution of charity. [31 Stat. L. 844.]

This is from the District of Columbia Appropriation Act of March 1, 1901, ch. 670.

[SEC. 1.] **[Education of colored deaf-mute children.]** * * * Columbia Institution for the Deaf and Dumb. * * * And the directors of said institution are hereby authorized to provide for the education of colored deaf-mute children properly belonging to the District of Columbia, in the Maryland School for Colored Deaf-Mutes, or some other suitable school, at

a cost not exceeding the per capita expense of educating the State pupils in such school. [33 Stat. L. 901.]

This is from the District of Columbia Appropriation Act of March 3, 1905, ch. 1406.

[SEC. 1.] [Designated Columbia Institution for the Deaf.] * * * From and after the passage of this Act the Columbia Institution for the Deaf and Dumb shall be known and designated as the Columbia Institution for the Deaf. [36 Stat. L. 1422.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

VIII. FREEDMEN'S HOSPITAL

Sec. 2038. [Freedmen's Hospital in District of Columbia continued, etc.] The Freedmen's Hospital and Asylum in the District of Columbia is, until otherwise ordered by Congress, continued under the control and supervision of the Secretary of War, who shall make all estimates, pass all accounts, and be responsible to the Treasury for all expenditures; but no part of any appropriation shall be used in support of, or to pay the expenses on account of, any person hereafter to be admitted to such Hospital and Asylum, unless persons removed thither from some other Government hospital. [R. S.]

Act of June 10, 1872, ch. 415, 17 Stat. L. 366; Act of March 3, 1871, ch. 114, 16 Stat. L. 506.

The hospital was placed under the control of the Secretary of the Interior by the Act of June 23, 1874, ch. 455, § 1, *infra*, this page.

Supervision of expenditures for the hospital was provided for by the Act of March 3, 1893, ch. 199, § 1, *infra*, p. 622.

Provisions regarding estimates were made by the Act of March 3, 1905, ch. 1483, § 1, *infra*, p. 622.

[SEC. 1.] [To be under direction of Secretary of Interior, etc.] That after June thirtieth, eighteen hundred and seventy-four, the Freedmen's Hospital in the District of Columbia shall, until otherwise ordered by Congress, be continued under the direction of the Secretary of the Interior, who shall make all estimates and pass all accounts, and shall be accountable to the Treasury of the United States for all expenditures; and all property including hospital and quartermaster's stores, belonging to said hospital, and now in charge of the War Department, be also transferred to the Interior Department. [18 Stat. L. 223.]

This is from the Sundry Civil Appropriation Act of June 23, 1874, ch. 455.

This section is in part superseded. See the notes to the preceding R. S. sec. 2038.

The Act of June 6, 1900, ch. 807, 31 Stat. L. 664, creating a board of charities for the District of Columbia, does not affect the supervision or jurisdiction of the Secretary of the Interior over this institution. (1900) 23 Op. Atty-Gen. 287.

[SEC. 1.] [**Expenditures, how supervised.**] * * * And hereafter the expenditures for the Freedmen's Hospital and Asylum shall be under the supervision and control of the Commissioners of the District of Columbia. [27 Stat. L. 551.]

This is from the District of Columbia Appropriation Act of March 3, 1893, ch. 199.

[SEC. 1.] [**Contracts for care and treatment of persons from District of Columbia.**] * * * The Secretary of the Interior is authorized to enter into contract with the Board of Charities of the District of Columbia for the care and treatment of persons from the District of Columbia admitted to the Freedmen's Hospital; and any money that may be received, from this source, on and after July first, nineteen hundred and five, shall be paid to the Secretary of the Interior, to be applied to the uses and purposes of the hospital. [33 Stat. L. 1190.]

This and the following paragraph of this section are from the Sundry Civil Appropriation Act of March 3, 1905, ch. 1483.

[**Estimates for expenses and maintenance.**] * * * Hereafter estimates for expenses and maintenance of the Freedmen's Hospital and Asylum shall be submitted by the Secretary of the Interior. [33 Stat. L. 1190.]

See the note to the preceding paragraph of this section.

The provisions of the text superseded a provision of the Act of Aug. 5, 1892, ch. 380, § 1, 27 Stat. L. 373, that: "hereafter the estimates for the Freedman's Hospital and Asylum shall, each year, be submitted in the annual estimates for the expenses of the government of the District of Columbia."

IX. LEPROSY HOSPITAL

An Act To provide for the investigation of leprosy, with special reference to the care and treatment of lepers in Hawaii.

[Act of March 3, 1905, ch. 1443, 33 Stat. L. 1009.]

[SEC. 1.] [**Leprosy hospital to be established at Molokai, Hawaii.**] That when the Territorial government of Hawaii shall cede to the United States in perpetuity a suitable tract of land one mile square, more or less, on the leper reservation at Molokai, Hawaii, there shall be established thereon a hospital station and laboratory of the Public Health and Marine-Hospital Service of the United States for the study of the methods of transmission, cause, and treatment of leprosy. [33 Stat. L. 1009.]

This is known as the "Leprosy Act."

SEC. 2. [**Hospital buildings.**] That the Secretary of the Treasury be, and he is hereby, authorized to cause the erection upon such site of suitable and necessary buildings for the purposes of this Act, at a cost not to exceed the sum herein appropriated for such purpose. [33 Stat. L. 1009.]

"The sum herein appropriated" mentioned in the text consisted of an appropriation for buildings, equipment and pay of officers made by section 5 of this Act, which is omitted as temporary merely and executed.

Appropriations for the maintenance of the hospital established by this Act are made yearly. That for the fiscal year ending June 30, 1916, is contained in the Sundry Civil Appropriation Act of March 3, 1915, ch. 75, § 1, 38 Stat. L. 837.

SEC. 3. [Treatment of patients.] That for the purposes of this Act the Surgeon-General, through his accredited agent, is authorized to receive at such station such patients afflicted with leprosy as may be committed to his care under legal authorization of the Territory of Hawaii, not to exceed forty in number to be under treatment at any time, said patients to remain under the jurisdiction of the said Surgeon-General, or his agent, until returned to the proper authorities of Hawaii. [33 Stat. L. 1009.]

SEC. 4. [Medical officers, etc.] That the Surgeon-General of the Public Health and Marine-Hospital Service of the United States is authorized to detail or appoint, for the purposes of these investigations and treatment, such medical officers, acting assistant surgeons, pharmacists, and employees as may be necessary for said purposes. [33 Stat. L. 1009.]

Section 5 of this Act, making appropriations, is omitted as executed. See the notes to section 2, *supra*, p. 622.

The Public Health and Marine-Hospital Service mentioned in the text is now known as the Public Health Service by virtue of the Act of Aug. 14, 1912, ch. 288, § 1, 37 Stat. L. 309. See the title HEALTH AND QUARANTINE.

SEC. 6. [Administration rules.] That the Surgeon-General of the Public Health and Marine-Hospital Service shall, subject to the approval of the Secretary of the Treasury, make and adopt regulations for the administration and government of the hospital station and laboratory and for the management and treatment of all patients of such hospital. [33 Stat. L. 1010.]

As to the Public Health and Marine-Hospital Service, see the notes to the preceding section 4 of this Act.

SEC. 7. [Extra pay to officers detailed.] That when any commissioned or noncommissioned officer of the Public Health and Marine-Hospital Service is detailed for duty at the leprosarium herein provided for, he shall receive, in addition to the pay and allowances of his grade, one-half the pay of said grade and such allowances as may be provided for by the Surgeon-General of the Public Health and Marine-Hospital Service, with the approval of the Secretary of the Treasury. [33 Stat. L. 1010.]

See the following paragraph of the text.

As to the Public Health and Marine-Hospital Service, see the notes to the preceding section 4 of this Act.

[Sec. 1.] **[Compensation of officers.]** * * * For maintenance of leprosy hospital, Hawaii, including pay of officers and employees: *Provided*, That the provisions of section seven of the Act of March third, nineteen hundred and five, as to compensation shall apply to said officers while engaged in investigations of leprosy at Kalihi and other places in Hawaii. [36 Stat. L. 1394.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

The Act of March 3, 1905, ch. 1443, § 7, mentioned in the text, is given *supra*, this page.

HOURS OF SERVICE ACTS

See LABOR; RAILROADS

HOUSE OF REPRESENTATIVES

See CONGRESS

HOWARD UNIVERSITY

See EDUCATION

HYDRAULIC MINING

See MINERAL LANDS, MINES AND MINING

HYDROGRAPHIC OFFICE

See SHIPPING AND NAVIGATION

IMMIGRATION

- I. BUREAU OF IMMIGRATION, 628.
 - II. IMMIGRATION GENERALLY, 632.
 - III. THE COOLY TRADE, 702.
-

I. Bureau of Immigration, 628.

Act of March 3, 1891 ch. 551, 628.

Sec. 7. Former Superintendent of Immigration — Salary — Duties and Reports — Office — Clerks, 628.

Act of Aug. 18, 1894, ch. 301, 629.

Sec. 1. Commissioners of Immigration — Appointment — Terms of Office, 629.

Act of March 2, 1895, ch. 177, 629.

Sec. 1. Superintendent of Immigration Designated Commissioner-general of Immigration — Duties, 629.

Act of June 6, 1900, ch. 791, 630.

Sec. 1. Commissioner-general of Immigration to Administer Chinese Exclusion and Immigration Laws, 630.

Act of April 27, 1904, ch. 1630, 630.

Sec. 1. Appropriations for "Expenses of Regulating Immigration," 630.

Act of Feb. 20, 1907, ch. 1134, 630.

Sec. 22. Commissioner-general of Immigration — Duties Defined — Rules, etc.— Details to Secure Information — Details for Foreign Service, 630.

40. Bureau of Immigration and Naturalization — Information Division Created — Duties, etc.— Agents of States, etc., 631.

Act of March 4, 1907, ch. 2918, 632.

Sec. 1. Estimates for Division of Information, 632.

Act of June 25, 1910, ch. 384, 632.

Sec. 1. Estimates — Statements of Amounts Required and Expenditures, 632.

II. Immigration Generally, 632.

R. S. 2164. No Charge upon Particular Persons Immigrating, etc., 632.

Act of Feb. 26, 1885, ch. 164, 633.

Sec. 2. Validity of Contracts for Labor as Service of Alien Made Prior to Migration, 633.

Act of Oct. 19, 1888, ch. 1210, 633.

Sec. 1. Allowance to Informers, 633.

Act of March 3, 1893, ch. 206, 635.

Sec. 8. Companies to File Certificate Showing Notice in Foreign Countries of Immigration Laws — Penalty, 635.

Act of April 29, 1902, ch. 641, 636.

Sec. 3. Alien Contract Labor — Permission to Foreign Exhibitors, 636.

Act of Feb. 3, 1905, ch. 297, 636.

Sec. 1. Refund of Head Tax Erroneously Collected, 636.

Act of Feb. 20, 1907, ch. 1134, 637.

Sec. 1. Tax on Aliens Entering United States — Disposition of Fund — Lien on Vessels — Aliens Exempted — Exclusion of Aliens Detrimental to Labor Conditions, 637.

2. Classes of Aliens Excluded, 640.

3. Importation of Aliens for Prostitution or Other Immoral Purpose — Punishment — Deportation — Attempts to Return — Testimony of Husband or Wife, 649.

4. Importing Contract Labor a Misdemeanor, 654.

5. Penalty for Violations — Suits by Informer, 656.

6. Advertising Abroad for Labor Immigration a Misdemeanor — Exceptions, 659.

7. Soliciting by Vessel Owners, etc., Forbidden — Penalties, 660.

8. Punishment for Illegally Landing Aliens, etc., 660.

9. Exclusion for Certain Physical Disabilities — Fines for Violation — Clearance Refused — Bond, 631.

10. Decision of Special Inquiry Board on Diseased Persons, Final, 662.

11. Return of Alien Accompanying Rejected Helpless Alien, 663.

12. Lists of Alien Passengers Arriving Required — Contents — Alien Passengers Leaving — Contents — Disposition — Regular Trips — Insular Possessions, 663.

3. es:gnation, etc., of Aliens on Lists — Certificate of Medical, etc., Examination, 665.

14. Medical Certificate — Verification, 665.

15. Penalty for Not Delivering Lists — Passengers Departing, 666.

16. Inspection by Immigration Officers — On Shipboard — at Immigrant Stations, 666.

17. Medical Examination on Arrival, 668.

18. Penalty for Allowing Illegal Landing, 669.

19. Return of Illegally Landed Aliens — Charges — Detention to Use as Witness — Maintenance While Detained — Insane Aliens, 670.

20. Deportation within Three Years after Entry — Expenses — Release Pending Appeal, 673.

21. Return of Illegally Entered Aliens in Three Years — Penalty for Refusal of Vessel Owners, etc. — Attendant When Necessary, 681.

23. Commissioners of Immigration — Duties, 684.

24. Immigrant Inspectors, Officers, etc. — Appointment — Compensation — Duties — Powers — Decisions, 684.

25. Special Inquiry Boards — Composition — Designation of Other Officials — Authority, Hearings, etc. — Appeals — Finality Decisions, 685.

26. Admissions under Bond Permitted in Certain Cases, 691.

27. Restriction on Compromises, etc., 692.

28. Pending Suits, etc., Not Affected, 692.

29. Jurisdiction of Federal Courts, 693.

Sec. 30. Immigrant Station Privileges — Disposal of — Liquors Forbidden — Receipts, 693.

31. Local Courts Granted Jurisdiction, 693.

32. Entry Along Borders of Canada and Mexico, 694.

33. Construction of Term " United States " — Aliens from Canal Zone, 694.

34. Commissioner of Immigration at New Orleans, La., 694.

35. Ports of Deportation, 694.

36. Deportation unless Entering at Seaports, etc.— Canada and Mexico Borders, 697.

37. Families of Aliens, Having Contagious Diseases — Temporary Detention — Admission, 697.

38. Anarchists, etc., Prohibited Entry — Enforcement — Penalty for Assisting Illegal Entries, 697.

41. Foreign Officials, etc., 699.

43. Repeal — Chinese Exclusion, 699.

44. Effect, 699.

Act of March 4, 1909, ch. 299, 700.

*Sec. 1. Medical Examination — Reimbursement — Repeal, 700.
Head Tax, etc., to Be Covered into the Treasury, 700.*

Act of March 4, 1909, ch. 305, 700.

List of Aliens Not Required on Vessels for Canada and Mexico, 700.

Act of March 4, 1911, ch. 285, 700.

Sec. 1. Credit of Reimbursements, 700.

Act of Feb. 25, 1913, ch. 73, 701.

Sec. 1. Immigrant Stations to Be Established at Interior Places, 701.

Act of Oct. 22, 1913, ch. 32, 701.

Sec. 1. Temporary Detention of Aliens — Expenses to Be Paid by Transportation Lines, 701.

Act of Aug. 1, 1914, ch. 223, 702.

Sec. 1. Commissioner of Immigration at New Orleans, 702.

III. The Cooly Trade, 702.

R. S. 2158. Cooly Trade Prohibited, 702.

R. S. 2159. Vessels Employed in Cooly Trade Shall Be Forfeited, 702.

R. S. 2160. Building Vessels to Engage in Cooly Trade, How Punished, 702.

R. S. 2161. Punishment for Violation of Section 2158, 703.

R. S. 2162. This Title Not to Interfere with Voluntary Emigration, 703.

R. S. 2163. Examination of Vessels, 703.

Act of March 3, 1875, ch. 141, 703.

Sec. 1. Consular Inquiry and Certificate, 703.

2. Transportation of Subjects of China or Japan, etc., without Free Consent, How Punished, Contracts Void, 704.

4. Contracting to Supply Labor of Cooly in Violation of Law, 704.

CROSS-REFERENCES

Emigrant Vessels, see **CARRIERS**.

Chinese Immigration, see **CHINESE EXCLUSION**.

Prohibition of Immigration Because of Disease in Foreign Countries, see **HEALTH AND QUARANTINE**.

See generally, **WHITE SLAVE TRAFFIC**.

I. BUREAU OF IMMIGRATION

SEC. 7. [Former superintendent of immigration — salary — duties and reports — office — clerks.] That the office of superintendent of immigration is hereby created and established, and the President, by and with the advice and consent of the Senate, is authorized and directed to appoint such officer, whose salary shall be four thousand dollars per annum, payable monthly. The superintendent of immigration shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury, to whom he shall make annual reports in writing of the transactions of his office, together with such special reports, in writing, as the Secretary of the Treasury shall require. The Secretary shall provide the superintendent with a suitable furnished office in the city of Washington, and with such books of record and facilities for the discharge of the duties of his office as may be necessary. He shall have a chief clerk, at a salary of two thousand dollars per annum, and two first-class clerks. [26 Stat. L. 1085.]

This is from the Immigration Act of March 3, 1891, ch. 551. The other sections of this Act were superseded by the various sections of the Act of Feb. 20, 1907, ch. 1134, given *infra*, this title.

The Secretary of the Treasury was charged with the administration of the laws relating to immigration by the Act of Aug. 3, 1882, ch. 376, §§ 2 and 3, 22 Stat. L. 214, and the Act of Feb. 26, 1885, ch. 164, §§ 6 and 7, as added by the amending Act of Feb. 23, 1887, ch. 220, 24 Stat. L. 415. The office of Superintendent of Immigration was created and his duties prescribed by the provisions of the text. By the Act of March 2, 1895, ch. 177, § 1, *infra*, p. 629, the Superintendent of Immigration was designated the Commissioner General of Immigration, and he was charged with the administration of the laws relating to Chinese exclusion by the Act of June 6, 1900, ch. 791, § 1, *infra*, p. 630.

Further duties were imposed on the Commissioner General of Immigration by the Act of Feb. 20, 1907, ch. 1134, § 22, *infra*, p. 630.

The Act of Feb. 14, 1903, ch. 552, 32 Stat. L. 825, establishing a Department of Commerce and Labor and given under **COMMERCE DEPARTMENT**, transferred, by §§ 4, 7, and 10 thereof, the Commissioner General of Immigration, and Commissioners of Immigration, the Bureau of Immigration, and the Immigration Service at large, from the Department of the Treasury to the newly created Department of Commerce and Labor, and by a Res. of April 28, 1904, No. 34, 33 Stat. L. 591, it was provided that the words "Secretary of the Treasury" whenever used in the Act of March 3, 1903, ch. 1012, 32 Stat. L. 1213, or in amendments thereto or in prior Acts in relation to alien immigration, be stricken out, and the words "Secretary of Commerce and Labor" inserted in lieu thereof. Subsequently, by the Act of June 29, 1906, ch. 3592, § 1, 34 Stat. L. 596, the designation of the Bureau of Immigration was changed to the Bureau of Immigration and Naturalization.

By the Act of March 4, 1913, ch. 141, 37 Stat. L. 736, creating a Department of Labor and given in **LABOR DEPARTMENT**, the Commissioner General of Immigration, the Commissioners of Immigration, the Bureau of Immigration and Naturalization and the Immigration Service at large were transferred from the Department of Commerce and Labor and placed under the jurisdiction of the newly created Department of Labor, and the Bureau of Immigration and Naturalization was divided into two bureaus, to be known as the Bureau of Immigration and the Bureau of Naturalization.

The provisions of the text as to salaries have been superseded by various subsequent Appropriation Acts. The Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, § 1, 38 Stat. L. 1046, provided for a "Commissioner-General, \$5,000; Assistant Commissioner General who shall also act as chief clerk and actuary, \$3,500;" and for sundry other clerks and employees.

Salaries.—The Attorney-General ruled, in 1891, that the superintendent of immigration and his clerical assistants might be paid out of the "immigrant fund" created under section 1 of the Act of Aug. 3, 1882. (See sec. 1, Act of Feb. 20, 1907, *infra*, p. 637.) (1891) 20 Op. Atty.-Gen. 76.

Prior to the establishment of the office of Superintendent of Immigration, the Secretary of the Treasury, charged with the administration of the immigration laws, was authorized to appoint a supervising inspector, or a special inspector, to perform such duties in connection with the service as the secretary might direct, the appointee to be paid from the immigrant fund. (1891) 29 Op. Atty.-Gen. 76, 259.

Inspectors of immigration.—This section manifestly contemplates and intends that inspectors of immigration shall be appointed by the Secretary of the Treas-

ury. An appointment of such officer by the superintendent of immigration could be upheld only by presuming it to be made with the concurrence or approval of the Secretary of the Treasury, his official head. *Nishimura Ekiu v. U. S.*, (1891) 142 U. S. 651, 12 S. Ct. 336, 35 U. S. (L. ed.) 1146.

Jurisdiction of offense under White Slave Traffic Act.—Failure to file with the Commissioner General of Immigration the statement required by section 6 of the White Slave Traffic Act of June 25, 1910 (title WHITE SLAVE TRAFFIC) is an offense committed at Washington, D. C., the office of such commissioner, and a person charged with such offense has the right to a trial within the District of Columbia, the District Court for the district of a state being without jurisdiction. *U. S. v. Lombardo*, (D. C. Wash. 1915) 228 Fed. 980.

Expenses on Ellis Island.—See note under section 1, Act of Feb. 20, 1907, *infra*, p. 637.

[SEC. 1.] **[Commissioners of immigration — appointment — terms of office.]** * * * The commissioners of immigration at the several ports shall be appointed by the President, by and with the advice and consent of the Senate, to hold their offices for the term of four years, unless sooner removed, and until their successors are appointed; and nominations for such offices shall be made to the Senate by the President as soon as practicable after the passage of this Act. [28 Stat. L. 391.]

This is from the Sundry Civil Appropriation Act of Aug. 18, 1894, ch. 301.

By a provision of the Act of Feb. 20, 1907, ch. 1134, § 24 (*infra*, p. 684), which by section 43 thereof (*infra*, p. 699) superseded and repealed a similar provision of the Act of March 3, 1903, ch. 1012, § 24, 32 Stat. L. 1219, the mode of appointing commissioners provided by this section was not altered.

[SEC. 1.] **[Superintendent of Immigration designated Commissioner-General of Immigration — duties.]** * * * Bureau of Immigration: For Superintendent of Immigration, who shall hereafter be designated as Commissioner-General of Immigration, and, in addition to his other duties, shall have charge, under the Secretary of the Treasury, of the administration of the alien contract-labor laws, four thousand dollars. [28 Stat. L. 780.]

This is from the Legislative, Executive and Judicial Appropriation Act of March 2, 1895, ch. 177.

The office of Superintendent of Immigration was created by the Act of March 3, 1891, ch. 551, § 7, given on p. 628. See the notes to said section.

[SEC. 1.] [Commissioner-general of immigration to administer Chinese exclusion and immigration laws.] * * * and hereafter the Commissioner-General of Immigration, in addition to his other duties, shall have charge of the administration of the Chinese exclusion law and of the various Acts regulating immigration into the United States, its Territories, and the District of Columbia, under the supervision and direction of the Secretary of the Treasury. [31 Stat. L. 611.]

This is from the Sundry Civil Appropriation Act of June 6, 1900, ch. 791.

See the notes to the Act of March 3, 1891, ch. 551, § 7, *supra*, p. 628.

For the various Acts relating to the exclusion of Chinese see the title CHINESE EXCLUSION.

[SEC. 1.] [Appropriations for "expenses of regulating immigration."]
 * * * The authority to incur expenditures under the appropriation for "expenses of regulating immigration" shall be construed by the accounting officers of the Treasury without reference to any specific appropriation heretofore made for repairs or alterations to any immigrant station. [33 Stat. L. 416.]

This is from the Deficiencies Appropriation Act of April 27, 1904, ch. 1630.

SEC. 22. [Commissioner-general of immigration — duties defined — rules, etc. — details to secure information — details for foreign service.] That the Commissioner-General of Immigration, in addition to such other duties as may by law be assigned to him, shall, under the direction of the Secretary of Commerce and Labor, have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction, and supervision of all officers, clerks, and employees appointed thereunder. He shall establish such rules and regulations, prescribe such forms of bond, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss, and shall have authority to enter into contract for the support and relief of such aliens as may fall into distress or need public aid; all under the direction or with the approval of the Secretary of Commerce and Labor. And it shall be the duty of the Commissioner-General of Immigration to detail officers of the immigration service from time to time as may be necessary, in his judgment, to secure information as to the number of aliens detained in the penal, reformatory, and charitable institutions (public and private) of the several States and Territories, the District of Columbia, and other territory of the United States and to inform the officers of such institutions of the provisions of law in relation to the deportation of aliens who have become public charges: *Provided*, That the Commissioner-General of Immigration may, with the approval of the Secretary of Commerce and Labor, whenever in his judgment such action may be necessary to accomplish the purposes of this Act, detail immigration officers,

and also surgeons, in accordance with the provisions of section seventeen, for service in foreign countries. [34 Stat. L. 905.]

The foregoing section 22 and the following section 40 were from the Immigration Act of Feb. 20, 1907, ch. 1134. See the notes to section 1 of this Act, *infra*, p. 637.

Provisions somewhat similar to those of the text were made by the Act of March 3, 1903, ch. 1012, § 22, 32 Stat. L. 1219, repealed by section 43 of this Act, *infra*, p. 699.

See the notes to the Act of March 3, 1891, ch. 551, § 7, *supra*, p. 628.

Rule subjecting alien seeking admission from insular possessions to further examination.—An alien admitted to one of the insular possessions, such as Porto Rico, Hawaii, or the Philippines, may be subjected to further examination if he proceeds to the mainland, as a test of his right to enter the continent, and the Commissioner General of Immigration is empowered to adopt such a rule. *Healy v. Backus*, (C. C. A. 9th Cir. 1915) 221 Fed. 358, 137 C. C. A. 166, wherein the court said: "The power of the Commissioner General for adopting rules and regulations for carrying the provisions of the Immigration Act into effect is very broad, and if it be as we have said, it might well be that persons would not be likely to become public charges in insular possessions, or certain of them, while they would be likely to become public charges on the continent, why is it not a reasonable and perfectly natural exercise of that power to admit such persons to the insular possessions on condition that if they proceed to the mainland they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the Act according to the conditions found to exist, and

is not, we think, beyond the authority conferred by Congress. The admission to the insular possessions under the amended rule 14 is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes, and not upon the ground of having, after entry, become a public charge for causes theretofore existing after unqualified admission."

"Rules and regulations may be made to carry out the statutes and facilitate the exclusion and return of persons belonging to the classes whose immigration Congress has forbidden; but no mere rule of the department can operate to exclude persons not belonging to one or other of the classes named in the statutes." This case was under the Act of 1891. *In re Kornmehl*, (1898) 87 Fed. 315.

Force of rules.—Proper rules and regulations adopted by an executive department of the government, in pursuance of the provisions of an Act of Congress, have the force and effect of the Act itself. *U. S. v. Sibray*, (C. C. Pa. 1910) 178 Fed. 144, *reversed* on other grounds (C. C. A. 3d Cir. 1911) 185 Fed. 401, 107 C. C. A. 483.

SEC. 40. [Bureau of immigration and naturalization—information division created—duties, etc.—agents of states, etc.] Authority is hereby given the Commissioner-General of Immigration to establish, under the direction and control of the Secretary of Commerce and Labor, a division of information in the Bureau of Immigration and Naturalization; and the Secretary of Commerce and Labor shall provide such clerical assistance as may be necessary. It shall be the duty of said division to promote a beneficial distribution of aliens admitted into the United States among the several States and Territories desiring immigration. Correspondence shall be had with the proper officials of the States and Territories, and said division shall gather from all available sources useful information regarding the resources, products, and physical characteristics of each State and Territory, and shall publish such information in different languages and distribute the publications among all admitted aliens who may ask for such information at the immigrant stations of the United States and to such other persons as may desire the same. When any State or Territory appoints and maintains an agent or agents to represent it at any of the immigrant stations of the United States, such agents shall, under regulations prescribed by the Commissioner-General of Immigration, subject to the approval of the Secretary of Commerce and Labor, have access to aliens

who have been admitted to the United States for the purpose of presenting, either orally or in writing, the special inducements offered by such State or Territory to aliens to settle therein. While on duty at any immigrant station such agents shall be subject to all the regulations prescribed by the Commissioner-General of Immigration, who, with the approval of the Secretary of Commerce and Labor, may, for violation of any such regulations, deny to the agent guilty of such violation any of the privileges herein granted. [34 Stat. L. 909.]

See the notes to the preceding section 22 of this Act.

Estimates for the division of information were required by a provision of the Act of March 4, 1907, ch. 2918, § 1, given in the following paragraph of the text.

[SEC. 1.] **[Estimates for division of information.]** * * * For additional assistants, clerical and otherwise, necessary to establish and maintain a division of information in the Bureau of Immigration and Naturalization, Department of Commerce and Labor, until June thirtieth, nineteen hundred and eight, fifty thousand dollars, which shall be paid from the permanent appropriation for expenses of regulating immigration: *Provided*, That detailed estimates shall be submitted in the manner required by law for appropriations required to meet this object during the fiscal year nineteen hundred and nine and thereafter. [34 Stat. L. 1329.]

This is from the Sundry Civil Appropriation Act of March 4, 1907, ch. 2918.

The division of information mentioned in the text was authorized by the Act of Feb. 20, 1907, ch. 1134, § 40, given in the preceding paragraph of the text.

Estimates for the expenses of regulating immigration were required by the Act of June 25, 1910, ch. 384, § 1, given in the following paragraph of the text.

As to the Department of Commerce and Labor see the notes to the Act of March 3, 1891, ch. 551, § 7, *supra*, p. 628.

[Sic. 1.] **Estimates — statements of amounts required and expenditures.** * * * Hereafter there shall be submitted, following the estimates under the foregoing appropriation for expenses of regulating immigration, statements showing the amount required for each object of expenditure mentioned in said estimates, together with a statement of the expenditures under each of such objects for the fiscal year terminated next preceding the period of submitting said estimates. [36 Stat. L. 764.]

This is from the Sundry Civil Appropriation Act of June 25, 1910, ch. 384, following appropriations for the enforcement of laws relating to immigration and Chinese exclusion, to which the words "foregoing appropriations" refer.

Provisions similar to those of the text were made by the Act of March 4, 1909, ch. 299, § 1, 35 Stat. L. 982.

Estimates for the division of information were required by the Act of March 4, 1907, ch. 2918, § 1, given in the preceding paragraph of the text.

II. IMMIGRATION GENERALLY

Sec. 2164. [No charge upon particular persons immigrating, etc.] No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country, which is not equally imposed

and enforced upon every person immigrating to such State from any other foreign country. [R. S.]

Act of May 31, 1870, ch. 114, 16 Stat. L. 144.

Title XIX of the Revised Statutes, "Immigration," comprised sections 2158-2164, inclusive, of which only the last section—2164—related to immigrations proper, the other sections relating more particularly to the cooly trade. While the title as originally enacted was not divided, those sections relating to the cooly trade are placed, with subsequent Acts of like character, under subdivision III of this title, *infra*, p. 702.

Subsequent to the enactment of these sections of the Revised Statutes there were passed numerous Acts designed to supplement the previously existing laws on this subject. These were in a large measure superseded by the more comprehensive provisions of the Act of March 3, 1903, ch. 1012, 32 Stat. L. 1213. This latter Act was, however, with the exception of section 34 thereof, which related to the sale of liquor within the Capitol building of the United States, entirely repealed by the Act of Feb. 20, 1907, ch. 1134, § 43, *infra*, p. 699, which Act, given within this subdivision, re-enacted the provisions of the Act which it repealed as well as those of the earlier Acts.

For a reference to the various Acts relating to the Bureau of Immigration, see the note to the Act of March 3, 1891, ch. 551, § 7, *supra*, p. 628.

Constitutional.—It was held in *U. S. v. Jackson*, (1874) 3 Sawy. 59, 26 Fed. Cas. No. 15,459, that the section of the Act of 1870, from which this section of the Revised Statutes was taken, is constitutional.

By the term "charge," as here used, is meant any onerous condition. A state statute which makes the right of the immigrant to land depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceeding, and whose execution of the bond can only be obtained upon such terms as he may exact, is as onerous as any charge which can well be imposed, and, when imposed upon persons of particular classes, is in conflict with this statute. *In re Ah Fong*, (1874) 3 Sawy. 144, 1 Fed. Cas. No. 102.

An indictment against a tax collector, alleging that a certain person was deprived of a right secured to him by this statute, in that there was exacted from him a certain sum by the defendant under color of a certain law of the state, is bad when it contains no averment describing the person as one coming within the provisions of the state law. "The statute requires that a party shall be subjected to a deprivation of right secured by the statute under color of some law, statute, order, or custom; but if this exaction, although made by a tax collector, has been levied upon a person not within the provisions of the state law, the exaction cannot be said to have been made 'under color of law.'" *U. S. v. Jackson*, (1874) 3 Sawy. 59, 26 Fed. Cas. No. 15,459.

SEC. 2. [Validity of contracts for labor or service of alien made prior to migration.] That all contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person, company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its Territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect[.] [23 Stat. L. 332.]

This is from an Act of Feb. 26, 1885, ch. 164, entitled "An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia." Apparently it has not been superseded by any subsequent provision to the same purpose.

This Act was amended by the provision of the Act of Oct. 19, 1888, ch. 1210, § 1, given in the following paragraph of the text.

[SEC. 1.] [Allowance to informers.] * * * That the act approved February twenty-sixth, eighteen hundred and eighty-five, entitled "An act to prohibit the importation and migration of foreigners and aliens under

contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," be, and the same is hereby, amended so as to authorize the Secretary of the Treasury to pay to an informer who furnishes original information that the law has been violated such a share of the penalties recovered as he may deem reasonable and just, not exceeding fifty per centum, where it appears that the recovery was had in consequence of the information thus furnished. [25 Stat. L. 567.]

This is from the Deficiencies Appropriation Act of Oct. 19, 1888, ch. 1210.

The Act of Feb. 26, 1885, ch. 164, amended by this section, was superseded, except section 2 thereof, which is given in the preceding paragraph of the text, by the Act of March 3, 1903, ch. 1012, 32 Stat. L. 1213, which was superseded by the Act of Feb. 20, 1907, ch. 1134, and repealed by section 43 thereof, *infra*, p. 699. This provision, however, has apparently not been superseded by any subsequent Act.

Constitutional.—Congress has power over the exclusion of aliens, and the reasons for its discrimination, excluding some and omitting others, are not open to challenge in the courts. Having this power of discrimination, Congress has the power to punish any who assist in the introduction of persons within the prohibited class. *Lees v. U. S.*, (1893) 150 U. S. 476, 14 S. Ct. 163, 37 U. S. (L. ed.) 1150.

District Court has jurisdiction.—The general jurisdiction over actions for penalties and forfeitures has been and is vested by statute in the District Court, and when a state imposes a penalty and forfeitures, jurisdiction of an action therefor would vest in the District Court, unless it is in express terms placed elsewhere. The provision, "as debts of like amount are now recovered in the Circuit Court," [section 3, now superseded] in effect provides that, although the recovery of a penalty is a proceeding criminal in its nature, yet in this class of cases it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts. *Lees v. U. S.*, (1893) 150 U. S. 476, 14 S. Ct. 163, 37 U. S. (L. ed.) 1150. See also *Rosenberg v. Union Iron Works*, (1901) 109 Fed. 844; *U. S. v. Whitcomb Metallic Bedstead Co.*, (1891) 45 Fed. 89. But see *U. S. v. Mexican Nat. R. Co.*, (1889) 40 Fed. 769; *U. S. v. Banister*, (1895) 70 Fed. 44.

The jurisdiction of actions brought under this section is not affected by the Act of Aug. 13, 1888, giving to the Circuit Courts (since abolished, and now the District Courts; see JUDICIARY) original cognizance of civil suits where the matter in suit exceeds \$2,000, as a suit to recover penalties is one of a penal and quasi-criminal nature. *U. S. v. Whitcomb Metallic Bedstead Co.*, (1891) 45 Fed. 89. See also *U. S. v. Mexican Nat. R. Co.*, (1889) 40 Fed. 769.

A private person cannot sue for his own benefit, by his private attorney, to recover the penalty given by this section. While the action may be brought in the name of a private person, the statute is highly penal, and the prosecution should be commenced and conducted by the United States

district attorney, acting under the responsibility of his official oath, and the proceeds of any judgment recovered therein must be paid into the treasury of the United States. The Act of 1888 has made no change in this respect. *Rosenberg v. Union Iron Works*, (1901) 109 Fed. 844.

Elements of offense.—"A careful perusal of the section will demonstrate that the penalty is attached, not to the making of the illegal contract, but to assisting, encouraging, or soliciting the migration of the alien to perform labor or service here, knowing that such illegal contract or agreement had been made. To give a right of action under this section three things are essential: (1) The immigrant must first, previous to his becoming a resident of the United States, have entered into a contract to perform labor or service here. (2) He must have actually migrated or entered into the United States in pursuance of such contract. (3) The defendant must have prepaid his transportation, or otherwise assisted, encouraged, or solicited his migration, knowing that he had entered into this illegal contract." *U. S. v. Craig*, (1886) 28 Fed. 799.

Correspondence consisting of a letter proposing on the part of the men to come to this country and enter into defendant's service on condition that the transportation should be furnished them, and a reply by the defendant, enclosing passes, did not make an agreement within the statute; the elements of time and compensation were omitted. *U. S. v. Edgar*, (C. C. A. 1891) 48 Fed. 91, 4 U. S. App. 41, 1 C. C. A. 49.

"Importation or migration."—The employment by a railway company of a clerk residing in Canada, to work in its office in New York state, who comes from his home each morning to the office and returns home each night, is not assisting or encouraging the "importation or migration" of a foreigner. *U. S. v. Michigan Cent. R. Co.*, (1891) 48 Fed. 365.

Form of action.—An action of debt to recover a penalty under this statute is the proper form of action, not only by the terms of the statute, but also on general principles, for while the action, being

based on a violation of the statute, sounds in tort, yet debt lies for a statutory penalty, because the sum demanded is certain. *U. S. v. McElroy*, (1902) 115 Fed. 252.

Action rests on tort — *capias*.— In *U. S. v. Banister*, (1895) 70 Fed. 44, the court said that an action for penalty under this section is not founded on any contract, but rests on a tort consisting in the violation of the statute. When debts for forfeitures created by statute would be recoverable in the state courts by action on the statute begun by *capias*, suit may be begun in the Circuit (now District) Court in that way.

Right to be confronted with witness.— The action for the penalty is a civil suit, and the defendants have not the right to be confronted in open court on the trial of the cause, with the witness against them, but the cause may be determined upon evidence taken by deposition. *Moller v. U. S.*, (C. C. A. 1893) 57 Fed. 490, 13 U. S. App. 472, 6 C. C. A. 459.

Witness against himself.— Though an action civil in form, a suit to recover a penalty is unquestionably criminal in its nature, and a defendant cannot be compelled to be a witness against himself. *Lees v. U. S.*, (1893) 150 U. S. 476, 14 S. Ct. 163, 37 U. S. (L. ed.) 1150.

Sufficiency of complaint.— A declaration in an action to recover the penalty provided for in this section must aver every particular necessary to bring the case within the purview of the statute. The omission to aver clearly and precisely that the foreign laborer did ever immigrate into the United States, and that the defendant knew, when he assisted or encouraged the laborer to migrate, that he was under a contract to perform labor in the United States, is fatal. *U. S. v. Bornemann*, (1890) 41 Fed. 751.

Acts of assistance.— The declaration should set out the acts of assistance or

encouragement which constitute the alleged violation of the law and form the basis of the action; it is not sufficient simply to charge, in the words of the statute, that the defendant "assisted, encouraged, and solicited" the immigration of the alien mentioned. *U. S. v. McElroy*, (1902) 115 Fed. 252. See also *U. S. v. River Spinning Co.*, (1895) 70 Fed. 978.

Character of labor or service.— A declaration is not sufficient which fails to show the character of labor or service in which the immigrant is to be employed, so that the court may judge whether it comes within the law. *U. S. v. McElroy*, (1902) 115 Fed. 252.

Vague allegations as to contract.— A petition in an action for a penalty is insufficient when it seems to have been drawn with a view, not to assert that there was any contract previous to the importation of the immigrant into the United States, but rather to suggest the same by vague allegations and inferences. *Moller v. U. S.*, (C. C. A. 1893) 57 Fed. 490, 13 U. S. App. 472, 6 C. C. A. 459. See also *U. S. v. Gay*, (1897) 80 Fed. 254.

A complaint in an action for a penalty, for a violation of the provisions of this statute, is sufficient, under rules of the state courts for the construction of pleadings providing that the pleadings shall be liberally construed, when the facts set forth show that the contract was made abroad, and the defendant prepaid the transportation of the laborer. *U. S. v. Great Falls, etc., R. Co.*, (1892) 53 Fed. 77.

An action for malicious prosecution may be maintained if the defendant procured, under color of this statute, the issue of a criminal warrant, even though the complaint failed to state a criminal offense and the warrant was void, if the proceedings were malicious and unfounded and without probable cause. *Beuthner v. Ellinger*, (1895) 90 Wis. 439, 63 N. W. 756.

SEC. 8. [Companies to file certificate showing notice in foreign countries of immigration laws — penalty.] That all steamship or transportation companies, and other owners of vessels, regularly engaged in transporting alien immigrants to the United States, shall twice a year file a certificate with the Secretary of the Treasury that they have furnished to be kept conspicuously exposed to view in the office of each of their agents in foreign countries authorized to sell emigrant tickets, a copy of the law of March third, eighteen hundred and ninety-one, and of all subsequent laws of this country relative to immigration, printed in large letters, in the language of the country where the copy of the law is to be exposed to view, and that they have instructed their agents to call the attention thereto of persons contemplating emigration before selling tickets to them; and in case of the failure for sixty days of any such company or any such owners to file such

a certificate, or in case they file a false certificate, they shall pay a fine of not exceeding five hundred dollars, to be recovered in the proper United States court, and said fine shall also be a lien upon any vessel of said company or owners found within the United States. [27 Stat. L. 570.]

This is from an Act of March 3, 1893, ch. 206, entitled "An Act to facilitate the enforcement of the immigration and contract labor laws of the United States." The other sections of this Act have been superseded by the various subsequent immigration Acts given in the title.

* A civil action may properly be brought for the failure to comply with the provisions of this statute. *U. S. v. Atlantic*

Fruit Co., (C. C. A. 2d Cir. 1913) 206 Fed. 440, 124 C. C. A. 322.

SEC. 3. [Alien contract labor — permission to foreign exhibitors.] That nothing in the provisions of this Act or any other Act shall be construed to prevent, hinder, or restrict any foreign exhibitor, representative, or citizen of any foreign nation, or the holder, who is a citizen of any foreign nation, of any concession or privilege from any fair or exposition authorized by Act of Congress from bringing into the United States, under contract, such mechanics, artisans, agents, or other employees, natives of their respective foreign countries, as they or any of them may deem necessary for the purpose of making preparation for installing or conducting their exhibits or of preparing for installing or conducting any business authorized or permitted under or by virtue of or pertaining to any concession or privilege which may have been or may be granted by any said fair or exposition in connection with such exposition, under such rules and regulations as the Secretary of the Treasury may prescribe, both as to the admission and return of such person or persons. [32 Stat. L. 177.]

This is from an Act of April 29, 1902, ch. 641, regulating the exclusion of Chinese. Sections 1, 2, and 4 of this Act are given under the title **CHINESE EXCLUSION**.

As to the authority of the Secretary of the Treasury, see the notes to the Act of March 3, 1891, ch. 551, § 7, *supra*, p. 628.

[SEC. 1.] [Refund of head tax erroneously collected.] * * * That the Commissioner-General of Immigration, with the approval of the Secretary of Commerce and Labor, shall have power to refund head tax heretofore and hereafter collected under section one of the Immigration Act approved March third, nineteen hundred and three, upon presentation of evidence showing conclusively that such collection was erroneously made. [33 Stat. L. 684.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Feb. 3, 1905, ch. 297.

The Act of March 3, 1903, ch. 1012, § 1, 32 Stat. L. 1213, mentioned in the text, which authorized the head tax therein referred to, was repealed by the Act of Feb. 20, 1907, ch. 1134, § 43, *infra*, p. 699, and similar provisions re-enacted by section 1 thereof, *infra*, p. 637.

An Act To regulate the immigration of aliens into the United States.*

[*Act of Feb. 20, 1907, ch. 1134, 34 Stat. L. 898.*]

[**SEC. 1.**] [**Tax on aliens entering United States — disposition of fund — lien on vessels — aliens exempted — exclusion of aliens detrimental to labor conditions.**] That there shall be levied, collected, and paid a tax of four dollars for every alien entering the United States. The said tax shall be paid to the collector of customs of the port or customs district to which said alien shall come, or, if there be no collector at such port or district, then to the collector nearest thereto, by the master, agent, owner, or consignee of the vessel, transportation line, or other conveyance or vehicle bringing such alien to the United States. The money thus collected, together with all fines and rentals collected under the laws regulating the immigration of aliens into the United States, shall be paid into the Treasury of the United States, and shall constitute a permanent appropriation to be called the "immigrant fund," to be used under the direction of the Secretary of Commerce and Labor to defray the expense of regulating the immigration of aliens into the United States under said laws, including the contract labor laws, the cost of reports of decisions of the Federal courts, and digest thereof, for the use of the Commissioner-General of Immigration, and the salaries and expenses of all officers, clerks, and employees appointed to enforce said laws. The tax imposed by this section shall be a lien upon the vessel, or other vehicle of carriage or transportation bringing such aliens to the United States, and shall be a debt in favor of the United States against the owner or owners of such vessel, or other vehicle, and the payment of such tax may be enforced by any legal or equitable remedy. That the said tax shall not be levied upon aliens who shall enter the United States after an uninterrupted residence of at least one year, immediately preceding such entrance, in the Dominion of Canada, Newfoundland, the Republic of Cuba, or the Republic of Mexico, nor upon otherwise admissible residents of any possession of the United States, nor upon aliens in transit through the United States, nor upon aliens who have been lawfully admitted to the United States and who later shall go in transit from one part of the United States to another through foreign contiguous territory: *Provided*, That the Commissioner-General of Immigration, under the direction or with the approval of the Secretary of Commerce and Labor, by agreement with transportation lines, as provided in section thirty-two of this Act, may arrange in some other manner for the payment of the tax imposed by this section upon any or all aliens seeking admission from foreign contiguous territory: *Provided further*, That if in any fiscal year the amount of money collected under the provisions of this section shall exceed two million five hundred thousand dollars, the excess above that amount shall not be added to the "immigrant fund:" *Provided further*, That the provisions of this section shall not apply to aliens arriving in Guam, Porto Rico, or Hawaii; but if any such alien, not having become a citizen of the United States, shall later arrive at any port or place of the United States on the North American Continent the provisions of this section shall apply: *Provided further*, That whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country

* This Act repealed by Act of Feb. 5, 1917. See PAMPH. SUPP. No. 9; 1918 SUPP. FED. STAT. ANN.

other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone. [34 Stat. L. 898.]

This is the first section of the "Contract Labor Law," or "Immigration Act of 1907," and, with the exception of sections 22 and 40, given *supra*, pp. 630, 631, and section 42, the remaining sections are here given.

Said section 42 prescribed regulations for the transportation of immigrant passengers by steamships or other vessels, which were to become effective on Jan. 1, 1909. This section superseded similar provisions of the Passenger Act of Aug. 2, 1882, ch. 374, § 1, which was repealed, to take effect Jan. 1, 1909, by section 43 of the Act given in the text, *infra*, p. 699. However, by an Act of Dec. 19, 1908, ch. 6, § 2, 35 Stat. L. 584, there was repealed said section 42 and so much of sections 43 and 44 of this Act, *infra*, p. 699, as provided for the repeal of section 1 of the Act of 1882, ch. 374, the repeal to become effective, by section 3 of said Act of Dec. 19, 1908, ch. 6, on Jan. 1, 1909. Section 1 of the last cited Act constituted an amendment to section 1 of the Act of Aug. 2, 1882, ch. 374, and is given under the title CARRIERS.

Previous provisions relating to a head tax on immigrants were made by the Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. L. 214; the Act of June 26, 1884, ch. 121, § 22, 23 Stat. L. 58; the Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. L. 391. These were superseded by the Act of March 3, 1903, ch. 1012, § 1, 32 Stat. L. 1213, as amended by the Act of March 22, 1904, ch. 749, 33 Stat. L. 144, which was repealed by section 43 of this Act, *infra*, p. 699.

The moneys collected, which were to form, under the provisions of the text, an "immigrant fund," were to be covered into the Treasury by a provision of the Act of March 4, 1909, ch. 299, § 1, *infra*, p. 700.

The refund of erroneously collected head taxes was authorized by the Act of Feb. 3, 1905, ch. 297, *supra*, p. 636.

The former duties of the Secretary of Commerce and Labor are now imposed on the Secretary of Labor, see the notes to R. S. sec. 2164, *supra*, p. 632.

Constitutional.—Construing a similar provision for a tax on aliens, under the Act of 1882, it was held that the statute was within the power of Congress to enact, as being a regulation of commerce with foreign nations, and that it does not violate the constitutional provision that a tax "shall be uniform throughout the United States." The law applies to all ports alike, and gives no preference to one over another. *Head-Money Cases*, (1884) 112 U. S. 580, 5 S. Ct. 247, 28 U. S. (L. ed.) 798.

The power exercised in enacting the statute is not the taxing power. The sum demanded of the ship owner is not, strictly speaking, a tax or duty within the meaning of the Constitution, as money thus raised, though paid into the treasury, is appropriated in advance to the uses of the statute, and constitutes a fund raised from those who are engaged in the transportation of passengers, and who make a profit out of it, for the temporary care of the passengers and for the protection of the citizens among whom they are landed. *Head-Money Cases*, (1884) 112 U. S. 580, 5 S. Ct. 247, 28 U. S. (L. ed.) 798.

This statute is not unconstitutional as conflicting with existing treaties. If there is such conflict, the Act of Congress must prevail in a judicial forum. *Head-Money Cases*, (1884) 112 U. S. 580, 5 S. Ct. 247,

28 U. S. (L. ed.) 798. See also *Thingvall Line v. U. S.*, (1889) 24 Ct. Cl. 255.

Exclusive federal jurisdiction.—A state statute levying a duty for each and every alien passenger who shall come by vessel from a foreign port to a port within the state is void. Such a tax as this is a regulation of commerce with foreign nations, confided by the Constitution to the exclusive control of Congress. *People v. Compagnie Générale Transatlantique*, (1882) 107 U. S. 59, 2 S. Ct. 87, 27 U. S. (L. ed.) 383; *People v. Pacific Mail Steam Ship Co.*, (1883) 16 Fed. 344. See also *Passenger Cases*, (1849) 7 How. 283, 12 U. S. (L. ed.) 702. See *Chy Lung v. Freeman*, (1875) 92 U. S. 275, 23 U. S. (L. ed.) 550.

The calculation of head money is in practice based on the list of passengers furnished by the master of the vessel under section 9 of the Passenger Act of Aug. 2, 1882, 22 Stat. L. 186 (title CARRIERS). (1890) 19 Op. Atty-Gen. 706.

Passengers subject to tax.—The passengers on whom the capitation tax is laid are those who make the United States their place of destination and not those who merely touch at our ports *en route* to some other country. (1897) 21 Op. Atty-Gen. 543.

The duty is collectible on account of all itinerant persons, not citizens of the United States, coming to the ports of this

country from foreign ports, and is demandable as often as such person enters. (1885) 18 Op. Atty.-Gen. 185, 196.

Children under one year of age are "passengers" so as to be chargeable with the duty. The Head-Money Cases, (1883) 18 Fed. 135.

Discharged seamen are passengers, within the meaning of that term as used in this statute, if they shipped as seamen as a convenient method of securing passage to this country, and for the purpose of entering as other alien immigrants. But if they shipped with the intention in good faith to continue their occupation as seamen, and with no intention to make entry into this country, then they are not passengers, and are exempt from the tax. (1901) 23 Op. Atty.-Gen. 521.

Japanese laborers who arrive as seamen and are without passports vouchsafing their entry into the United States are not subject to deportation under the last proviso of this section. *U. S. v. Hemet*, (D. C. Ore. 1907) 156 Fed. 285.

Alien seamen.—The provision of this section for a head tax of four dollars for every alien entering the United States does not apply to alien seamen working in the pursuit of their calling. *U. S. v. International Mercantile Marine*, (S. D. N. Y. 1915) 219 Fed. 328, wherein the court said: "The Supreme Court held in the case of *Taylor v. United States*, [1907] 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130, where sailors signed articles for New York and return, and deserted, that a section of the Immigration Act similar to the one under consideration 'does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact.'"

Deserting seaman.—This section does not render the owner of a vessel liable for the tax upon an alien seaman who deserts after reaching this country, in the absence of any evidence that the officers of the vessel had reason to suppose that the seaman made the voyage with the intention of so gaining admission, or that such intention in fact existed. *U. S. v. International Mercantile Marine Co.*, (1909) 171 Fed. 841, 96 C. C. A. 420, following *Taylor v. U. S.*, (1907) 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130.

Alien diplomatic officials.—This section applies as well to alien officials coming into the United States on diplomatic missions as to aliens who are private individuals and come here for other purposes. The duty thus imposed is not a tax upon the officials of foreign governments, but is merely a charge imposed upon the transportation company for every passenger brought into the United States by it.

This opinion was rendered under the Act of 1903. (1905) 25 Op. Atty.-Gen. 370.

Citizens of the Philippine Islands coming to the United States from foreign ports are not required to pay the head tax prescribed by this section. This opinion was rendered under the Act of 1903. (1904) 25 Op. Atty.-Gen. 131.

The duty should be exacted of convicts, lunatics, etc., although by the terms of the statute they are not to be permitted to land, but are to be returned to the place whence they came. This opinion was given under the Act of 1882. (1885) 18 Op. Atty.-Gen. 135.

Head taxes illegally, improperly, or excessively imposed were subject to refund by the Secretary of the Treasury under section 26 of the Act of June 26, 1884, 23 Stat. L. 59. (1890) 19 Op. Atty.-Gen. 660. See present provision in section 1, Act of Feb. 3, 1905, *supra*, p. 636.

But the secretary had to obey the law in finding that the tax had been illegally, improperly, or excessively imposed, and could not regard the tax as "improperly" collected, and refund the money, merely because it might involve the country in a controversy with a foreign nation. *Thingvall Line v. U. S.*, (1889) 24 Ct. Cl. 255.

Expenses on Ellis Island.—Under sections 7 and 8 of the Act of March 3, 1891, 26 Stat. L. 1085 (see *supra*, p. 628), the Secretary of the Treasury was fully authorized to provide subsistence on Ellis Island, to expend from the immigrant fund such moneys as were required to properly complete the necessary improvements in connection with putting the place in condition for use as a receiving station, and to pay such proper expenses as might be required to carry the immigration laws into effect. (1891) 20 Op. Atty.-Gen. 217.

Employment of counsel.—The duties of United States attorneys are prescribed by law, and among those duties are not those of advising or defending boards of immigration. The provision of section 1 of the Act of 1882, empowering the Secretary of the Treasury to pay out of the immigrant fund "the expense of regulating immigration" under the Act gives him the power to employ and pay counsel for the purposes mentioned. (1885) 18 Op. Atty.-Gen. 108.

The rules of the Commissioner-General of Immigration are to be designed to carry this Act into practical effect; he can make no rule contrary to the spirit of the law, and much less can he add to it any provisions excluding aliens. The twenty-first rule of the commissioner goes beyond the authority of the Act in excluding Japanese and Koreans who are without passports. *U. S. v. Hemet*, (D. C. Ore. 1907) 156 Fed. 285.

Validity of department regulations regarding head tax.—In *Stratton v. Oceanic Steamship Co.*, (1905) 140 Fed. 829, 72 C. C. A. 241, under a somewhat similar

provision of the Act of 1903, it was held that a regulation requiring the master or owner of a vessel bringing an alien to a port of the United States for the professed purpose of proceeding directly therefrom to foreign territory, to deposit the amount of the head tax with the collector before such alien shall be permitted to land, the same to be refunded on proof satisfactory to the immigration officer in charge of

said port that such alien has passed by direct and continuous journey through and out of the United States, was not an amendment or addition to the statute, but was a reasonable and lawful regulation for the purpose of protecting the United States from fraud and loss, and within the power conferred on the commissioner. See also (1904) 25 Op. Atty-Gen. 109.

SEC. 2. [Classes of aliens excluded.] That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled; those who have been, within one year from the date of application for admission to the United States, deported as having been induced or solicited to migrate as above described; any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly; all children under sixteen years of age unaccompanied by one or both of their parents, at the discretion of the Secretary of Commerce and Labor or under such regulations as he may from time to time prescribe: *Provided*, That nothing in this Act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude: *Provided, further*, That the provisions of this section relating to the payments for tickets or passage by any corporation, association, society, municipality, or foreign government shall not apply to the tickets or passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory: *And provided further*, That skilled labor may be

imported if labor of like kind unemployed can not be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants. [34 Stat. L. 898, as amended by 36 Stat. L. 263.]

This section was amended by an Act of March 26, 1910, ch. 128, § 1, 36 Stat. L. 263, by inserting therein, in the description of classes excluded, the words "persons who are supported by or receive in whole or in part the proceeds of prostitution," making the section to read as here given.

Previous provisions defining the classes of aliens excluded were made by the Act of March 3, 1875, §§ 3, 5, 18 Stat. L. 477; the Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. L. 214; the Act of Feb. 26, 1885, ch. 164, §§ 1, 5, 6, 23 Stat. L. 332, 333, and the Act of March 3, 1891, ch. 551, § 1, 26 Stat. L. 1084. These were superseded by the Act of March 3, 1903, ch. 1012, § 2, 32 Stat. L. 1214, which was repealed by section 43 of this Act, *infra*, p. 699.

As to the Secretary of Commerce and Labor, see the notes to the Act of March 3, 1891, ch. 551, § 7, *supra*, p. 628.

- I. Authority of Congress over immigration, 641.
- II. Construction of statutes and treaties, 641.
- III. Countries affected by Act, 641.
- IV. "Alien," 642.
- V. Persons likely to become a public charge, 643.
- VI. Persons committing crime involving moral turpitude, 644.
- VII. Prostitutes or persons attempting to bring them in, 646.
- VIII. Persons solicited to migrate, 646.
- IX. Children, 648.
- X. Burden of proof, 648.

I. AUTHORITY OF CONGRESS OVER IMMIGRATION

Authority as plenary.—The authority of Congress over the general subject matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country. *Lapina v. Williams*, (1914) 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 515; *Ex p. Pouliot*, (E. D. Wash. 1912) 196 Fed. 437.

For cases upholding the constitutionality of the earlier Act of 1891 see *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 651, 12 S. Ct. 336, 35 U. S. (L. ed.) 1146; *Japanese Immigrant Case*, (1903) 189 U. S. 86, 23 S. Ct. 611, 47 U. S. (L. ed.) 721; *U. S. v. Rogers*, (E. D. Pa. 1895) 65 Fed. 787.

II. CONSTRUCTION OF STATUTES AND TREATIES

Statutes.—The immigration statutes should be strictly construed. *Redfern v. Halpert*, (C. C. A. 1911) 186 Fed. 150, 108 C. C. A. 262.

This and other sections of this Act regulating the immigration of aliens into the United States, and providing for the deportation of alien prostitutes and such as

become public charges within three years, etc., were a re-enactment and extension of Act Cong. March 3, 1903, ch. 1012, 32 Stat. L. 1213, and prior legislation on the same subject enacted in the light of the construction placed on the prior Acts by the courts. *Looe Shee v. North*, (1909) 170 Fed. 566, 95 C. C. A. 646.

The construction of the provision of this section for the deportation of aliens likely to become a public charge to include persons likely to become criminals does not conflict with the provision for exclusion of an alien convicted of crime. *U. S. v. Williams*, (1910) 175 Fed. 274.

Treaty.—A treaty entered into with another country, providing that the citizens of each country shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, does not give the citizens of the other country within the prohibited classes designated by this statute full liberty to enter or reside, when the treaty excepts from its operation any ordinance or regulation relating to "police and public security." This case was under the corresponding section of the Act of 1891. *Japanese Immigrant Case*, (1903) 189 U. S. 86, 23 S. Ct. 611, 47 U. S. (L. ed.) 721.

III. COUNTRIES AFFECTED BY ACT

Generally.—In *U. S. v. Johnson*, (C. C. N. Y. 1881) 7 Fed. 453, it was held that similar provisions of the Act of 1875 applied to all countries, Oriental and other.

China.—The provisions of this section excluding alien immigrants afflicted with certain diseases, etc., are applicable to Chinese immigrants otherwise entitled to admission. *Ex p. Lee She Wing*, (1908) 164 Fed. 506; *Looe Shee v. North*, (C. C. A. 1909) 170 Fed. 566, 95 C. C. A. 646; *Ex p. Li Dick*, (1909) 174 Fed. 674; (1903) 24 Op. Atty.-Gen. 706. See **CHINESE EXCLUSION**.

Hawaii.—In (1909) 27 Op. Atty-Gen. 479, it was held that the President was authorized to sign a blank form of letter addressed to officers of the United States abroad commending to their favorable consideration an agent of the Hawaiian government, who was being sent to the Azores and Madeira to make arrangements for the transportation of immigrants from those islands of Hawaii, their passage being prepaid by the Hawaiian government, and their immigration being induced solely by a representation of the resources of Hawaiian Islands and the industrial conditions existing there, without any offer or promise of employment being made to any of them, such persons to have perfect freedom of action in choosing their places of residence and vocations.

Philippine Islands.—The immigration laws of the United States have been by Act of Congress carried to the Philippine Islands and authorized to be there put into effect under appropriate legislation by the Insular Government. See *Sui v. McCoy*, (1915) 239 U. S. 139, 36 S. Ct. 95.

Natives of the Philippine Islands, though not "professional actors, artists, . . . or singers," may be admitted by the Secretary of the Treasury, if he deems the case proper for the exercise of his favorable administrative discretion, as where it appears to be meritorious, and involves no competition with American labor, and the aliens will be properly cared for and returned in due time to their own country, for which the Secretary may, under section 7 of the Act of March 3, 1893 (section 26 of the present Act, *infra*, p. 691), take suitable bond. This opinion was rendered under the Act of 1885. (1901) 23 Op. Atty-Gen. 495.

Aliens previously admitted to the Philippine Islands.—Admission to the Philippines does not *ipso facto* entitle an alien to admission to the mainland. *Ex p. Marshall*, (N. D. Cal. 1914) 213 Fed. 123, wherein it was held that the immigration officers on the mainland might exclude therefrom aliens theretofore admitted to the Philippine Islands upon proof satisfactory to them that the aliens so excluded were persons likely to become a public charge. The court said: "The supervision over the admission of aliens to the mainland has been intrusted to the Commissioner General of Immigration, while the supervision of the admission of aliens to the Philippines is under the control of the Secretary of War. It is not a fair statement of the situation to say that the proceedings of the Immigration Department here sought to be reviewed is an attempt on the part of the immigration officers to review the action of the Secretary of War in admitting these aliens at the port of Manila. Had the aliens been content to remain in the Philippines, to which place alone the Secretary of War had power to admit them, no question of

their right to do so could have been moved by the immigration authorities. But when they left the Philippines for the mainland they left the only place to which they had been admitted, and the only place to which those admitting them had any authority to admit them, and when they reached the mainland they were naturally confronted by those whose duty it is to see that no alien shall be admitted thereto who is likely to become a public charge. I am satisfied therefore that the action of the authorities at Manila is not conclusive upon the immigration officers on the mainland, and while the law is, in its present form, very uncertain and unsatisfactory, I am of the opinion that, whether we call it exclusion or expulsion, the immigration officers may prevent the entry to the mainland of aliens who have heretofore been permitted to land at Manila for any reason which would lawfully operate to prevent their landing here, in the first instance, if they had never gone near the Philippines. If they so have the power to exclude, as the aliens appear to have had a fair hearing, the fact that this was done under a warrant of arrest is immaterial."

IV. "ALIEN"

Alien defined.—An alien has been defined to be "one born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws." *Low Wah Suey v. Backus*, (1912) 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165.

"Aliens" as used in Immigration Act.—It is now settled that the term "aliens" as used in this Act, includes not only "alien immigrants" but every alien irrespective of any previous residence or domicile in the United States. "Aliens" returning after a temporary absence are therefore as much subject to the provisions of this section as those entering for the first time. *Lapina v. Williams*, (1914) 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 515, *affirming Ex p. Hoffman*, (C. C. A. 2d Cir. 1910) 178 Fed. 839, 103 C. C. A. 327.

Prior to the decision in the foregoing case of *Lapina v. Williams* there was some conflict in the construction of the word "aliens." The early immigration acts used the words "alien immigrants" and the courts held uniformly that they did not affect the rights of alien residents. But the word "immigrants" did not appear after the word "alien" in the Acts of 1903 and 1907, and the question arose as to the precise signification of the term "alien." Thus in *U. S. v. Nakashima*, (C. C. A. 9th Cir. 1908) 160 Fed. 842, 87 C. C. A. 646, under the Act of 1903, the court held that it was not the intent of Congress to change the signification of the term and that it retained

the same meaning as had formerly been accorded it by interpretation of the courts, that is, it pertained to alien immigrants, not to alien residents. A like question arose in *U. S. v. Suekichi*, (C. C. A. 9th Cir. 1912) 199 Fed. 750, 118 C. C. A. 188, under the Act of 1907, and the court following the Nakashima case held that the term "aliens" had reference to alien immigrants and not to alien residents. See also *In re Buchsbaum*, (E. D. Pa. 1905) 141 Fed. 221; *U. S. v. Rodgers*, (C. C. A. 3d Cir. 1911) 191 Fed. 970, 112 C. C. A. 382. On the other hand, in *U. S. v. Tsurukichi Nakao*, (C. C. A. 9th Cir. 1914) 217 Fed. 49, 133 C. C. A. 35, and in *U. S. v. Tsunezo Kusano*, (C. C. A. 9th Cir. 1914) 217 Fed. 50, 133 C. C. A. 36, it was held that this section applied to an alien who having remained in the United States for more than three years after first entry and having gone abroad for a temporary purpose, with the intention of returning again, seeks admittance to the United States. In *Lapina v. Williams*, *supra*, the Supreme Court, after reviewing the legislative history of various immigration acts, and discussing the elimination of the word "immigrant" and other equivalent qualifying phrases, concluded that Congress in the Act of 1903 sufficiently expressed, and in the Act of 1907 reiterated, the purpose of applying the prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country.

Where an alien arrived by water at the port of New York and was subject to deportation, as belonging to one of the classes of aliens whose entry is prohibited, it was held to be no defense to his deportation that he had three years before arrived in the United States by water, and had remained for four months, during which he bought a farm and took out his first naturalization papers, and since his second arrival he had contracted marriage in the United States. This case was under the Act of 1903. *In re Kliebs*, (1904) 128 Fed. 656.

Aliens not destined for United States.

—The immigration laws apply only to aliens applying for landing within the United States as their destination, so that an alien listed on a ship's manifest and ticketed for Halifax, on being refused admission to enter Canada, not having disavowed any intention to land there, and not having questioned the jurisdiction of the Dominion government in directing his deportation, was not entitled to his release on habeas corpus from the custody of the officers of the steamship while temporarily in port in the United States pending his deportation to the place from whence he came in accordance with the

direction of the Dominion. *U. S. v. Fielding*, (1909) 175 Fed. 290.

Crews of vessels.—These statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to the ports of the United States, who come with no purpose to reside therein, but with the intention of leaving again, on that or some other vessel, for the port of shipment, or some other foreign port in the course of her trade. *U. S. v. Burke*, (1899) 99 Fed. 895 (construing the corresponding section of the Act of 1891). See also (1901) 23 Op. Atty-Gen. 522.

When a stowaway became a duly enrolled seaman, and signed articles for the voyage, the master of the vessel was not rendered liable under this statute for his desertion while in port. The seaman's legal status is not that of an immigrant but of a deserter. This decision was under the Act of 1891. *U. S. v. Sandrey*, (1891) 48 Fed. 550.

Returning cattlemen, being resident aliens and not "alien immigrants" or "aliens immigrating," should be admitted, if not for any other reason excluded persons, and the master of a vessel is not liable to a fine imposed by this statute if he has not entered such aliens' return on an immigrant list as provided by the statute. (1900) 23 Op. Atty-Gen. 278, construing the Act of 1891.

V. PERSONS LIKELY TO BECOME A PUBLIC CHARGE

Rule stated.—The term "persons likely to become a public charge" is not limited to paupers or those liable to become such; "paupers" are mentioned in a separate class. *Lam Fung Yen v. Frick*, (C. C. A. 6th Cir. 1916) 233 Fed. 393, 147 C. C. A. 329, following the construction in *U. S. v. Williams*, (S. D. N. Y. 1910) 175 Fed. 274, where it was construed as including "not only those persons who through misfortune cannot be self-supporting, but also those who will not undertake honest pursuits, and who are likely to become periodically the inmates of prisons."

An alien cannot be declared a public charge on the ground that the labor market in the city of his immediate destination is overstocked. *Gegiow v. Uhl*, (1915) 239 U. S. 3, 36 S. Ct. 2, 60 U. S. (L. ed.) 114, *reversing* (C. C. A. 2d Cir. 1914) 215 Fed. 573, 131 C. C. A. 641, wherein the court said: "The petitioners are Russians seeking to enter the United States. They have been detained for deportation by the Acting Commissioner of Immigration and have sued out a writ of habeas corpus. The objection relied upon in the return is that the petitioners were 'likely to become public charges for the following, among other reasons: That they arrived here with very little money, [forty dollars and twenty-five dollars, respectively,] and are bound for Portland,

Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded,' etc. We assume the report to be candid, and, if so, it shows that the only ground for the order was the state of the labor market at Portland at that time; the amount of money possessed and ignorance of our language being thrown in only as make-weights. . . . In the Act of February 20, 1907, ch. 134, § 2, 34 Stat. 898, as amended by the Act of March 28, 1910, ch. 123, § 1, 36 Stat. 263, determining who shall be excluded, 'Persons likely to become a public charge' are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes and so forth. The persons enumerated in short are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions unless the one phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after. The statute deals with admission to the United States, not to Portland, and in § 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked. Yet, as officers of the general government, they would seem to be more concerned with that than with the conditions of any particular city or state. Detriment to labor conditions is allowed to be considered in § 1, but it is confined to those in the continental territory of the United States and the matter is to be determined by the President. We cannot suppose that so much greater a power was entrusted by implication in the same act to every commissioner of immigration, even though subject to appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge."

Under the Act of 1882, it was held that the words "unable to take care of himself or herself without becoming a public charge," did not have reference to the passenger's personal efforts alone. "The law intends those only who are likely to 'become a public charge,' because they can neither take care of themselves, nor are under the charge or protection of any other person who, by natural relation, or by assumed responsibility, furnishes reasonable assurance that they will not be-

come a charge upon the public." *In re Day*, (1886) 27 Fed. 680.

A native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States by the treaty with Spain, of April 11, 1899, 30 Stat. L. 1754 (titles PORTO RICO; TREATIES), was held not to be, upon her arrival at the port of New York, an alien immigrant, within the meaning of the Act of Congress of March 3, 1891, providing for the detention and deportation of alien immigrants likely to become public charges. *Gonzales v. Williams*, (1904) 192 U. S. 1, 24 S. Ct. 177, 48 U. S. (L. ed.) 317.

Married women.—Where the relator was married to her husband in Cuba, and he had already entered the United States and was employed, earning daily wages sufficient to prevent himself and his wife from becoming public charges, and both were strong, healthy, and intelligent, it was held that the relator was also entitled to enter. *U. S. v. Redfern*, (1910) 180 Fed. 500.

Detention of injured seaman in hospital.—An alien seaman injured aboard a British vessel, and sent ashore to a hospital for treatment through the British consul, cannot be detained by the hospital authorities against his wish, on the ground that he is not cured and is liable to become a public charge, and that the consul directed his detention until he was cured so that he might be returned to the port from which he came, and he will be discharged on habeas corpus. This case was under the corresponding section of the Act of 1903. *In re Carlsen*, (1904) 130 Fed. 379.

For evidence held insufficient to support a finding that an alien was likely to become a public charge, see *Greenwood v. Frick*, (C. C. A. 6th Cir. 1916) 233 Fed. 629, 147 C. C. A. 437.

VI. PERSONS COMMITTING CRIME INVOLVING MORAL TURPITUDE

Time of admission of guilt.—The provision of this section, excluding persons who admit having committed a crime involving moral turpitude, applies to admissions made after entry into the country as well as prior to entry. *U. S. v. Williams*, (C. C. A. 2d Cir. 1912) 200 Fed. 538, 118 C. C. A. 632.

Conviction of crime in foreign country after admission.—The provisions of this section excluding from admission persons "who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude," and of section 20 requiring the deportation of any alien who shall enter the United States in violation of law, do not authorize the deportation of an alien because of his conviction of a felony in the country from which he came after his admission into the United States. *Ex p. Koerner*, (1909) 176 Fed. 478.

Convicts.—"The relators, by their own admission, were found guilty in the country from which they came of an assault with a deadly weapon. They were sentenced to two and four months' imprisonment, respectively, and have served their terms. They are clearly convicts, within the meaning of the Act regulating immigration." This case was under the corresponding section of the Act of 1891. *In re Aliano*, (1890) 43 Fed. 517.

Moral turpitude.—In *U. S. v. Uhl*, (S. D. N. Y. 1913) 203 Fed. 152, which was a habeas corpus proceeding, it appeared that the petitioner was an alien seeking admission to this country and it was established before the immigration officials that he had been convicted in England of the offense of criminal libel in that he had published defamatory statements regarding the king. The officials went further, examined the report of the proceedings at the trial and determined therefrom that the acts of the petitioner involved moral turpitude. Thereupon they found that he had been convicted of a crime embracing it and ordered his exclusion. It was held that this was error, as the offense did not, in its inherent nature, involve moral turpitude and the petitioner was therefore released from custody. The court said: "In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available, and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of like crimes may be excluded although their particular acts evidence no immorality and that some who have been

convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws."

A conviction under a charge of having maliciously published a defamatory libel does not involve such moral turpitude as to exclude an alien. *U. S. v. Uhl*, (C. C. A. 2d Cir. 1914) 210 Fed. 860, 127 C. C. A. 422.

Various lapses from virtue, not amounting to prostitution, are not such misdemeanors involving moral turpitude as will exclude an alien woman in the absence of proof that any law was violated by her in the commission of such acts. *Ex p. Isojoki*, (N. D. Cal. 1915) 222 Fed. 151.

Evidence.—In *U. S. v. Williams*, (S. D. N. Y. 1913) 203 Fed. 155, which was a case involving the right of Cipriana Castro, late president of Venezuela, to enter this country, the court said: "The board of special inquiry has held, and its decision has been affirmed upon appeal to the Secretary of Commerce and Labor, that Gen. Castro shall be excluded because he has admitted the commission of a crime involving moral turpitude, viz., the murder of Gen. Paredes, and therefore falls within the excluded class of 'persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude.' It is to be noted that Congress has required in respect to this particular class of aliens proof of a specified kind and no other, viz., either a conviction in the country where the crime was committed or an admission by the alien. There is no pretense of any conviction, and I think ordinary proof is not sufficient. Testimony of unimpeached eye-witnesses that they had seen Gen. Castro kill Gen. Paredes with his own hand in cold blood would not only be insufficient, but would be wholly incompetent. Therefore telegrams passing between the state department and its representatives at Caracas upon which the board relied are not evidence whatever to connect Gen. Castro with the death of Gen. Paredes. When examined before the special board, he had the right to insist that the proof on this point be restricted to that required by the act, viz., his own admission. This provision must have been intended as a limitation upon the power of the immigration authorities. It deprives them of the right to try the question of guilt at all. So it is a privilege to aliens because it insures them against any such trial. This privilege is entirely taken away if an admission may be rested upon presumptions arising from the alien's refusing to answer questions on the subject when under examination. I think the

act contemplates an explicit and voluntary admission."

Exclusive power is given the immigration officials to determine what is satisfactory evidence under this section. U. S. v. Rodgers, (C. C. A. 3d Cir. 1911) 191 Fed. 970, 112 C. C. A. 382.

Proof that an alien, prior to his immigration, committed a single act of fornication or adultery in the country from which he emigrated, was held to be insufficient to justify his deportation as an alien having been convicted of or having admitted committing a felony or other crime or misdemeanor involving moral turpitude. U. S. v. Sibray, (1910) 178 Fed. 144.

For evidence held insufficient to support a finding that an alien had been convicted of an offense involving moral turpitude, see Greenwood v. Frick, (C. C. A. 8th Cir. 1916) 233 Fed. 629, 147 C. C. A. 437.

Effect of pardon.—Considering the provision of the Act of 1875 prohibiting the immigration of convicts, the Attorney-General ruled that the statute did not forbid the entry of one who had been found guilty of embezzlement and sentenced to imprisonment, had served a portion of the sentence, and been pardoned. The same effect—that it blots out the offense—must be given to a pardon by a foreign state of an offense within its jurisdiction as would be given to a pardon in this country. (1885) 18 Op. Atty.-Gen. 239.

VII. PROSTITUTES OR PERSONS ATTEMPTING TO BRING THEM IN

Persons "procuring or attempting to bring in prostitutes," etc.—"Section 2 declares that certain classes of aliens shall be excluded from admission into the United States, and among them 'persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose.' This section applies only where an alien brings in a woman or girl for the purpose indicated. It does not declare that the woman or girl need be an alien." Lewis v. Frick, (1914) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967, *affirming* (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493.

Prostitute—wife of citizen.—Where an alien female was found practicing prostitution in the United States within three years after her entry, it was held that she was subject to deportation though her status at the time of entry as the wife of a citizen of the United States entitled her to enter. Looe Shee v. North, (1909) 170 Fed. 566, 95 C. C. A. 646.

Evidence of prostitution.—Evidence that an alien female was found practicing prostitution within three years after her entry was held to be evidence that she was a prostitute when she entered the United

States, and was therefore subject to deportation as provided by this Act. Looe Shee v. North, (1909) 170 Fed. 566, 95 C. C. A. 646.

For evidence held insufficient to establish the offense of prostitution, see Chan Kam v. U. S., (C. C. A. 9th Cir. 1916) 232 Fed. 855, 147 C. C. A. 437, *reversing* (C. C. A. 9th Cir. 1916) 230 Fed. 990, 145 C. C. A. 184.

For evidence held sufficient to warrant a finding by the department that an alien woman was a prostitute, see Chu Tai Ngan v. Backus, (C. C. A. 9th Cir. 1915) 226 Fed. 446, 141 C. C. A. 276.

VIII. PERSONS SOLICITED TO MIGRATE

Contract of employment unnecessary.—The classes of aliens excluded by this section include aliens solicited or induced to immigrate by reason of offers or promises, even if there is no contract of employment. (1907) 26 Op. Atty.-Gen. 410.

Passage paid by state.—The payment of passage money of immigrants by a state with its funds is not prohibited by this section, but its payment with funds contributed by any society or association renders the immigrant liable to exclusion, even though the payment be made through the agency of the state or its officers, and although the immigrant would otherwise be entitled to admission. The same prohibition does not extend, however, to the payment of passage money by individuals, whether directly through the agency of a state, provided their action is, and is shown to be, in good faith individual, and not attended by such combination or concert of action as would make it substantially the act of an association or a society. (1907) 26 Op. Atty.-Gen. 199.

Promise of employment by state officer.—An alien who arrived at New Orleans from Cuba on Aug. 5, 1907, his passage money having been paid by an agent of the Louisiana State Board of Agriculture and Immigration out of funds appropriated by that state, the agent having assured the alien of employment upon his arrival, which assurance operated as a material, if not the principal, inducement to his immigration, the expectation being that the employer would loan the alien the sum so advanced for the reimbursement of the state, was held not to be entitled to admission to the United States. (1907) 26 Op. Atty.-Gen. 410.

"Contract laborer."—In U. S. v. Dwight Mfg. Co., (D. C. Mass. 1913) 210 Fed. 74, where it appeared the defendant was accused of assisting or encouraging an alien's migration by publishing an advertisement in Manchester, England, which held out to first class weavers the prospect of wages ranging in amount between specified limits, to be earned by working for the defendant at Baltic, Conn., the court, in holding that the declaration

sufficiently charged an offer of employment, so as to make such alien a "contract laborer" within this section, said: "An opinion is quoted rendered to the President in 1909 by the then Attorney General (27 Op. Atty.-Gen. 479) in which it is pointed out that the provisions of the Act of 1907 were passed because the courts had so construed previous acts as to require, in order to prove an alien a 'contract laborer,' proof that he came in pursuance of a completed contract previously entered into with him, and that Congress, regarding this as a defect, evidently intended to remedy it. It was said: 'The meaning of the words added in the act of 1907 does not require that their effect be given greater force than to cure the defect in the previous law, which it was the manifest purpose of the amendment to remedy; and the statute as thus amended could very properly be construed to prohibit only an offer or promise of employment which is of such definite character that an acceptance thereof would constitute a contract.' But the facts upon which this opinion was rendered did not present a case in which there was or was to be any offer or promise of employment to any of the aliens concerned, and their immigration was to be induced only by representations of the resources of Hawaii and the industrial conditions there existing. No court appears as yet either to have adopted or disapproved the construction suggested by the above opinion. The former acts did not make an alien a 'contract laborer,' and thereby put him into the excluded class, unless he was under or came to this country under a contract. The present act makes him a 'contract laborer' or not, according to the moving cause of his coming. Not only an agreement with him to perform labor in this country, but also an offer or promise of employment to perform such labor, are to make him a 'contract laborer,' if by such offer or promise he has been induced to migrate, or solicited to migrate; as well as if, in consequence of such agreement, he has been induced or solicited to migrate. A penal statute like this is indeed to be strictly construed, yet the language actually used by Congress must be interpreted according to its fair and obvious meaning. If, as this declaration alleges, the aliens named were in fact induced to migrate by offers no more specific as to terms and conditions, amounts to be paid, the character of the labor, or the terms of payment, than the offers described as above, I do not think the court could properly say that they were not 'contract laborers' within the act; nor do I see how the court can properly say that offers made in the terms alleged could not have induced any of them to migrate." See also *U. S. v. Dwight Mfg. Co.*, (D. C. Mass. 1913) 210 Fed. 79,

and *U. S. v. Dwight Mfg. Co.*, (D. C. Mass. 1913) 210 Fed. 81.

Deportation of contract laborers.—Neither the Immigration Act of 1903 nor this section authorizes the deportation as a contract laborer of an alien who entered the United States before the later Act took effect; the former containing no provision whatever in that regard, and the latter, while making such provision, also expressly providing, in section 28, that it shall not be construed to affect "any act, thing, or matter . . . done or existing" at the time of its taking effect, but that the same shall be governed by prior laws, which are continued in force for that purpose. *Botis v. Davies*, (1909) 173 Fed. 996.

An alien upon promise to employ him on arrival in this country at stipulated wages in a definite occupation, made by one who advanced him money for his passage, secured by mortgage on his property, and who accompanied him on his journey, came to this country, went to work for such person at the stipulated wages and designated occupation, repaid the advance out of his wages, and continued in the employment of the person who made the promise and advance for a year. It was held that he was a contract laborer, expressly excluded by this section. *Ex p. George*, (1910) 180 Fed. 785.

Lithographic artists as contract laborers.—In (1907) 26 Op. Atty.-Gen. 284, it was held that two lithographic artists, who came to the United States in pursuance of a contract of employment entered into with the American Lithographic Company, of New York, their passage being prepaid by that company, and who had been excluded upon the ground that their admission would be in violation of this section relating to contract labor, should be admitted, it being shown beyond reasonable doubt that there was not a sufficient number of lithographic artists in the country to meet the demands of business.

Superintendent of lumbering company.—An alien induced to come to the United States by promise of employment as superintendent of a lumbering company, conditioned that he must be a competent woodsman, logger, and mill man, and a first-class mechanic, does not come within the provisions of this section, provided the agreement does not require him to perform manual labor. The provisions of the statute are limited to manual labor, skilled or unskilled. (1909) 27 Op. Atty.-Gen. 383.

A contract to work as a chemist on a sugar plantation in Louisiana is not a contract to perform labor or service as prohibited by this statute (Act of 1885). *U. S. v. Laws*, (1896) 163 U. S. 258, 16 S. Ct. 998, 41 U. S. (L. ed.) 151.

An under coachman, who does no work on the farm, or in the garden, or in the

dairy, but, under the direction of his employer's family, performs services which minister exclusively to their personal comfort and enjoyment, is employed "strictly as a personal or domestic servant." This case was under the Act of 1885. *In re Howard*, (1894) 63 Fed. 263.

Learned profession.—Expert accountants are not members of a recognized learned profession within the meaning of the exception in this Act. *In re Ellis*, (1903) 124 Fed. 637.

A milliner was held not to be a "professional artist" within the meaning of the corresponding section of the Act of 1885. *U. S. v. Thompson*, (1889) 41 Fed. 28.

A contract to labor as a farm servant or dairyman does not bring an immigrant within the exception that the statute shall not apply to persons employed strictly as personal or domestic servants. This case was under the Act of 1885. *In re Cummings*, (1887) 32 Fed. 75.

New industry.—The Act of 1885 exempted skilled workmen engaged upon a new industry. Under that provision the manufacture of fine lace curtains not begun before the McKinley Tariff Law of 1890, and, according to the testimony, not firmly established at the time of trial of one indicted on the charge of importing contract labor contrary to law, was held to be a new industry. This decision was under the Act of 1885. *U. S. v. Bromiley*, (1893) 58 Fed. 554.

The manufacture of "French silk stockings," being a product differing in appearance, in certain useful qualities, and, to some extent, in the method of manufacture, from anything theretofore made, is to be called a new industry. The statute (provision in the Act of 1885, exempting skilled workmen employed upon a new industry) intends to except from the penalty therein denounced the manufacture of any strictly new product, whether it be or be not included within a general class of goods before produced. *U. S. v. McCallum*, (1891) 44 Fed. 745.

IX. CHILDREN

Children of naturalized parents.—Under Act of March 2, 1907, ch. 2534, § 5, 34 Stat. L. 1229 (title CITIZENSHIP), providing that a child born without the United States of alien parents shall be deemed a citizen by virtue of the naturalization of the parent taking place during the minority of the child, provided that the citizenship of such child shall begin when he begins to reside permanently in the United States, until a minor child of a naturalized parent has begun to reside permanently in the United States he is an alien, and he cannot begin so to reside if he belongs to a class of aliens debarred

from entry, and the naturalization of a father will not permit his minor child born abroad, and remaining in the country of his nativity until after the naturalization, to come into the United States if prohibited from entering by Act of Feb. 20, 1907, ch. 1134, given in the text, excluding from admission into the United States persons belonging to enumerated classes. *U. S. v. Rodgers*, (C. C. A. 1911) 185 Fed. 334, 107 C. C. A. 452, *affirmed* (1910) 182 Fed. 274.

Bond under section 2 for admission of alien children.—The fact that this section contains no direct provision for a bond for the admission of alien children under the age of 16 years does not preclude the acceptance of a bond for such purpose. The section provides for the admission of such children when accompanied by one or both parents at the discretion of the Secretary of Labor. And in the exercise of that discretion he clearly would have authority to condition their admission upon the giving of a bond conditioned on their attendance at public school until 16 years of age, that none of them during said period should perform any work interfering with such school attendance, that a quarterly report should be made to the commissioner of immigration and that none of the children should become a public charge. *Illinois Surety Co. v. U. S.*, (C. C. A. 2d Cir. 1916) 229 Fed. 527, 143 C. C. A. 595; *Illinois Surety Co. v. U. S.*, (C. C. A. 2d Cir. 1916) 229 Fed. 533, 143 C. C. A. 601.

X. BURDEN OF PROOF

Rule stated.—The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected. *U. S. v. Williams*, (S. D. N. Y. 1913) 203 Fed. 155.

While the payment of an immigrant's passage out of state funds does not itself require his exclusion, yet such payment operates to throw upon the immigrant the burden of showing that he does not come within any of the otherwise excluded classes, such as paupers, etc., specifically excluded by the Act. (1907) 26 Op. Atty-Gen. 410.

Under this section a person whose passage is paid by another must be prepared to show, not merely that he does not come within any of the categories of immigrants to be excluded, but also that his passage was not paid, directly or indirectly, by a corporation, association, society, municipality, or foreign government. (1907) 26 Op. Atty-Gen. 199.

SEC. 3. [Importation of aliens for prostitution or other immoral purpose — punishment — deportation — attempts to return — testimony of husband or wife.] That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. Jurisdiction for the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said importation by the person or persons accused, or in any district in which a violation of any of the foregoing provisions of this section occur. Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. That any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and shall be imprisoned for not more than two years. Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this Act. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against a wife or husband. [34 Stat. L. 899, as amended by 36 Stat. L. 264.]

This section was amended to read as above given by an Act of March 26, 1910, ch. 128, § 2, 36 Stat. L. 264. As originally enacted it was as follows:

"SEC. 3. That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this Act." [34 Stat. L. 899.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Somewhat similar provisions were made by the Act of March 3, 1875, ch. 141, § 3, 18 Stat. L. 477, which were superseded by the Act of March 3, 1903, ch. 1012, § 3, 32 Stat. L. 1214, which was repealed by section 43 of this Act, *infra*, p. 699.

Constitutionality.—In *Zakonaite v. Wolf*, (1912) 226 U. S. 272, 33 S. Ct. 31, 57 U. S. (L. ed.) 218, the constitutionality of this section was attacked because violative of the guaranties that no person shall be deprived of life, liberty or property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, as contained in the Fifth and Sixth Amendments. The court, in sustaining the constitutionality of the section, said: "As to the first point, an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the secretary's conclusion of fact. That being so, and the appellant having had a fair hearing, the findings are not subject to review by the courts. With respect to the second point little more need be said. It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the Act in question. The appellant raises some other constitutional objections, viz.: that the Immigration Act vests in the federal authorities the power to try an immigrant for a violation of the penal laws of the state of which he has become a resident, and so interferes with the police powers of the state; that the Act vests judicial powers in an executive branch of the government; that it violates the constitutional guaranty of the privilege of the writ of habeas corpus, and the like. These are without substance, and require no discussion." See also *Choy Gum v. Bockus*, (C. C. A. 9th Cir. 1915) 223 Fed. 487, 139 C. C. A. 35. In *Bugajewitz v. Adams*, (1913) 228 U. S. 585, 33 S. Ct. 607, 57 U. S. (L. ed.) 978, Mr. Justice Holmes, having before him the construction and constitutionality of this statute, said: "By the Act of February 20, 1907, c. 1134, § 3, 34 Stat. 898, 899, any alien woman found practicing prostitution within three years after she should have

entered the United States was to be deported 'as provided by sections twenty and twenty-one of this Act.' This section was amended by the Act of March 26, 1910, c. 128, § 2, and the limitation of three years was stricken out, but the amendment still refers to §§ 20, 21, and orders deportation 'in the manner provided by' §§ 20, 21. The beginning of these two sections provides for the taking into custody of aliens subject to removal, within three years from entry, and so it has been argued in other cases that the three-year limitation still holds good. The construction of the amendment was not relied on here, but before we can deal with the constitutional question it becomes necessary to dispose of that point. We are of opinion that the effect of striking out the three-year clause from § 3 is not changed by the reference to §§ 20, 21. The change in the phraseology of the reference indicates the narrowed purpose. The prostitute is to be deported, not 'as provided' but 'in the manner provided' in §§ 20, 21. These sections provide the means for securing deportation, and it still was proper to point to them for that. . . . The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want." See also *Schwartz v. Adams*, (1913) 228 U. S. 592, 33 S. Ct. 609, 57 U. S. (L. ed.) 980.

The provision of this section that "any alien . . . who shall receive, share in, or derive benefit from any part of the earnings of any prostitute . . . shall be deemed to be unlawfully within the United States and shall be deported, . . ." is not unconstitutional as an infringement of the police power of the states. *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701, 115 C. C. A. 501.

The provision in this section for the deportation of any alien woman who, after her immigration into the United States, shall be found practicing prostitution therein, regardless of the length of time which has elapsed since her entry, is within the constitutional power of Congress, and valid. *U. S. v. Wejs*, (1910) 181 Fed. 860; *U. S. v. Williams*, (1910) 183 Fed. 904. See also *Ea p. Gouyet*, (D. C. Mont. 1909) 175 Fed. 230.

Validity as to maintenance of prostitutes.—Section 3 of the Act of 1907, as originally enacted, made it an offense to

harbor for the purpose of prostitution any alien woman or girl. This part of the Act was declared unconstitutional, as inimical to the police powers of the state, in *Keller v. U. S.*, (1909) 213 U. S. 138, 29 S. Ct. 470, 53 U. S. (L. ed.) 737, 16 Ann. Cas. 1066, followed by *Ex p. Gouyet*, (D. C. Mont. 1909) 175 Fed. 230, and *Ex p. Lair*, (D. C. Kan. 1910) 177 Fed. 789, reversed (C. C. A. 8th Cir. 1912) 195 Fed. 47, 115 C. C. A. 49. After the decision by the Supreme Court in the *Keller* case, Congress amended the Act by adding the words "in pursuance of such illegal importation" and the amendatory Act purged the old statute of the objection. *U. S. v. Krsteff*, (S. D. Ill. 1911) 185 Fed. 201; *U. S. v. Tsuji Suekichi*, (C. C. A. 9th Cir. 1912) 199 Fed. 750, 118 C. C. A. 188.

For the purpose of providing a constitutional law, Congress, by the amendment of 1910, inserted the additional words "in pursuance of such illegal importation" evidently with the idea of finding constitutional support for the enactment in the power of Congress to regulate the migration or importation of aliens. *U. S. v. Lavoie*, (W. D. Wash. 1910) 182 Fed. 943.

Interpretation.—The words "or for any other immoral purpose" in the above section are broad enough to include the case of one who imports an alien woman into the United States with intent that she shall live with him as his concubine; and an indictment omitting any averment as to prostitution *eo nomine*, but alleging an importation for the purpose of living in concubinage with the importer, is sufficient to charge an offense under the statute. *U. S. v. Bitty*, (1908) 208 U. S. 393, 28 S. Ct. 396, 52 U. S. (L. ed.) 543, reversing (1907) 155 Fed. 938.

Element of offenses.—To warrant the conviction of a defendant charged with a violation of this section where the charge is that of holding a woman so imported by the defendant and another for the purposes of prostitution, it must be shown that the defendant, either alone or in connection with such other, knowingly and wilfully imported, or caused to be imported, such woman for the purposes of prostitution, and thereafter, to effect the object of such illegal importation, knowingly and wilfully held such woman for such purposes. It is not necessary that the defendant should have detained such woman by physical force, but it is sufficient to constitute a holding within the meaning of the statute if such woman was detained for the purpose of prostitution by physical means applied to her either directly or indirectly by defendant, or by threats, express or implied, directly made to her by defendant, or by commands made to her directly or indirectly by defendant, and calculated and operating to restrain her freedom of action

and will. To warrant a conviction for attempting to hold the same proof is required, except that it is not necessary that the means used should have been successful. This decision was under the Act of 1903. *U. S. v. Giuliani*, (1906) 147 Fed. 594.

Immoral purpose.—An indictment for keeping, maintaining, controlling, supporting, or harboring an alien female pursuant to an illegal importation for an immoral purpose, alleging that such purpose was unlawful cohabitation and adultery, sufficiently charged that the purpose was immoral. *U. S. v. Krsteff*, (1911) 185 Fed. 201.

Mere unlawful cohabitation within a district with an alien woman imported for immoral purposes is not in violation of this section prohibiting the holding or attempt to hold any alien woman or girl for immoral purposes in pursuance of an illegal importation; Congress having no jurisdiction to control the morals of alien women within the United States unless in some manner connected with unlawful importation. *U. S. v. Krsteff*, (1911) 185 Fed. 201.

An alien employed as a cook in a house of prostitution is squarely within the class denounced by this section. *Ex p. Leo Shew Ung*, (N. D. Cal. 1914) 210 Fed. 990.

The words "in any way assists, protects or promises to protect from arrest" do not mean merely in any way assists from arrest, as by furnishing money to escape to one who is threatened with arrest. The intention of the statute was to declare unlawful the presence in this country of any alien who in any way assists a prostitute to practice prostitution, or toward its practice. *Ex p. Young*, (N. D. Wash. 1914) 211 Fed. 370.

Effect of marriage to citizen.—An alien prostitute who entered the United States and was found an inmate of a house of ill fame and practicing prostitution within three years after landing, having been since lawfully married to a native-born citizen of the United States, is to be deemed a citizen, and cannot be deported under the immigration laws for her conduct previous to her marriage. (1909) 27 Op. Atty.-Gen. 507.

But the Secretary of Commerce and Labor has authority to consider the evidence connected with the marriage of an alien prostitute to a citizen of the United States, and, subject to the principle that the validity of the marriage is to be determined by the law of the place where the contract is made, may deport the woman if the facts justify the conclusion that the ceremony was entered into merely for the purpose of evading the immigration law, and with no intention on the part of the parties to live together as husband and wife. (1909) 27 Op. Atty.-Gen. 578.

Woman previously domiciled in United States.—In a prosecution for the importation of an alien woman for the purpose of prostitution, in violation of this section, it is not a defense that such woman had previously been domiciled for a time in the United States and had departed therefrom with the intention of returning. *U. S. v. Villet*, (1909) 173 Fed. 500.

Return after temporary absence.—When an alien prostitute once steps beyond the borders of the United States for any purpose, however temporary or transitory, she has no right to return here to resume her illegal calling. *Ex p. Pouliot*, (E. D. Wash. 1912) 196 Fed. 437.

"Any alien" as including other than woman or girl.—"Section 3 prohibits the importation of 'any alien' for the purpose of prostitution or for any other immoral purpose. Of course, in order to constitute an offense against this section, the person brought in must be an alien. But the person need not be a woman or girl. This is clear from the changes made by Congress in § 3 when amending it in 1910. The section as it stood in the 1907 Act (34 Stat. L. 898, 899, ch. 1134) forbade and rendered felonious the importation or attempt to import 'any alien woman or girl for the purpose of prostitution, or for any other immoral purpose;' the phrase 'alien woman or girl' being repeated in other clauses of the section; and one of the principal changes made in 1910 (36 Stat. L. 263, 264, ch. 128) was to eliminate the words 'woman or girl,' so that now the section prohibits the importation of 'any alien' for the purposes referred to, and declares that whoever shall import or attempt to import 'any alien for the purpose,' etc., or shall hold or attempt to hold 'any alien' for any such purpose, etc., or shall keep, etc., in pursuance of such illegal importation 'any alien,' shall be deemed guilty of a felony. The purpose of the amendment is not to be mistaken. Moreover, the offense is made a felony irrespective of whether it is committed by an alien or by a citizen of this country, the only difference being that by one of the clauses any alien convicted under this section is, after the expiration of his sentence, to be returned to the country whence he came, or of which he is a subject or a citizen." *Lewis v. Frick*, (1914) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967, *affirming* (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493.

Time for deportation unlimited.—Under the provision in this amended section that "any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States . . . shall be deemed to be unlawfully within the

United States and shall be deported in the manner provided by sections 20 and 21 of this Act," there is no limitation of the time within which an alien prostitute may be deported to three years from the time of her entry as was the case under the section before amendment, it being one of the purposes of the amendment to abolish such limitation as to the class of aliens referred to therein; and the amended section, while not retrospective, applies to any alien woman found so conducting herself as to come within its provisions since its enactment, regardless of her previous conduct or of the time of her entry into the country. *U. S. v. Weis*, (1910) 181 Fed. 860; *U. S. v. Prentiss*, (1910) 182 Fed. 894; *U. S. v. Williams*, (S. D. N. Y. 1910) 183 Fed. 904; *U. S. v. North German Lloyd Steamship Co.*, (1911) 185 Fed. 158; *Sire v. Berkshire*, (W. D. Tex. 1911) 185 Fed. 967; *Ladaux v. Berkshire*, (W. D. Tex. 1911) 185 Fed. 971; *Chomel v. U. S.*, (C. C. A. 7th Cir. 1911) 192 Fed. 117, 112 C. C. A. 461; *Ex p. Cardonnel*, (N. D. Cal. 1912) 197 Fed. 774; *Ex p. Garcia*, (N. D. Cal. 1913) 205 Fed. 53; *U. S. v. Czeslicki*, (M. D. Pa. 1913) 209 Fed. 496; *Choy Gum v. Backus*, (C. C. A. 9th Cir. 1915) 223 Fed. 487, 139 C. C. A. 35. And see *Bugajewitz v. Adams*, (1913) 228 U. S. 585, 33 S. Ct. 607, 57 U. S. (L. ed.) 978; *Schwartz v. Adams*, (1913) 228 U. S. 592, 33 S. Ct. 609, 57 U. S. (L. ed.) 980.

Amendment not retroactive.—In *U. S. v. Tsuji Suekichi*, (C. C. A. 9th Cir. 1912) 199 Fed. 750, 118 C. C. A. 188, the court said: "It is perfectly manifest, from a careful reading of the amendatory Act, that it is not intended to be retroactive. It prescribes that any alien who shall do the things therein denounced shall be deemed to be unlawfully within the United States, looking to the future. Then it provides that any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section (section 3 of the Act of 1910), attempt to return to or to enter the United States, shall be deemed guilty of a misdemeanor, and any alien who shall be convicted under any of the provisions of this section shall at the expiration of his sentence be taken into custody and returned to the country whence he came, etc., all providing with reference to future conduct, and not in any way past. 'Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' Applying the rule here, there can be no doubt that it was not the intentment of Congress to make section 3 of the Act of 1910 retroactive in its operation." To the same effect see *U. S. v. International Mercantile*

Marine Co., (E. D. Pa. 1913) 204 Fed. 702. See also section 20 of this Act, *infra*, p. 673, and the notes thereto.

Not retrospective as to carrier.—This section abrogates the three-year time limit for deportation of aliens at the expense of the carrier by which they unlawfully entered as provided by the Act of March 3, 1903, ch. 1012, sections 19 and 21, 32 Stat. L. 1218, but does not operate retroactively and hence does not apply to an alien prostitute where the three-year limit expired before the passage of this amendment. *U. S. v. North German Lloyd Steamship Co.*, (1911) 186 Fed. 672.

Vessel owner's liability after three years.—The amendment of 1910 struck out the three-year limitation. When, therefore, the time limit for deportation of this particular class of aliens was removed and they were ordered to be deported "in the manner provided in section 20," the three-year period mentioned in the later section was to be disregarded for all purposes. In other words, this particular class is to be deported at any time from the port of deportation at the expense of the owners of the vessel which brought them in. *Oceanic Steam Nav. Co. v. U. S.*, (C. C. A. 2d Cir. 1916) 232 U. S. 591, 146 C. C. A. 549.

Venue.—Where an indictment charged an illegal importation into the United States of an alien woman for an immoral purpose, and showed that the importation was complete at the port where the alien was landed, the venue was in that district, and could not be laid in another district to which accused and the alien thereafter went. *U. S. v. Krsteff*, (1911) 185 Fed. 201.

In *U. S. v. Lavoie*, (1910) 182 Fed. 943, it appeared that the accused imported a female alien, who was a prostitute, from British Columbia into the northern district of California in March, 1908, visited her in San Francisco occasionally, where she continued to practice prostitution, but after the spring of 1908 their relations were interrupted until 1910, when defendant again met her in Seattle, in the western district of Washington, and renewed illicit relations with her. It was held that such relations had in Washington were not "pursuant to the illegal importation," there being no continuity of association, and hence defendant could not be convicted of keeping or maintaining in the Washington district, but was only guilty of importing, for which he was only subject to prosecution in the northern district of California. See also *U. S. v. Lair*, (C. C. A. 8th Cir. 1912) 195 Fed. 47, 115 C. C. A. 49, *reversing* (D. C. Kan. 1910) 177 Fed. 789, which was a prosecution under the Act of 1903 after the Act of 1907 became effective.

Fair trial.—Where certain alien prostitutes on being arrested in deportation proceedings were each granted a hearing on the question of deportation, and there voluntarily testified, and each admitted facts essential to authorize an order of deportation, an objection that they were not accorded a fair trial was untenable. *U. S. v. Williams*, (S. D. N. Y. 1910) 183 Fed. 904.

Intimidation by inspectors.—In *U. S. v. Williams*, (1911) 185 Fed. 598, the evidence was held to show that aliens detained pending proceedings for their deportation were, by the influence of the inspector who was hearing their case, persuaded and intimidated from exercising their right to be represented by counsel, under the rules prescribed by the Secretary of Commerce and Labor providing that in such cases the alien arrested shall be given a hearing before the Commissioner of Immigration or an immigration inspector, and that in such stage of the hearing as the commissioner or inspector shall deem proper the alien shall be apprised that he may thereafter be represented by counsel, who, if selected, shall be permitted to be present during the further conduct of the hearing, so that the proceedings were fatally irregular, and the order of the Secretary of Commerce and Labor deporting such aliens based upon the proceedings was invalid, and the detention of the aliens thereunder illegal.

For evidence held to be insufficient to support a finding and recommendation of deportation under this section, see *Whitfield v. Hanges*, (C. C. A. 8th Cir. 1915) 222 Fed. 745, 138 C. C. A. 199, *modifying* order in (N. D. Ia. 1913) 209 Fed. 675.

Res judicata.—Although a person is acquitted under an indictment based on this section the Secretary of Commerce and Labor may proceed against the person under section 2 as the doctrine of *res judicata* does not apply. *Lewis v. Frick*, (1914) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967, *affirming* (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493.

Indictment—Under section 3 of the Act of 1875.—An indictment which stated that the defendants imported into a certain district in the United States, from a certain foreign place, certain named women, was held to be a sufficient averment of importation; it was held not necessary to state the facts constituting the ultimate fact of importation. *U. S. v. Johnson*, (C. C. N. Y. 1881) 7 Fed. 453; *U. S. v. Pagliano*, (C. C. N. Y. 1893) 53 Fed. 1001.

The use of the word "prostitution" was held sufficiently definite without specifying the kind of prostitution referred to. *U. S. v. Pagliano*, (C. C. N. Y. 1893) 53 Fed. 1001.

The place at which women are to be used for the purposes of prostitution need not be stated in the indictment. U. S. v. Pagliano, (C. C. N. C. 1893) 53 Fed. 1001.

That the importation was in pursuance of an agreement made prior to the importation need not be alleged in the indictment. U. S. v. Pagliano, (C. C. N. Y. 1893) 53 Fed. 1001.

The use of the words "did import and bring" in the indictment, whereas the statute used the word "import" only, was not objectionable. U. S. v. Pagliano, (C. C. N. Y. 1893) 53 Fed. 1001.

Scope of application.—The provisions of the corresponding section of the Act of 1875 were held to apply to all countries, Oriental and other. U. S. v. Johnson, (1881) 7 Fed. 453.

SEC. 4. [Importing contract labor a misdemeanor.] That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act. [34 Stat. L. 900.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1903, ch. 1012, § 4, 32 Stat. L. 1214, which was repealed by section 43 of this Act, *infra*, p. 699.

History of section.—This section is largely copied from the like-numbered section of the Act of March 3, 1903, ch. 1012, 32 Stat. L. 1213, the words "shall be unlawful" being changed to "shall be a misdemeanor." U. S. v. Regan, (1914) 232 U. S. 37, 34 S. Ct. 213, 58 U. S. (L. ed.) 494.

Constitutional.—The somewhat similar provision of the earlier Act of 1885, wherein the words "shall be unlawful" were used instead of "shall be a misdemeanor" were held to be a valid exercise of the power of Congress "to regulate commerce with foreign nations." U. S. v. Craig, (1886) 28 Fed. 795; *In re Florio*, (1890) 43 Fed. 114.

Construction of statute.—This section being penal in its nature must be strictly construed. *Grant Bros. Constr. Co. v. U. S.*, (1911) 13 Ariz. 388, 114 Pac. 955, *affirmed* (1914) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776.

Construing a similar provision of the Act of 1903 it was held that a person is not liable for penalty under this and the following section, unless in addition to assisting, encouraging, or soliciting, it is also charged that the immigration is "by reason" of an offer, solicitation, promise, or agreement to or with him, or that the immigration has been in order that the immigrant may perform labor or service by reason of an offer, solicitation, promise, or agreement to or with him. *Darnborough v. Benn.* (C. C. A. 1911) 187 Fed. 580, 109 C. C. A. 270.

Every violation of the statute must be based upon the existence of a contract or agreement, parol or special, express or implied, made previous to the importation or migration, to perform labor or service in the United States, its territories, or the District of Columbia. This

decision was rendered under the corresponding section of the Act of 1895, which included the Territories and the District of Columbia in its provisions. *Moller v. U. S.*, (C. C. A. 1893) 57 Fed. 490, 13 U. S. App. 472, 6 C. C. A. 459. But see *U. S. v. Baltic Mills Co.*, (C. C. A. 2d Cir. 1903) 124 Fed. 38, 59 C. C. A. 558, as to the necessity, under later statutes, of proving that there had been a contract with the alien made previous to the importation or migration.

Construed with section 5.—Although this section defines a crime without prescribing the punishment therefor, it is not a nullity. It should be read together with section 5 (*infra*, p. 656) as if both constituted one section, when it becomes clear that the punishment for the misdemeanors is provided for. The provision of a civil does not exclude a criminal remedy. *Millon v. U. S.*, (C. C. A. 2d Cir. 1914) 219 Fed. 186, 134 C. C. A. 560, *following* U. S. v. Stevenson, (1909) 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153.

In an earlier case, *U. S. v. Tsokas*, (S. D. N. Y. 1908) 163 Fed. 129, it was held that the word "misdemeanor" imports a crime and defines an offense for conspiracy to commit which an indictment will lie under R. S. sec. 5440 (now section 37 of the Penal Code, title PENAL LAWS), notwithstanding the fact that no punishment for the completed crime itself is provided within the limits of the Act.

The gist of the offense consists in the prepayment of transportation and the offense is committed when that is done, whether the contract laborers succeed in getting into the United States or not. *U. S. v. New York Cent., etc., R. Co.*, (N. D. N. Y. 1916) 232 Fed. 179.

Issuing pass to alien contract laborer.—The issuing and delivering of a pass to

an alien contract laborer by a corporation owning and operating lines reaching into a foreign country is a prepayment of transportation within the meaning of this section. *U. S. v. New York Cent., etc., R. Co.*, (N. D. N. Y. 1916) 232 Fed. 179.

Contract laborers.—In *Botis v. Davies*, (1909) 173 Fed. 996, it appeared that the petitioner, who was a Greek boy then sixteen years old, wrote to a distant relative in Chicago to know if the latter would give him employment if he came to the United States, and receiving an affirmative answer he came; his father paying his passage. On his arrival the relative gave him work at fifteen dollars per month and board, where he remained for fourteen months, and then bought a horse and wagon and started in business for himself as a fruit peddler. He had no contract for employment before he came, and no wages were mentioned, and he would have come merely on the relative's promise to give him a home until he found employment. It was held, under the Act of 1885, that he did not come as a "contract laborer" within the meaning of that Act.

Farm laborers.—The bringing of an alien into the United States under contract to work on a farm as a laborer, under the direction of others, was held to be within the prohibition of the corresponding section of the Act of 1885. *U. S. v. Parsons*, (C. C. A. 1904) 130 Fed. 681, 66 C. C. A. 129.

Cheap unskilled manual labor.—The purpose of the statute was to stay the influx of cheap, unskilled manual labor, and it does not include the case of one who was engaged to work as a draper, window dresser, and dry-goods clerk. This case was under the Act of 1885. *U. S. v. Gay*, (C. C. A. 1899) 95 Fed. 226, 37 C. C. A. 46. But see (1901) 23 Op. Atty.-Gen. 381.

Church minister.—The statute does not include the case of a contract made by an incorporated religious society with an alien, by which he was to remove to this country and enter into the service of the society as its rector and pastor. Decided under the Act of 1885. *Holy Trinity Church v. U. S.*, (1892) 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226. But see (1901) 23 Op. Atty.-Gen. 381.

Alien lacemakers should be refused a landing when they come in violation of the alien contract labor laws. The prohibition of section 1 of the Act of 1885, and section 1 of the Act of March 3, 1891, includes all persons who are in the category of skilled or unskilled manual laborers, if not all persons who are not fairly within the classification of the recognized learned professions or other specific exceptions named. "It may be . . . that the court's logic in the *Gay* case (*U. S. v. Gay*, (C. C. A. 7th Cir. 1899) 95 Fed. 226, 37 C. C. A. 46) and its con-

struction of the scope of the decision in the *Trinity Church* case (*Holy Trinity Church v. U. S.*, (1892) 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226) were pressed too far." (1901) 23 Op. Atty.-Gen. 381.

Alien seamen using the ports of the country in their ships are not alien immigrants within the meaning of the statute. Every foreign seaman, signed on the articles abroad, is an alien contracted with to perform duty in the United States while the vessel lies in the United States loading; but he is not contracted with to remove to the United States, or assisted or encouraged to migrate—to change his residence—to the United States, to perform labor there. This case was under the Act of 1885. *U. S. v. Burke*, (1899) 99 Fed. 895.

While the public and private vessels of every nation while on the high seas, and without the territorial limits of any state, are subject to the jurisdiction of the state to which they belong and are in many respects considered a part of its territory, it does not follow from this that a merchant vessel flying the American flag is a part of the United States within the immigration laws or that a sailor whose home is on the sea is a contract laborer within the purview of these laws. *Scharrenberg v. Dollar Steamship Co.*, (C. C. A. 9th Cir. 1916) 229 Fed. 970, 144 C. C. A. 252.

"Person."—The word "person" in this section does not include a state, but it does include an officer of a state professing to act under its authority. (1907) 26 Op. Atty.-Gen. 199.

Transportation paid by state.—A state advertising its inducements may prepay the passage of an alien immigrant out of its public funds, provided he is qualified in other respects, the advertisement being lawful, and neither the state, nor its officers, nor anyone else having otherwise solicited or encouraged the immigration. The status of such an immigrant would be the same as that of any other alien lawfully admitted to this country. (1907) 26 Op. Atty.-Gen. 109. See also (1907) 26 Op. Atty.-Gen. 181.

Promise to father of immigrant.—Under a somewhat similar provision of the Act of 1903, it was held that where the immigration of an alien minor was procured by reason of an agreement with him through his father, who was the owner of his services, no promises or offers save those made to him "through his father" as the person entitled to his services being shown, his immigration was not obtained by means of any promise or agreement "with him," and was therefore not a violation of the statute. *Darnborough v. Benn*, (C. C. A. 1911) 187 Fed. 580, 109 C. C. A. 270.

Evidence.—On a trial of an action against a defendant charged with having

prepaid the transportation of a contract laborer into the United States in violation of sections 4 and 5, a proposed manifest for the immigrant on the form prescribed under section 12 of the Act, filled out by a third person before sailing of the vessel, and which was not used, but which contained a statement that the immigrant's passage was paid by the defendant, was held to be incompetent as evidence against him, as the declaration of a third person not made in his presence. *Regan v. U. S.*, (C. C. A. 1910) 183 Fed. 293, 105 C. C. A. 505, 31 L. R. A. (N. S.) 1073, *reversed* on the question of measure

of proof required, (1914) 232 U. S. 37, 34 S. Ct. 213, 58 U. S. (L. ed.) 494.

Measure of proof required.—In an action brought under sections 4 and 5, the government has the burden of proving the violation of the Act, but such violation need not be proved beyond a reasonable doubt, a reasonable preponderance of proof is sufficient. *U. S. v. Regan*, (1914) 232 U. S. 37, 34 S. Ct. 213, 58 U. S. (L. ed.) 494, *reversing* (C. C. A. 2d Cir. 1913) 203 Fed. 433, 121 C. C. A. 543, (C. C. A. 2d Cir. 1910) 183 Fed. 293, 105 C. C. A. 505, 31 L. R. A. (N. S.) 1073.

SEC. 5. [Penalty for violations—suits by informer.] That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States. [34 Stat. L. 900.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Provisions similar to those of the text were made by the Act of Feb. 26, 1885, ch. 164, §§ 3, 4, 23 Stat. L. 333, and were superseded by the Act of March 3, 1903, ch. 1012, § 5, 32 Stat. L. 1214, which was repealed by section 43 of this Act, *infra*, p. 699.

Section 4 of this Act mentioned in the text is given *supra*, p. 654.

History of section.—This section is largely copied from the like-numbered section of the Act of March 3, 1903, ch. 1012, 32 Stat. L. 1213. *U. S. v. Regan*, (1914) 232 U. S. 37, 34 S. Ct. 213, 58 U. S. (L. ed.) 494.

Nature of action.—The action for the penalty is a civil one and is attended with the usual incidents of a civil action. *Grant Bros. Constr. Co. v. U. S.*, (1914) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776, *affirming* (1911) 13 Ariz. 388, 114 Pac. 955. See also *Hepner v. U. S.*, (1909) 213 U. S. 103, 29 S. Ct. 474, 53 U. S. (L. ed.) 720, 16 Ann. Cas. 960, 27 L. R. A. (N. S.) 739.

But Congress, by providing in this section for a civil action for the recovery of a penalty for a violation of section 4, did not preclude a prosecution by indictment to enforce such penalty. *Millon v. U. S.*, (C. C. A. 2d Cir. 1914) 219 Fed. 186, 134 C. C. A. 560, wherein it appeared that the defendant objected to the jurisdiction of the court on the ground that while section 4 defines a crime, it prescribes no punishment, and therefore the whole pro-

vision was a nullity. Following *U. S. v. Stevenson*, (1909) 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153, the court said: "The separation of sections 4 and 5 may be disregarded. Read together, as if they both constituted section 4, it is quite clear that the punishment for the misdemeanor is a fine of \$1,000. The provision of a civil does not exclude a criminal remedy. The government may proceed either by indictment to punish the misdemeanor or by civil remedy to collect the penalty as for a debt. In either case the fine or penalty is the sum of \$1,000."

"Knowingly."—A right to the penalty arises only where section 4 is violated "by knowingly assisting, encouraging or soliciting the migration or importation" of an alien contract laborer into the United States. Knowledge being an element of what is penalized, it must be included in the statement of a cause of action for the penalty. *Grant Bros. Constr. Co. v. U. S.*, (1914) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776, *affirming* (1911) 13 Ariz. 388, 114 Pac. 955.

The word "knowingly" as used in this

section necessarily makes knowledge of all the essential facts constituting the wrongdoing a prerequisite to liability for the penalty. It must therefore be held that knowledge of the essential fact that the contract laborer was an alien is a necessary condition to liability for the penalty. *U. S. v. Great Northern R. Co.*, (C. C. A. 8th Cir. 1914) 214 Fed. 46, 130 C. C. A. 486.

"Person who shall first bring action."

—The first person to sue for penalties under this section is the sole person entitled to recover, and no right of action remains in any one else during the pendency of the suit. And when the suit, after a trial on the merits, results in final judgment for the defendant, such judgment finally bars every suit to recover the penalties by any other party. But the mere bringing of an action by the first person to sue will not permanently divest all other parties of any possible title to the chose in action. In order to bar a second suit to recover it must have been heard upon its merits and resulted in a final judgment. *U. S. v. Dwight Mfg. Co.*, (D. C. Mass. 1914) 213 Fed. 522.

Separate penalty for each alien.—The statute declares that "separate suits may be brought for each alien thus promised labor or service," and this plainly means that a separate penalty shall be assessed in respect of each alien whose migration or importation is knowingly assisted, encouraged or solicited in contravention of the statute. *Grant Bros. Constr. Co. v. U. S.*, (1914) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776, *affirming* (1911) 13 Ariz. 388, 114 Pac. 955.

Contract laborer.—This Act does not penalize a person or corporation who knowingly assists or encourages any contract laborer to migrate into this country by offers of employment, etc.; it is only against a person or corporation who knowingly assists an alien contract laborer by offers of employment, etc., so to migrate. *U. S. v. Great Northern R. Co.*, (C. C. A. 8th Cir. 1914) 214 Fed. 46, 130 C. C. A. 486, wherein the court said: "If regard be had to the mere letter of the act of Congress it might be said that the penalty, as denounced by section 5 is: For assisting the migration of 'any contract laborer' and that such contract laborer as defined by section 2 is one 'who has been induced or solicited to migrate to this country by offers or promises of employment,' etc. . . . On this literal view of a few words of the act, the argument is made that one incurs the penalty, if he assists or encourages the immigration of any one, whether alien or not, by offers or promises of employment, etc. But this kind of an argument does not appeal to us. The whole act discloses that it deals most exclusively with the subject of immigration of aliens. The title to the act

is 'An act to regulate the immigration of aliens into the United States.' The opening sentence of section 2 is: 'The following classes of aliens shall be excluded from admission into the United States,' among them 'persons, hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind. . . .' Again in section 5 of the act which denounces the penalty for violating the provisions of section 4 provision is found for the recovery of the penalty by the United States or any person who might first bring the action 'including any such alien thus promised labor or service of any kind as aforesaid; . . . and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid.' In view of these provisions and of the manifest purpose of the act as disclosed by all its provisions, we have no hesitancy in holding the contention of the government to be untenable."

A section foreman, without authority to go into a foreign land to secure laborers, was not acting within the line of his duty or scope of his authority, in arranging with and encouraging an alien to enter the country in violation of the Contract Labor Law, so as to charge a railroad company with a violation of the Act, where there was no knowledge of nor acquiescence in the unauthorized act of such employee. *U. S. v. Chicago, etc., R. Co.*, (D. C. Idaho 1915) 228 Fed. 554.

Amendment of declaration.—In *U. S. v. Dwight Mfg. Co.*, (D. C. Mass. 1913) 210 Fed. 85, which was an action to recover penalties for a violation of this Act; it appeared that the five years' period of limitation expired after a demurrer had been filed, but before it was heard, and the government filed an application to amend its declaration after the expiration of the five-year period. The court, allowing the amendment, said: "The violations of the statute asserted in this case are alleged to have been committed on various dates between July 20 and October 26, 1907. Under R. S. sec. 1047 [title FINES, PENALTIES AND FORFEITURES], no suit for penalties incurred by them can be maintained unless commenced within five years from the time when the penalties accrued. When this suit was commenced, therefore, from six to nine months only remained of the time after which the right to sue for such penalties would have expired by limitation, and the demurrer was filed at least three months before the expiration of that time. If leave to amend is refused, and if the pending demurrer be sustained, it is now too late to bring another suit. . . . The circumstances seem to me to require that the government's application should be in no

way prejudiced by the fact that the five years referred to have expired since the demurrer was filed on April 15, 1912, and before it was heard on February 1, 1913, or before this motion which has followed upon the hearing."

Admissibility of evidence.—In *Grant Bros. Constr. Co. v. U. S.*, (1914) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776, *affirming* (1911) 13 Ariz. 388, 114 Pac. 955, it was held that as evidence of whether certain persons were aliens the decision of a board of special inquiry was admissible. The court said: "Over the defendant's objection, the decision of the board of special inquiry was admitted in evidence as tending to prove that the forty-five men were aliens, and it is said that this was error because the defendant was not a party to the proceeding. One of the questions committed by law to the board for decision, subject to an appeal to the Secretary of Commerce, was whether the men were aliens. The document admitted in evidence disclosed that, after a hearing, the board determined that question in the affirmative, and that the men acquiesced by waiving their right to an appeal. In that way their status as aliens was conclusively established as between themselves and the United States. It is true that the defendant was not a party to that proceeding, and that as a general rule a judgment binds only the parties and their privies. But it is equally true that a judgment in a prior action is admissible, even against a stranger, as *prima facie*, but not conclusive, proof of a fact which may be shown by evidence of general reputation, such as custom, pedigree, race, death and the like, and this because the judgment is usually more persuasive than mere evidence of reputation. 1 Starkie Ev. 386; 1 Greenleaf Ev., §§ 139, 526, 555; *Patterson v. Gaines*, [1848] 6 How. 550, 599, [12 U. S. (L. ed.) 553]; *Pile v. McBratney*, [1853] 15 Ill. 314, 319; *McCullum v. Fitzsimons*, [1845] 1 Rich. L. (S. C.) 252. In principle, alienage is within the latter rule, and so the board's decision was properly admitted in evidence for the purpose stated."

In an action under this section for penalties for encouraging immigration of alien contract laborers, evidence of statements made by the associates and employees of one with whom the defendant contracted was held to be admissible to show the acts done under the contract, though the evidence also tended to show defendant's knowledge of the unlawful acts. *Grant Bros. Constr. Co. v. U. S.*, (1911) 13 Ariz. 388, 114 Pac. 955, *affirmed* (1914) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776.

Presumption.—A presumption will not necessarily be indulged that the defendant knew a contract laborer was actually an alien. Thus where the employer and

the employee were located on opposite sides of and near to an international boundary line over which people must necessarily pass and repass with much frequency and for a variety of purposes, the court held that no presumption of fact arose that the employee was a citizen of that country in which he was on a given occasion found. *U. S. v. Great Northern R. Co.*, (C. C. A. 8th Cir. 1914) 214 Fed. 46, 130 C. C. A. 486.

Intent.—To warrant the recovery of the penalty prescribed by this section for encouraging immigration of alien contract laborers, there must have been a conscious violation of the Act. *Grant Bros. Constr. Co. v. U. S.*, (1911) 13 Ariz. 388, 114 Pac. 955, *affirmed* (1913) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776.

Payment of transportation.—The payment of an alien's transportation to enable him to come to the United States, though one of the acts declared unlawful by section 4 of this Act, is not an act for which a penalty is incurred under this section unless it amounts to an assistance, encouragement, or solicitation of the alien's immigration with knowledge, etc., or in order that the alien may perform labor or service by reason of an offer, solicitation, promise, or agreement to or with him. This case was under the similar provisions of the Act of 1903. *Darnborough v. Benn*, (C. C. A. 1911) 187 Fed. 580, 109 C. C. A. 270.

Degree of proof.—In an action to recover a penalty for violating section 4, the violation need only be proved by a reasonable preponderance of proof. Proof beyond a reasonable doubt, as in a criminal case, is not essential. *U. S. v. Regan*, (1914) 232 U. S. 37, 34 S. Ct. 213, 58 U. S. (L. ed.) 494, *reversing* (C. C. A. 2d Cir. 1913) 203 Fed. 433, 121 C. C. A. 543.

Direction of verdict.—Under similar provisions of the Act of 1903, it was held that the trial court could direct a verdict in favor of the government plaintiff in an action of debt to recover the penalty incurred under sections 4 and 5 of that Act for inducing an alien to migrate to the United States for the purpose of performing labor there, where it appeared by undisputed testimony that the defendant had committed the offense out of which the cause of action arose. *Hepner v. U. S.*, (1909) 213 U. S. 103, 29 S. Ct. 474, 53 U. S. (L. ed.) 720.

Jury questions.—Whether a construction company for which alien contract laborers were imported in violation of sections 4 and 5 had such knowledge of the unlawful acts as to warrant assessment of a penalty was held under the evidence to be a jury question. *Grant Bros. Constr. Co. v. U. S.*, (1911) 13 Ariz. 388, 114 Pac. 955, *affirmed* (1913) 232 U. S. 647, 34 S. Ct. 452, 58 U. S. (L. ed.) 776.

Costs.—A successful party in a suit under this section for penalties for

encouraging immigration of alien contract laborers is entitled to costs. *Grant Bros. Constr. Co. v. U. S.*, (1911) 13 Ariz. 388, 114 Pac. 955, *affirmed* (1913) 232 U. S. 647, 34 S. Ct. 462, 58 U. S. (L. ed.) 776.

Detention of alien as a witness in the prosecution of suits to recover a penalty under this section. See note under section 19.

SEC. 6. [Advertising abroad for labor immigration a misdemeanor — exceptions.] That it shall be unlawful and be deemed a violation of section four of this Act to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under promise or agreement as contemplated in section two of this Act, and the penalties imposed by section five of this Act shall be applicable to such a case: *Provided*, That this section shall not apply to States or Territories, the District of Columbia, or places subject to the jurisdiction of the United States advertising the inducements they offer for immigration thereto, respectively. [34 Stat. L. 900.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Provisions similar to those of the text were made by the Act of March 3, 1891, ch. 551, § 3, 26 Stat. L. 1084, and were superseded by the Act of March 3, 1903, ch. 1012, § 6, 32 Stat. L. 1215, which was repealed by section 43 of this Act, *infra*, p. 699.

Sections 2, 4, and 5 of this Act, mentioned in the text, are given *supra*, pp. 640, 654, 656.

Advertisement by state.—This section contains no exceptions in favor of a state in reference to specific promises of employment to individual immigrants, nor any requirements that the promises of employment, in order to work exclusion, must be the sole inducement to exclusion. (1907) 26 Op. Atty.-Gen. 410.

But it is lawful for a state to advertise its inducements to immigration, and to set forth, as part of such advertisement, the scale of wages generally prevailing within its territory. The status of immigrants induced to come to this country by reason of such advertisements would be the same as that of any other aliens lawfully admitted to the United States. (1907) 26 Op. Atty.-Gen. 181; (1907) 26 Op. Atty.-Gen. 199.

The contribution of money by individuals to a state fund, to be used by the state in advertising its inducements to immigrants, which advertisement could not lawfully be published by private persons, and to repay the passage of aliens attracted by such advertisement, though without promise of employment, express or implied, would amount to encouraging or assisting immigration in the form prohibited by this section and render the parties contributing liable to the penalties provided by section 5. (1907) 26 Op. Atty.-Gen. 199.

"Promise of employment."—The words "promise of employment" in this section are used in a broad sense, meaning not merely an offer of employment which, by acceptance, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the pros-

pect of assured employment. (1907) 26 Op. Atty.-Gen. 199.

Effect upon immigrants.—There is nothing in this Act, or in any previous Act, which would authorize the exclusion of alien immigrants because the immigration was induced by advertisement, or even by solicitation or promise of employment, unless there was an enforceable contract existing at the time of application for admission requiring them to render service as laborers. (1907) 26 Op. Atty.-Gen. 199.

The following advertisement: "Wanted — First-class weavers on fine comb work, in one of the most beautiful villages in Connecticut, U. S. A. First-class weavers can earn per week 35s. to £2. Families preferred. Reasonable rents in six-room cottages on line of railroad and electric cars. This is a new mill starting up. None but first-class weavers and respectable people need apply. Baltic Mills Company, H. Lawton, Manager, Baltic, Conn., U. S. A.," is within the interdicted class. Any assurance of probable employment, definite as to the kind, the place, and the rate of wages, is a promise of employment within the meaning of the statute. This section was intended to dispense with the necessity, under former statutes (see *U. S. v. Craig*, (E. D. Mich. 1886) 28 Fed. 795), of proving that there had been a contract with the alien "made previous to the importation or migration," or that there had been any other assistance or encouragement to his migration than a promise of employment. This case was under the corresponding section of the Act of 1891. *U. S. v. Baltic Mills Co.*, (C. C. A. 1903) 124 Fed. 38, 59 C. C. A. 558.

SEC. 7. [Soliciting by vessel owners, etc., forbidden — penalties.] That no transportation company or owner or owners of vessels, or others engaged in transporting aliens into the United States, shall, directly or indirectly, either by writing, printing, or oral representation, solicit, invite, or encourage the immigration of any aliens into the United States, but this shall not be held to prevent transportation companies from issuing letters, circulars, or advertisements, stating the sailings of their vessels and terms and facilities of transportation therein; and for a violation of this provision, any such transportation company, and any such owner or owners of vessels, and all others engaged in transporting aliens into the United States, and the agents by them employed, shall be severally subjected to the penalties imposed by section five of this Act. [34 Stat. L. 900.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Somewhat similar provisions were made by the Act of March 3, 1891, ch. 551, § 4, 26 Stat. L. 1084, but were superseded by the Act of March 3, 1903, ch. 1012, § 7, 32 Stat. L. 1215, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 8. [Punishment for illegally landing aliens, etc.] That any person including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment for each and every alien so landed or brought in or attempted to be landed or brought in. [34 Stat. L. 900.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of Feb. 26, 1885, ch. 164, § 4, 23 Stat. L. 333, and the Act of March 3, 1891, ch. 551, § 6, 26 Stat. L. 1035, but were superseded by the Act of March 3, 1903, ch. 1012, § 8, 32 Stat. L. 1215, which was repealed by section 43 of this Act, *infra*, p. 699.

Venue.—The offense of bringing into and landing in the United States an alien not lawfully entitled to admission, made a misdemeanor by this section, can be prosecuted only in the district where such alien is landed, and the fact that the person who unlawfully brought in a child under sixteen years of age, unaccompanied by one or both of her parents, afterward took such child to another district, does not confer jurisdiction on the court in such district. *U. S. v. Capella*, (1909) 169 Fed. 890.

The word "person."—Under section 6 of the Act of 1891, which did not include "the master, agent, owner or consignee of any vessel," the Attorney-General ruled that the word "person" included a transportation company conducting the business of transportation either by land or water so as to make such a company liable to the penalties prescribed thereby. Corporation officers or servants responsible for or actually engaged in breach of the immigration laws are liable to the fine and imprisonment imposed by this

section, or the corporation itself is liable to a fine in the case of any and each alien brought into or landed in the United States, who is not entitled to enter. (1898) 22 Op. Atty-Gen. 122.

Conviction of conspiracy to commit offense described in this section was sustained in *Mark Yick Hee v. U. S.*, (C. C. A. 2d Cir. 1915) 223 Fed. 732, 139 C. C. A. 262.

Insanity developed after debarkation.—Where an alien deserted from the vessel on which he was brought to the United States, but there was no evidence that he was either insane, epileptic, a pauper, or a person likely to become a public charge, when the vessel arrived in port, or at any other time when he was on board, nor until a month later, when he was arrested, and when he first gave evidence of insanity, it was held that the master was not chargeable with bringing an alien not entitled to land into the United States. This decision was under the Act of 1903. *Waterhouse v. U. S.*, (1908) 159 Fed. 876, 87 C. C. A. 56.

SEC. 9. [Exclusion for certain physical disabilities — fines for violation — clearance refused — bond.] That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States any alien subject to any of the following disabilities: Idiots, imbeciles, epileptics, or persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fine, and in the event such fine is imposed, while it remains unpaid, nor shall such fine be remitted or refunded: *Provided*, That clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fine and costs, such sum to be named by the Secretary of Commerce and Labor. [34 Stat. L. 901.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1891, ch. 551, § 1, 26 Stat. L. 1084, but were superseded by the Act of March 3, 1903, ch. 1012, § 9, 32 Stat. L. 1215, which was repealed by section 43 of this Act, *infra*, p. 699.

By an Act of March 4, 1913, ch. 141, there was created a Department of Labor, and all matters relating to immigration were transferred to the jurisdiction of the Secretary of Labor. See LABOR DEPARTMENT.

Constitutionality.—Section 9 of the Act of 1903, similar in its provisions to the present section, was declared constitutional. *Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercantile Marine Co. v. Stranahan*, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

Enforcement by administrative rather than judicial officers.—The provision in this Act empowering the Secretary of the Treasury (now Secretary of Labor) to exact a money penalty for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease, in violation of this section, when the official medical examination at the port of arrival shows that the alien was suffering from the disease at the time of embarkation, the existence of which might have been detected by a competent medical examination then made, as the statute requires, does not render such statute open to the objection that it defines a criminal offense, and authorizes a purely administrative officer

to determine whether the defined crime has been committed, and if so, to inflict a punishment. These cases were under the similar provisions of section 9 of the Act of 1903. *Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercantile Marine Co. v. Stranahan*, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

Rules controlling enforcement.—The enforcement of the exaction of one hundred dollars which the Secretary of the Treasury (now Secretary of Labor) is authorized by this section to impose for violations of its provisions against bringing into the United States aliens afflicted with loathsome or dangerous contagious diseases, is not necessarily governed by the rules controlling in criminal prosecutions merely because such exaction is a penalty. These cases were under section 9 of the Act of 1903. *Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercantile Marine Co. v.*

Stranahan, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

Stowaways.—This section is intended only to apply to a case where a diseased person is brought in by the vessel as a passenger, or voluntarily, or when the vessel owner or transportation company has an opportunity to discover the exist-

ence of the disease by means of medical examinations at the time or before the alien is taken on board. It is not applicable to the case of persons brought in as stowaways, who had stolen passage. This case was under section 9 of the Act of 1903. *Cunard Steamship Co. v. Stranahan*, (1904) 134 Fed. 318.

SEC. 10. [Decision of special inquiry board on diseased persons, final.] That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act. [34 Stat. L. 901.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1903. ch. 1012, § 10, 32 Stat. L. 1216, which was repealed by section 43 of this Act, *infra*, p. 699. See *Ex p. Lee Sher Wing*, (1908) 164 Fed. 506.

Constitutionality.—Making the official medical examination at the port of arrival conclusive for the purpose of imposing the penalty enforceable by refusing clearance papers until paid, which is authorized by section 9, for violating its provisions by bringing into the United States an alien afflicted with a loathsome or contagious disease from which he was suffering at the time of embarkation, the existence of which might have been detected by means of a competent medical examination then made, does not render such statute repugnant to U. S. Const., Fifth Amendment, as taking property without due process of law. These cases were under the similar provisions of sections 9 and 10 of the Act of 1903. *Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercantile Marine Co. v. Stranahan*, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

Finality of decision.—The decision of the board of special inquiry is final and will not be inquired into on habeas corpus proceedings, nor is it material that the body of the relator is not produced in court on the return day of the writ. *U. S. v. Williams*, (S. D. N. Y. 1913) 203 Fed. 292.

Where, on the arrival of an alien, he was examined by the medical officer of the United States public health and marine service, who certified that he was "afflicted with idiocy," and thereafter a board of special inquiry decided on such certificate that the alien was not entitled to enter and directed that he be deported, it was held that the decision of the board

was a conclusive finding as to the existence of the physical disability and that the applicant was within section 2, *supra*, p. 640, providing that all idiots shall be excluded. *U. S. v. Rodgers*, (1910) 182 Fed. 274, *affirmed* (C. C. A. 1911) 185 Fed. 334, 107 C. C. A. 452.

The decision of the board of special inquiry is final. The fact that cogent evidence was not submitted to them, or that their decision is believed to be erroneous is not ground for an application to the District Court to retry the case upon habeas corpus proceedings. *Ex p. Joyce*, (D. C. Mass. 1913) 212 Fed. 282. See also *U. S. v. Williams*, (S. D. N. Y. 1913) 204 Fed. 844; *Ex p. Joyce*, (D. C. Mass. 1913) 212 Fed. 285.

Where it is sought to review a decision of the board of inquiry excluding an alien on the ground that he is afflicted with a loathsome or with a dangerous contagious disease, the only question for consideration is the alienage of the immigrant, and when that is established the court cannot review the decision of the board on the question as to fact or the character of the disease. This case construed section 10 of the Act of 1903. *In re Neu-wirth*, (1903) 123 Fed. 347. See also notes under section 25, *infra*, p. 685.

Construction of word "final."—Under the corresponding sections of the Act of 1903 it was held that in the provision of section 10 making the decision of the board of special inquiry based upon the certificate of the examining medical officer final as to the rejection of aliens affected with a loathsome, dangerous contagious disease, the word "final" was not used in such broad sense as to deprive an alien so rejected of the right of appeal

unqualifiedly given by section 25 of that Act, or of the right to invoke the provisions of section 37, relating to the wife and children of a naturalized alien, in a case to which such section was applicable. *Rodgers v. U. S.*, (C. C. A. 1907) 157 Fed. 381, 85 C. C. A. 79.

Fair hearing.—While the board's decision, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with mental or physical disability which would bring them within the excluded classes, this does not mean that the certificate is to take the place of a fair hearing by the board. Such a construction would result in giv-

ing the inspecting medical officer, instead of the board, the power of final decision. "Although immigration rule 17, subdivisions 4, 5 (note), state that the board is virtually compelled to base its decision upon the certificate, we hold that it has no right to do so without exercising its own judgment after considering not only the certificate but whatever other evidence there may be touching the alien's right to enter." *Billings v. Sitner*, (C. C. A. 1st Cir. 1915) 228 Fed. 315, 142 C. C. A. 607.

Defective medical certificate.—See note under section 17, *infra*, p. 668.

SEC. 11. [Return of alien accompanying rejected helpless alien.] That upon the certificate of a medical officer of the United States Public Health and Marine Hospital Service to the effect that a rejected alien is helpless from sickness, mental or physical disability, or infancy, if such alien is accompanied by another alien whose protection or guardianship is required by such rejected alien, such accompanying alien may also be excluded, and the master, agent, owner, or consignee of the vessel in which such alien and accompanying alien are brought shall be required to return said alien and accompanying alien in the same manner as vessels are required to return other rejected aliens. [34 Stat. L. 901.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1903, ch. 1012, § 11, 32 Stat. L. 1216, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 12. [Lists of alien passengers arriving required — contents — alien passengers leaving — contents — disposition — regular trips — insular possessions.] That upon the arrival of any alien by water at any port within the United States it shall be the duty of the master or commanding officer of the steamer, sailing or other vessel having said alien on board to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation of such alien on board such steamer or vessel, which shall, in answer to questions at the top of said list, state as to each alien the full name, age, and sex; whether married or single; the calling or occupation; whether able to read or write; the nationality; the race; the last residence; the name and address of the nearest relative in the country from which the alien came; the seaport for landing in the United States; the final destination, if any, beyond the port of landing; whether having a ticket through to such final destination; whether the alien has paid his own passage or whether it has been paid by any other person or by any corporation, society, municipality, or government, and if so, by whom; whether in possession of fifty dollars, and if less, how much; whether going to join a relative or friend, and if so, what relative or friend, and his or her name and complete address; whether ever before in the United States, and if so, when and where; whether ever in prison or almshouse or an institution or hospital for the care and treatment of the insane or supported by charity; whether a polygamist; whether an anarchist; whether coming by reason of any offer, solicitation, promise, or agreement, express or implied, to perform labor in the United States, and

what is the alien's condition of health, mental and physical, and whether deformed or crippled, and if so, for how long and from what cause; that it shall further be the duty of the master or commanding officer of every vessel taking alien passengers out of the United States, from any port thereof, to file before departure therefrom with the collector of customs of such port a complete list of all such alien passengers taken on board. Such list shall contain the name, age, sex, nationality, residence in the United States, occupation, and the time of last arrival of every such alien in the United States, and no master of any such vessel shall be granted clearance papers for his vessel until he has deposited such list or lists with the collector of customs at the port of departure and made oath that they are full and complete as to the name and other information herein required concerning each alien taken on board his vessel; and any neglect or omission to comply with the requirements of this section shall be punishable as provided in section fifteen of this Act. That the collector of customs with whom any such list has been deposited in accordance with the provisions of this section, shall promptly notify the Commissioner-General of Immigration that such list has been deposited with him as provided, and shall make such further disposition thereof as may be required by regulations to be issued by the Commissioner-General of Immigration with the approval of the Secretary of Commerce and Labor: *Provided*, That in the case of vessels making regular trips to ports of the United States the Commissioner-General of Immigration, with the approval of the Secretary of Commerce and Labor, may, when expedient, arrange for the delivery of such lists of outgoing aliens at a later date: *Provided further*, That it shall be the duty of the master or commanding officer of any vessel sailing from ports in the Philippine Islands, Guam, Porto Rico, or Hawaii to any port of the United States on the North American Continent to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation, giving the names of all aliens on board said vessel. [34 Stat. L. 901.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Earlier provisions relating to lists of passengers were made by the Act of March 3, 1893, ch. 206, sec. 1, 27 Stat. L. 569. These were superseded by an Act of March 3, 1903, ch. 1012, sec. 12, 32 Stat. L. 1216, which was repealed by sec. 43 of this Act, *infra*, p. 699.

Further provisions relating to lists were made by the following sections 13, 14, and 15 of this Act.

A restriction on the provisions of this section was made by the Act of March 4, 1909, ch. 305, *infra*, p. 700.

Requirement mandatory.—The requirement of this section that the manifest shall be filled up at the port of embarkation is mandatory. *U. S. v. Coombes*, (C. C. A. 2d Cir. 1912) 200 Fed. 400, 118 C. C. A. 552, wherein the court said: "The words, being precise and unambiguous, should be enforced according to their plain meaning. Consideration of sections 12 and 15 shows that Congress had a definite scheme in mind, which it used appropriate words to express. It distinguished very clearly between the requirements imposed upon masters of vessels bringing aliens into the United States and those imposed upon masters

of vessels taking alien passengers out of the United States. It distinguished clearly between the penalties to be imposed in the two cases. Lists of all aliens coming into the country were to be furnished, containing information especially concerning their right to admission. On the other hand, lists of alien passengers only going out of the country with very little information were required. Masters of vessels bringing in aliens, who failed to comply with the act, were subjected to a penalty for each alien 'concerning whom the above information is not contained in any list as aforesaid.' But masters of vessels taking

alien passengers out of the United States were subjected only if they failed 'without good cause' to deliver the list, to a penalty of \$10 'for each alien not included in said list,' the fine in no case to exceed \$100. All this shows the plain intention to be more stringent in the case of aliens coming into than of alien passengers going out of the United States. If we have a right to look into the reasonableness of the requirement under consideration, it seems to us entirely so. Alien immigrants are more likely to answer the questions accurately when they embark than they are at the end of the voyage, which gives them an opportunity to advise each other of the various causes which will prevent their admission into the United States. Besides, it is fairer to advise them of their disabilities, if any, at the port of embarkation, so that they may be saved a useless voyage, if they are ineligible."

Manifest.—Where an alien endeavored in Europe to secure passage to New

York, and was told that if he purchased a ticket to Halifax and wished to continue to New York he could do so without extra charge, and was thereupon ticketed by the steamship officers and entered on the manifest as destined to Halifax, N. S., when, in fact, his destination was New York, it was held that such acts by the officers of the steamship would constitute a violation of section 12 requiring the master of a vessel to deliver to the immigration officers at the port of arrival a list or manifest made at the time and place of embarkation, stating the name, nationality, etc., and the final destination, as well as the seaport for landing in the United States, of each alien destined to land therein. *U. S. v. Fielding*, (1909) 175 Fed. 290.

Hawaii.—A territorial government, such as Hawaii, is not a municipality or a quasi-municipality, and is not prohibited, as such, from paying for the passage of an immigrant. (1909) 27 Op. Atty-Gen. 479.

SEC. 13. [Designation, etc., of aliens on lists — certificate of medical, etc., examination.] That all aliens arriving by water at the ports of the United States shall be listed in convenient groups, and no one list or manifest shall contain more than thirty names. To each alien or head of a family shall be given a ticket on which shall be written his name, a number or letter designating the list in which his name, and so forth, is contained, and his number on said list, for convenience of identification on arrival. Each list or manifest shall be verified by the signature and the oath or affirmation of the master or commanding officer, or the first or second below him in command, taken before an immigration officer at the port of arrival, to the effect that he has caused the surgeon of said vessel sailing therewith to make a physical and oral examination of each of said aliens, and that from the report of said surgeon and from his own investigation he believes that no one of said aliens is an idiot, or imbecile, or a feeble-minded person, or insane person, or a pauper, or is likely to become a public charge, or is afflicted with tuberculosis or with a loathsome or dangerous contagious disease, or is a person who has been convicted of, or who admits having committed a felony or other crime or misdemeanor involving moral turpitude, or is a polygamist or one admitting belief in the practice of polygamy, or an anarchist, or under promise or agreement, express or implied, to perform labor in the United States, or a prostitute, or a woman or girl coming to the United States for the purpose of prostitution, or for any other immoral purpose, and that also, according to the best of his knowledge and belief, the information in said lists or manifests concerning each of said aliens named therein is correct and true in every respect. [34 Stat. L. 902.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1893, ch. 206, § 2, 27 Stat. L. 569, but were superseded by the Act of March 3, 1903, ch. 1012, § 13, 32 Stat. L. 1216, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 14. [Medical certificate — verification.] That the surgeon of said vessel sailing therewith shall also sign each of said lists or manifests and

make oath or affirmation in like manner before an immigration officer at the port of arrival, stating his professional experience and qualifications as a physician and surgeon, and that he has made a personal examination of each of the said aliens named therein, and that the said list or manifest, according to the best of his knowledge and belief, is full, correct, and true in all particulars relative to the mental and physical condition of said aliens. If no surgeon sails with any vessel bringing aliens the mental and physical examinations and the verifications of the lists or manifests shall be made by some competent surgeon employed by the owners of the said vessel. [34 Stat. L. 903.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1893, ch. 206, § 3, 27 Stat. L. 569, which were superseded by the Act of March 3, 1903, ch. 1012, § 14, 32 Stat. L. 1217, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 15. [Penalty for not delivering lists — passengers departing.] That in the case of the failure of the master or commanding officer of any vessel to deliver to the said immigration officers lists or manifests of all aliens on board thereof, as required in sections twelve, thirteen, and fourteen of this Act, he shall pay to the collector of customs at the port of arrival the sum of ten dollars for each alien concerning whom the above information is not contained in any list as aforesaid: *Provided*, That in the case of failure without good cause to deliver the list of passengers required by section twelve of this Act from the master or commanding officer of every vessel taking alien passengers out of the United States, the penalty shall be paid to the collector of customs at the port of departure and shall be a fine of ten dollars for each alien not included in said list; but in no case shall the aggregate fine exceed one hundred dollars. [34 Stat. L. 903.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions somewhat similar to those of the text were made by the Act of March 3, 1893, ch. 206, § 4, 27 Stat. L. 570. These were superseded by the Act of March 3, 1903, ch. 1012, § 15, 32 Stat. L. 1217, which was repealed by section 43 of this Act, *infra*, p. 699.

Construction of section.—This section and rule 24 of the immigration regulations prescribe a penalty of ten dollars for each alien on board a vessel entering a port of the United States concerning whom the master has either not furnished a list or manifest, or has furnished one which does not contain the information required by sections 12, 13, and 14 of this Act, and a collector of customs has no authority to impose a fine or to collect a sum of less than that amount for each such violation of the statute. (1905) 25 Op. Atty.-Gen. 336.

The proper method of enforcing collec-

tion of a penalty imposed for a violation of sections 12, 13, and 14 of this Act, where payment is refused, is by a prosecution for the offense or an action to recover the penalty. (1905) 25 Op. Atty.-Gen. 336.

Being penal in character this provision must be construed with strictness. So construed it has been held that the delivering of manifests containing incorrect information does not subject a master to the penalty provided. *U. S. v. Four Hundred and Twenty Dollars*, (S. D. Ala. 1906) 162 Fed. 803.

SEC. 16. [Inspection by immigration officers — on shipboard — at immigrant stations.] That upon the receipt by the immigration officers at any port of arrival of the lists or manifests of incoming aliens provided for in sections twelve, thirteen, and fourteen of this Act, it shall be the duty of said officers to go or to send competent assistants to the vessel to which said

lists or manifests refer, and there inspect all such aliens, or said immigration officers may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would, under the provisions of this Act, bind the said transportation lines, masters, agents, owners, or consignees: *Provided*, That where a suitable building is used for the detention and examination of aliens the immigration officials shall there take charge of such aliens, and the transportation companies, masters, agents, owners, and consignees of the vessels bringing such aliens shall be relieved of the responsibility for their detention thereafter until the return of such aliens to their care. [34 Stat. L. 903.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1891, ch. 551, § 8, 26 Stat. L. 1085. These were superseded by the Act of March 3, 1903, ch. 1012, § 16, 32 Stat. L. 1217, which was repealed by section 43 of this Act, *infra*, p. 699.

Construction.—In *U. S. v. Holland-America Line*, (C. C. A. 2d Cir. 1914) 212 Fed. 116, 128 C. C. A. 632, it appeared that the United States brought an action against a steamship line to recover expenses incurred for maintenance and medical care and treatment of certain alien immigrants afflicted with diseases not warranting deportation, brought to this country by the defendant, while held for examination as to their right to enter. All of them were properly brought here and were subsequently admitted. As at that time there was no hospital for contagious diseases at Ellis Island, such of them as were so afflicted were sent to state hospitals under contracts with the government. The others were sent to the hospital at Ellis Island. Determining the question of the defendant's liability the court construed this section as follows: "Congress has made it perfectly clear in section 19 that in the case of immigrants brought to this country in violation of law the company shall pay 'the costs of their maintenance while on land as well as the expense of the return of such aliens.' It has gone farther and made the master or owner guilty of a misdemeanor if 'he shall make any charge for the return of any such alien or shall take any security from him for the payment of such charge.' The plain intent of these stringent provisions is to compel the companies to be vigilant in examining intending passengers before embarkation with a view to refusing such as are excluded by the Act. There can, of course, be no inference from these precise provisions that the companies are to pay the expenses in question, about which nothing at all is said in the Act. The legal fiction that the immigrants were not landed until they had been admitted

did not leave the defendant 'in charge' of them or make it liable for their maintenance and care. It only negated any presumption that, because of actual landing, they had been admitted or that the defendant's obligation to return them if ordered to be deported was at an end. Section 16 of the Act recognizes these considerations in disposing of the custody of the immigrants before admission. The section holds the companies liable for the detention and maintenance of immigrants landed temporarily for examination at places where they remain in the companies' charge. Then it goes on to provide that, where the government uses a suitable building for detention and examination, the immigration officials shall take charge of them, and the companies shall be relieved of responsibility thereafter for their detention until the immigrants are returned for deportation. The buildings on Ellis Island are just such suitable buildings, erected, indeed, by means of the head money tax of \$4 paid by the companies on each alien immigrant as required by the Act. So also the state hospitals where immigrants having contagious diseases were at that time sent until they could be removed to Ellis Island for examination were suitable buildings, and the expense so incurred was defrayed by the government out of the same source. We think the immigration officials, and not the defendant, were in the language of the Act in charge of the immigrants in question at both places, for all purposes. This construction appeals to our sense of fairness. The companies are required to pay head money on the passengers they bring here to provide moneys for defraying the expense of regulating immigration under the Act and no use of such funds could be more appropriate than to apply them

to the expenses of aliens pending examination who are rightfully brought here and are eventually admitted. It is stipulated by the parties that these moneys are more than enough in amount to do so after payment of all other expenses. If Congress had thought it just that the companies should pay these charges, we think it would have said so in express terms, as it did in the case of immigrants brought here in violation of law. It seems to us that the rule adopted by the immigration authorities was not consistent with law and was oppressive because it compelled the companies to pay in order to escape the alternative of having their steamers turned into hospitals and houses of detention. Such payments were not voluntary. They could not in the nature of things have been resisted."

"Landing."—"When section 16 provides that a 'temporary removal shall not be considered a landing,' the reference is to landing as affecting the lawful entry of the alien into the United States. 'Landing' refers, not to physically being on land, but to an act equivalent to an entry. In section 19 it will be noted that the cost of the maintenance of deported aliens 'while on land' shall be borne by the owner of the vessel. Surely, if Congress deemed it necessary to provide in plain language that expense of maintenance 'while on land' should be

paid by the owners of vessels, in the case of aliens subsequently excluded, it would have expressly provided (if it so intended) that expense of maintenance of aliens ultimately admitted should be similarly paid. Section 19 recognizes that the alien, though not entitled to a 'landing,' may physically be on land, and he is on land whether at Ellis Island or elsewhere than on the vessel. Reading sections 16 and 19 together, it is apparent that the Act had provided for a sensible and necessary method of handling these arriving immigrants." *U. S. v. Holland-America Line*, (S. D. N. Y. 1913) 205 Fed. 943.

Delegation of authority by commissioners.—The authority of the commissioners of immigration, individually or through persons whom they may appoint, to go on board any ship or vessel bringing immigrants, does not authorize them to delegate to any persons other than themselves the important functions—quasi-judicial in their character—which are by the statute confided to them. The action of a committee, appointed by the commissioners, determining as to the conditions of immigrants, has not the same legal effect as the action of the commissioners themselves. This case was under the Act of 1882. *In re Murnane*, (1889) 39 Fed. 99.

SEC. 17. [Medical examination on arrival.] That the physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health and Marine-Hospital Service, who shall have had at least two years' experience in the practice of their profession since receiving the degree of doctor of medicine and who shall certify for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien, or, should medical officers of the United States Public Health and Marine-Hospital Service be not available, civil surgeons of not less than four years' professional experience may be employed in such emergency for such service, upon such terms as may be prescribed by the Commissioner-General of Immigration under the direction or with the approval of the Secretary of Commerce and Labor. The United States Public Health and Marine-Hospital Service shall be reimbursed by the immigration service for all expenditures incurred in carrying out the medical inspection of aliens under regulations of the Secretary of Commerce and Labor. [34 Stat. L. 903.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Earlier provisions relating to the persons who might make the required examination were made by the Act of March 3, 1891, ch. 551, § 8, 26 Stat. L. 1085, as amended by the Act of March 3, 1893, ch. 208, § 6, 27 Stat. L. 570. These were superseded by the Act of March 3, 1903, ch. 1012, § 17, 32 Stat. L. 1217, which was repealed by section 43 of this Act, *infra*, p. 699.

The provisions of the text relating to reimbursements were repealed by the Act of March 4, 1909, ch. 299, § 1, *infra*, p. 700.

The Public Health and Marine-Hospital Service is now known as the Public Health Service. See the title HEALTH AND QUARANTINE.

Defective medical certificates.—In the case of *In re Madeiros*, (D. C. Mass. 1914) 225 Fed. 90, it appeared that none of the medical certificates which appeared in the record explicitly and categorically stated that the applicant was afflicted with a defect which might impair his ability to earn a living. But the court held that, fairly construed, that was their meaning. "In proceedings of this character, in which substance rather than form, and essential justice rather than

technicalities are to be regarded I do not think it can properly be held that the certificates were so defective that action based upon them was illegal and void."

Arriving by land.—The force and consequence of the medical examination are extended to alien immigrants arriving by land as well as those landing from a vessel. This ruling was made under the Act of 1893. (1898) 22 Op. Atty.-Gen. 122.

Effect of medical certificate.—See note under section 10, *supra*, p. 662.

SEC. 18. [Penalty for allowing illegal landing.] That it shall be the duty of the owners, officers, or agents of any vessel or transportation line, other than those railway lines which may enter into a contract as provided in section thirty-two of this Act, bringing an alien to the United States to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the negligent failure of any such owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor and be punished by a fine in each case of not less than one hundred nor more than one thousand dollars or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported as provided in sections twenty and twenty-one of this Act. [34 Stat. L. 904.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1891, ch. 551, § 8, 26 Stat. L. 1085. These were superseded by the Act of March 3, 1903, ch. 1012, § 18, 32 Stat. L. 1217, which was repealed by section 43 of this Act, *infra*, p. 699. Sections 20, 21, and 32 of this Act mentioned in the text are given *infra*, pp. 673, 681, 694.

"Landing from vessel."—Under the corresponding section of the Act of 1903, it was held that the words "landing from vessel," as used in this section, mean "to go ashore," the landing being complete the moment the vessel is left and the shore is reached. *Niven v. U. S.*, (1909) 169 Fed. 782, 95 C. C. A. 248.

Sailors.—Section 18 of the Act of 1903, corresponding to the present section 18, was held not to apply to seamen landed and placed in a hospital because of illness, who were unable to return to their home port with the vessel as intended. *Niven v. U. S.*, (1909) 169 Fed. 782, 95 C. C. A. 248.

Sailor deserting.—The ordinary case of a sailor deserting while on shore leave is not comprehended by the provisions of this section, notwithstanding the omission therefrom of the word "immigrant," which had followed the word "alien" in the earlier Acts. This case was under section 18 of the Act of 1903. *Taylor v. U. S.*, (1907) 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130, *affirming* (C. C. A. 2d Cir. 1907) 152 Fed. 1, 81 C. C. A. 197.

The fact that an alien seaman deserting while on shore leave was a stowaway under order of deportation does not bring the case within the provisions of this sec-

tion, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishing him if he lands or permits to land any alien at any other time or place. This case was under the corresponding section of the Act of 1903. *Taylor v. U. S.*, (1907) 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130, *affirming* (C. C. A. 2d Cir. 1907) 152 Fed. 1, 81 C. C. A. 197.

Where there was no evidence that any one connected with a vessel from which an alien escaped into the United States permitted or in any way connived at the alien's desertion, neither the master nor the agents of the vessel were guilty of an offense under section 18 of the Act of 1903, similar in its provisions to the present section 18. *Waterhouse v. U. S.*, (C. C. A. 9th Cir. 1908) 159 Fed. 876, 87 C. C. A. 56.

Under the Act of 1891.—On an indictment charging the master of a steamship with knowingly and negligently landing and permitting to land certain alien immigrants, it was necessary to prove wilful or negligent permission to escape. *U. S. v. Spruth*, (1896) 71 Fed. 678.

SEC. 19. [Return of illegally landed aliens — charges — detention to use as witness — maintenance while detained — insane aliens.] That all aliens brought to this country in violation of law shall, if practicable, be immediately sent back to the country whence they respectively came on the vessels bringing them. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came; and if any master, person in charge, agent, owner, or consignee of any such vessel shall refuse to receive back on board thereof, or on board of any other vessel owned or operated by the same interests, such aliens, or shall fail to detain them thereon, or shall refuse or fail to return them to the foreign port from which they came, or to pay the cost of their maintenance while on land, or shall make any charge for the return of any such alien, or shall take any security from him for the payment of such charge, such master, person in charge, agent, owner, or consignee shall be deemed guilty of a misdemeanor and shall, on conviction, be punished by a fine of not less than three hundred dollars for each and every such offense; and no vessel shall have clearance from any port of the United States while any such fine is unpaid: *Provided*, That the Commissioner-General of Immigration, with the approval of the Secretary of Commerce and Labor, may suspend, upon conditions to be prescribed by the Commissioner-General of Immigration, the deportation of any alien found to have come in violation of any provision of this Act, if, in his judgment, the testimony of such alien is necessary on behalf of the United States Government in the prosecution of offenders against any provision of this Act: *Provided*, That the cost of maintenance of any person so detained resulting from such suspension of deportation shall be paid from the "immigrant fund" but no alien certified, as provided in section seventeen of this Act, to be suffering from tuberculosis or from a loathsome or dangerous contagious disease other than one of quarantinable nature shall be permitted to land for medical treatment thereof in any hospital in the United States, unless with the express permission of the Secretary of Commerce and Labor: *Provided*, That upon the certificate of a medical officer of the United States Public Health and Marine-Hospital Service to the effect that the health or safety of an insane alien would be unduly imperiled by immediate deportation, such alien may, at the expense of the "immigrant fund," be held for treatment until such time as such alien may, in the opinion of such medical officer, be safely deported. [34 Stat. L. 904.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Earlier provisions for the return of aliens prohibited entry were made by the Act of Aug. 3, 1882, ch. 376, § 4, 22 Stat. L. 214; the Act of Feb. 26, 1885, ch. 164, § 8, added by the amending Act of Feb. 23, 1887, ch. 220, 24 Stat. L. 415, and further amended by the Act of Oct. 19, 1888, ch. 1210, 25 Stat. L. 566, and the Act of March 3, 1891, ch. 206, § 10, 26 Stat. L. 1086. These were superseded by the Act of March 3, 1903, ch. 1012, § 19, 23 Stat. L. 1218, which was repealed by section 43 of this Act, *infra*, p. 699.

A provision of the Act of March 3, 1905, ch. 1484, § 1, 33 Stat. L. 1244, that the necessary expenses incident to the detention of aliens ordered deported whose attendance as witnesses might be required should be paid from the permanent appropriation for expenses regulating immigration, may be regarded as superseded by the second proviso of the text.

The Public Health and Marine-Hospital Service mentioned in the text is now known as the Public Health Service. See the title HEALTH AND QUARANTINE.

Strictly construed.—This section must be strictly construed. *International Mercantile Marine Co. v. U. S.*, (C. C. A. 2d Cir. 1912) 192 Fed. 887, 113 C. C. A. 365.

Purpose of section.—This section is not aimed at the aliens of the excluded class, but at the owners of vessels unlawfully bringing them into this country. *U. S.*

v. Nord Deutscher Lloyd, (1912) 223 U. S. 512, 32 S. Ct. 244, 56 U. S. (L. ed.) 531 (*reversing* (S. D. N. Y. 1911) 186 Fed. 391), wherein the court said: "The Government might in large measure protect itself by inspection, rejection and order of deportation, but it is purposed also, as far as possible, to protect the alien. He might be ignorant of our laws and ought to be deterred from incurring the expense of making a passage which could only end in his being returned to the country from whence he came. This policy could best be subserved by securing the co-operation of the transportation companies, and to this end the statute required that they should not only maintain the aliens unlawfully brought by them into this country, but should take them back free of charge. In the absence of this last provision the company might well afford to accept as passengers those known or suspected to belong to the excluded class. It would receive from them their passage money from Europe to America. If they passed the inspection the transaction was ended. If they were deported the company would be at the trifling expense of maintaining them while here. But if it could charge and secure payment for the return passage, it would collect two fares instead of one. This would have made the transportation of an excluded alien more profitable than the carrying of one who could lawfully enter. This was so obvious that the statute not only required the cost of their passage to be borne by the transportation company, but prohibited the making of a charge or the taking of security for the return passage, which might be collected or enforced at the end of the journey. *U. S. v. Nord Deutscher Lloyd*, (1912) 223 U. S. 512, 32 S. Ct. 244, 56 U. S. (L. ed.) 531.

Scope of section.—This section has no extra-territorial operation, and a vessel owner cannot be indicted for what he did in a foreign country, but such an owner and a passenger can in a foreign country make a contract which will be of force in the United States, and if by reason of facts occurring in this country the statute operates to rescind the contract, the rights and duties of the parties can be determined in this country and acts of commission or omission which as a result of the rescission are here unlawful can here be punished. *U. S. v. Nord Deutscher Lloyd*, (1912) 223 U. S. 512, 32 S. Ct. 244, 56 U. S. (L. ed.) 531, *reversing* (S. D. N. Y. 1911) 186 Fed. 391.

Power of Congress.—It was within the power of Congress to provide for or authorize delay in the execution of an order of deportation and a suspension of action thereunder for a reasonable time

to serve some public purpose. *In re Aliens*, (N. D. N. Y. 1916) 231 Fed. 335.

Immigrants defined.—This section applies only to the entry into the United States of immigrants, who, according to standard definitions of the term, are persons removing into the country for the purpose of permanent residence, and the penalty imposed on the master of a vessel for neglecting to detain on his vessel any "alien who may unlawfully come to the United States" on such vessel, or to return him to the port from which he came, must be construed in the light of such general purpose, and limited in its application to cases of alien immigrants. This case was under the corresponding section of the Act of 1891. *Moffit v. U. S.*, (C. C. A. 9th Cir. 1904) 128 Fed. 375, 63 C. C. A. 117.

Detention of alien.—It is not required that the detention of the alien be necessary or desired for the prosecution of a criminal offense under the Act. If his detention be necessary for the prosecution of a suit to recover a penalty for the violation of some provision of the immigration laws, such alien may be detained. *In re Aliens*, (N. D. N. Y. 1916) 231 Fed. 335.

Bail.—An alien subject to deportation but detained to be used as a witness may be admitted to bail pending his appearance in court as a witness. *In re Aliens*, (N. D. N. Y. 1916) 231 Fed. 335.

The words "neglect to detain" must be understood as the equivalent of "fail" or "omit" to detain, and impose on masters, owners, agents, and consignees absolutely the duty to do the things required of them respectively. This case was under the corresponding section of the Act of 1891. *Warren v. U. S.*, (C. C. A. 1893) 58 Fed. 559, 5 U. S. App. 656, 7 C. C. A. 368. But see *U. S. v. Spruth*, (1896) 71 Fed. 678.

Extent of shipowner's duty.—Shipowners who have wrongfully brought aliens into the United States, and have received them back on board the vessel for deportation, are not made absolute insurers of the return of the immigrants to the port from whence they came, by this section punishing as a misdemeanor the "neglect" to detain the persons so received, or to return them to that port; but nothing more is required than a faithful and careful effort to carry out the duty so imposed. This case was under the corresponding section of the Act of 1891. *Hackfeld v. U. S.*, (1905) 197 U. S. 442, 25 S. Ct. 456, 49 U. S. (L. ed.) 826, *reversing* (C. C. A. 9th Cir. 1903) 125 Fed. 596, 60 C. C. A. 428, and *overruling* *Warren v. U. S.*, (C. C. A. 1st Cir. 1893) 58 Fed. 559, 5 U. S. App. 656, 7 C. C. A. 368. *Followed* in *Hackfeld v. U. S.*, (C. C. A. 9th Cir. 1905) 141 Fed. 9, 72 C. C. A. 265.

Failure to enter alien on ship's manifest.—It was not the intention of the Immigration Act that an alien should be deported in case the ship's master failed, either wilfully or negligently, to include him in the manifest, and such an alien, though literally "brought to this country in violation of law" within the meaning of this section, is not within its provisions. *U. S. v. Williams*, (S. D. N. Y. 1909) 193 Fed. 228.

Alien escaping from vessel.—A master who does all he can to keep on board his vessel alien immigrants who have been ordered to be deported, short of putting them in chains, is not guilty of an offense under this section by reason of the fact that they escaped. *U. S. v. Hemet*, (D. C. Ore. 1907) 156 Fed. 285.

"Charge"—"taking security."—Under this section an indictment alleging that the defendant at Bremen collected return passage from certain proposed immigrants who were within the excluded classes, and held the money as security for a charge to be made for deportation, sufficiently charged the taking of the money as security within the United States, since the parties in Germany could make a contract which would be of force in the United States. When the alien paid and the defendant received money for a return passage they created a condition which was operative in New York. *U. S. v. Nord Deutscher Lloyd*, (1912) 223 U. S. 512, 32 S. Ct. 244, 56 U. S. (L. ed.) 531, *reversing* (S. D. N. Y. 1911) 186 Fed. 391.

Minor children of naturalized father.—The status, as aliens, of children born in a foreign country of alien parents is not changed by the naturalization of their father as a citizen of the United States by taking out his second papers while the children are detained in custody as immigrants at Ellis Island, and they remain subject to exclusion under the immigration laws for a dangerous contagious disease contracted before their embarkment, such children not being affected by R. S. sec. 2172 (title NATURALIZATION), which provides that the minor children of persons duly naturalized "if dwelling in the United States" shall be considered as citizens thereof. This case was under the corresponding section of the Act of 1903. *U. S. v. Williams*, (1904) 132 Fed. 894.

Evidence of violation of section.—In *Moffitt v. U. S.*, (C. C. A. 9th Cir. 1904) 128 Fed. 375, 63 C. C. A. 117, it appeared that the defendant was indicted under the corresponding section of the Act of 1891, for neglecting to detain on the steamship of which he was master an alien not entitled to land in the United States, by reason of which neglect the alien escaped and landed in the United States. On the trial the following facts were shown by an agreed statement: When defendant's

ship was anchored off shore at a Mexican port a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore he found that the vessel had started and proceeded some distance. Defendant refused his request that he be taken back and landed, but promised to stop and leave him on the return trip, and thereupon put him at work but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. It was held under said section that such facts were not sufficient to warrant the defendant's conviction, the alien not being an immigrant within the meaning and intent of the Act, whom defendant was required to put in irons or keep under guard to secure his return on the vessel, and there being no evidence or claim that defendant did not act in good faith.

Burden of proof.—Since this section imposes a penalty only in the cases of aliens "brought to this country in violation of law" the burden of proving that they were so brought here and that they were ordered deported by competent authority is upon the government. *Nord Deutscher Lloyd v. U. S.*, (C. C. A. 2d Cir. 1914) 213 Fed. 10, 130 C. C. A. 85.

Habeas corpus.—Whether the executive officers of the government, in deporting an alien immigrant, are proceeding according to law, is a judicial question, which may be inquired into on habeas corpus. Under the Act of 1891. *Lavin v. Le Fevre*, (C. C. A. 9th Cir. 1903) 125 Fed. 693, 60 C. C. A. 425.

To what country deported.—Under this and the following section providing that all aliens unlawfully coming into the country shall, if practicable, be immediately sent back on the vessel by which they were brought in, and that any alien unlawfully coming into the country may be returned as provided by law at any time within a year thereafter, where alien immigrants unlawfully came into the country from France, and after being temporarily absent in British Columbia, returned within a year of their arrival from France, it was held that they were properly deported to France. *Lavin v. Le Fevre*, (C. C. A. 9th Cir. 1903) 125 Fed. 693, 60 C. C. A. 425. See note "Country whence he came" under section 20, *infra*, p. 678, and note "To what place deported" under section 35, *infra*, p. 695.

Remission of fines.—The Secretary of Commerce and Labor has no power to remit a fine imposed by a United States court upon a steamship company for its

failure to detain and return to the country whence they came aliens whose deportation has been ordered under this section. (1908) 28 Op. Atty.-Gen. 624.

Compromise.—Fines imposed by way of sentence after a verdict of guilty found as the result of a trial upon an indictment under this section cannot be com-

promised by the Secretary of the Treasury under R. S. sec. 3469 (title CLAIMS), as such fines are not a "claim" within the meaning of that section. (1890) 20 Op. Atty.-Gen. 685. See also (1900) 23 Op. Atty.-Gen. 271; (1894) 20 Op. Atty.-Gen. 705.

SEC. 20. [Deportation within three years after entry — expenses — release pending appeal.] That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that can not be done, then the cost of removal to the port of deportation shall be at the expense of the "immigrant fund" provided for in section one of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came: *Provided*, That pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States. [34 Stat. L. 904.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Provisions prescribing the time within which an alien might be deported were made by the Act of Oct. 19, 1888, ch. 1210, § 1, 25 Stat. L. 566, and the Act of March 3, 1891, ch. 551, § 11, 26 Stat. L. 1086. These were superseded by the Act of March 3, 1903, ch. 1012, § 20, 32 Stat. L. 1218, which was repealed by section 43 of this Act, *infra*, p. 699.

- I. Entering in violation of law, 673.
- II. Limitation of time for deportation, 674.
- III. Proceedings for deportation, 675.
- IV. Effect of order of deportation, 677.
- V. Warrant of deportation, 677.
- VI. Place of deportation, 678.
- VII. Attendants, 679.
- VIII. Habeas corpus, 679.
- IX. Deportation of Chinese, 679.
- X. Cost of removal, 680.

I. ENTERING IN VIOLATION OF LAW

Generally.—Aliens who enter in violation of section 2 are included among those who enter "in violation of law." *Lewis v. Frick*, (1914) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967, *affirming* (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493.

Alien falsely representing himself to be citizen.—An alien who falsely represents himself to be a citizen, and by such artifice and fraud secures admission to the United

States, is guilty of "entering in violation of law," within the meaning of this section. *Williams v. U. S.*, (C. C. A. 2d Cir. 1911) 186 Fed. 479, 108 C. C. A. 457.

Alien resident temporarily absent.—Under this section which authorizes the deportation of any alien who has entered the United States in violation of law at any time within three years after entry, the fact that an alien entering is a resident of the United States and left temporarily is immaterial, and the legality of the last entry is to be determined as though there had been no previous entry, with the right to deport within three years thereafter if such entry is unlawful. *Ex p. Petterson*, (1898) 166 Fed. 537; *Ex p. Hoffman*, (C. C. A. 2d Cir. 1910) 179 Fed. 839, 103 C. C. A. 327; *Sibray v. U. S.*, (C. C. A. 3d Cir. 1911) 185 Fed. 401, 107 C. C. A. 483, *reversing* (1910) 178 Fed. 144; *U. S. v. Sprung*, (C. C. A. 4th Cir. 1910) 187 Fed. 903, 110 C. C. A.

37, reversing (1909) 182 Fed. 330; U. S. v. Tsurukichi Nakao, (C. C. A. 9th Cir. 1914) 217 Fed. 49, 133 C. C. A. 35; U. S. v. Tsunezo Kusano, (C. C. A. 9th Cir. 1914) 217 Fed. 50, 133 C. C. A. 36, following *Lapina v. Williams*, (1914) 232 U. S. 78, 34 S. Ct. 196, 58 U. S. (L. ed.) 515. *Contra*, *Redfern v. Halpert*, (C. C. A. 5th Cir. 1911) 186 Fed. 150, 108 C. C. A. 262.

In *U. S. v. Hook*, (1908) 166 Fed. 1007, it appeared that the petitioner, a Canadian by birth and citizenship, entered the United States in 1901 and was an inmate of houses of prostitution in various cities until 1905, when she went to Philadelphia to care for an invalid sister. She remained there two years, when she resumed life as a prostitute, and in the fall of 1907 went back to Canada, where she stayed four days, when she returned to the United States and continued her misconduct until she was arrested. It was held that the three-year period within which she was subject to deportation dated from her return from Canada, and that she was therefore unlawfully within the country.

In *U. S. v. Williams*, (1911) 187 Fed. 470, it appeared that an alien of the excluded classes, having been in the United States more than three years, shortly before his arrest as an alien not entitled to enter, while in Niagara Falls, passed from the American to the Canadian side to view the falls, and, after staying there an hour or more, came back to New York, and shortly thereafter was arrested. It was held that his return to the United States after going into Canada constituted a re-entry, after which he was subject to deportation.

Living in adultery after entry.—That an alien is living in adultery within the United States is not ground for deportation, such conduct being solely within the police power of the state. *U. S. v. Sibray*, (1910) 178 Fed. 144.

Likely to become public charge—involving moral turpitude.—In *Ex p. Saraceno*, (1910) 182 Fed. 955, it appeared that the petitioner, having immigrated to the United States in 1899, returned to Italy in January, 1909, and was followed about four months thereafter by his wife and children. He remained there until September, 1910, when he returned to the United States alone. He was a barber by trade and had followed that occupation in New York during his residence there, was twenty-nine years of age, and had twenty-five dollars when he landed. He intended to go to his brother, and was not subject to any mental or physical disability. On his examination it was shown that he had been twice arrested during his former residence in New York, and on the second occasion was convicted of carrying a concealed weapon and sentenced to imprisonment for fifteen days, his

offense being a misdemeanor under the New York law. It was held that petitioner was not a person likely to become a public charge, or a person convicted of an offense involving moral turpitude, and was not subject to deportation on either of such grounds.

A judgment of acquittal in a criminal prosecution of an alien for falsely claiming citizenship, entered on a directed verdict, is not a bar to proceedings for his deportation, under this section, for having obtained admission to the United States in violation of law by falsely representing himself to be a citizen. *Williams v. U. S.*, (C. C. A. 2d Cir. 1911) 186 Fed. 479, 108 C. C. A. 457.

Deportation as dependent on conviction for felony.—An alien may be deported for the offense of procuring or attempting to bring in prostitutes, etc., in the absence of a conviction for the felony under section 3. *Lewis v. Frick*, (1914) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967, affirming (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493.

II. LIMITATION OF TIME FOR DEPORTATION

Rule stated.—The alien must be taken into custody and deported, that is, taken out of the country, within three years. *International Mercantile Marine Co. v. U. S.*, (C. C. A. 2d Cir. 1912) 192 Fed. 887, 113 C. C. A. 365.

Similarly, under the corresponding section of the Act of 1903, which provided for a two-year period, it was held that a "deportation" for entering in violation of any prior law could only be made within two years, which meant the actual deportation, and not merely the commencement proceedings. *Botis v. Davies*, (1909) 173 Fed. 996.

But in *Bun Chew v. Connell*, (C. C. A. 9th Cir. 1916) 233 Fed. 220, 147 C. C. A. 226 (affirming [S. D. Cal. 1915] 220 Fed. 387), it was held that the secretary has the full three years in which to begin proceedings, holding that the statute should be construed in analogy with the statutes of limitations in criminal cases.

Under the corresponding section of the Act of 1891, which provided a limitation period of one year instead of three, it was held that where a proceeding for the deportation of an alien as authorized by this section was not begun by the seizure of the alien within one year next after his last entry into the United States, as required by section 11, the proceeding was barred. *In re Russomanno*, (1904) 128 Fed. 528.

Beginning of running of period of three years.—The period of three years from entry, prescribed by sections twenty and twenty-one, runs not from the date when the alien first entered the country, but from the time of the prohibited entry, irrespective of any qualification arising out of a previous residence or domicile

in this country. *Lewis v. Frick*, (1914) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967, *affirming* (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493.

Expiration of time.—Under the Act of 1903 and this section, providing for the deportation of aliens unlawfully in the country within three years after landing, deportation need not be completed within that time, the government having the whole of the last day of the three years in which to make the arrest, and prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation. *U. S. v. Redfern*, (1910) 180 Fed. 506. See also *U. S. v. International Mercantile Marine Co.*, (1911) 186 Fed. 669.

In *Matsumura v. Higgins*, (C. C. A. 9th Cir. 1911) 187 Fed. 601, 109 C. C. A. 431, it appeared that the petitioner, a Japanese alien, was convicted of importing an alien prostitute into the United States, sentenced to imprisonment, and on investigation by the Acting Secretary of Commerce and Labor was found to belong to the excluded class and ordered deported. It was held that since domiciliary rights could not grow for the benefit of petitioner during the period of his incarceration, the deportation writ was in abeyance during such period, and on its expiration was subject to immediate execution, though petitioner then had been in the United States more than three years.

III. PROCEEDINGS FOR DEPORTATION

Nature of proceedings.—A proceeding for the deportation of an alien is not criminal in its character, and an order of deportation is not a punishment for crime so as to entitle the alien to the constitutional guaranties and safeguards accorded to a citizen accused of crime. *Sire v. Berkshire*, (W. D. Tex. 1911) 185 Fed. 967; *Ladaux v. Berkshire*, (W. D. Tex. 1911) 185 Fed. 971.

Right of inspector to hear deportation proceeding.—In *Ex p. Kwan So*, (N. D. Cal. 1913) 211 Fed. 772, it was held that an inspector was not disqualified to hear a deportation proceeding, because he had acquired information from sources outside the record, in that he had participated in a so-called raid of the house in which the petitioner was found. The court said: "Concretely stated, the fact seems to be that he himself participated in the so-called raid of the house in which the petitioner was found, and which it is claimed by the government was a house of ill fame; and of course he had such knowledge as was thus acquired. While it is somewhat difficult for the mind, accustomed to the contemplation only of investigations conducted strictly in accordance with the time-honored rules of judicial procedure, to adjust itself to

the informal and sometimes *ex parte* methods of administrative officers, I do not think that, under the law as the same has been interpreted by the Supreme Court, the inspector here was disqualified. Indeed, sometimes, in our court procedure, judicial officers act upon facts within their own knowledge and do not resort to formal proofs in the nature of sworn testimony. Grand juries may return indictments upon information which they themselves acquire at first hand; and notably, in a certain class of contempt proceedings, judges convict upon facts which they themselves have observed."

Particularly required in deportation proceedings.—In proceedings before the immigration officers, looking to the deportation of aliens, no such particularity is required as is essential in court proceedings; but this does not mean that an omnibus charge of being in this country in violation of law, which does not in any degree whatever advise the alien as to just what he is called upon to meet, will satisfy the requirements either of the law, or of good faith or of fair dealing. *Ex p. Lew Lin Shew*, (N. D. Cal. 1914) 217 Fed. 317, wherein the court held that an order of deportation that the alien "is unlawfully in this country in that he has been found therein in violation of the Chinese exclusion laws," was too broad and indefinite to convey any idea of the specific reason for which the alien had been ordered deported.

Right to hearing.—Where a warrant of arrest, under which proceedings for the deportation of an alien were instituted, conducted, and concluded, charged alone a violation of this Act, but the proof and findings of the inspector before whom the hearing was had showed that the accused arrived in this country in 1906, it was held that such proceedings did not authorize a warrant of deportation by the Department of Commerce and Labor for violation of the Act of 1903 then in force, without a hearing on such charge, and that a person taken into custody on a warrant so issued was entitled to discharge on a writ of habeas corpus. *Davis v. Manolis*, (C. C. A. 7th Cir. 1910) 179 Fed. 818, 103 C. C. A. 310.

Where an alien had deserted from the crew of a vessel on which he was brought into the United States, and had been at large in the country for a month before he developed insanity, when he was arrested and ordered deported by the Secretary of Commerce and Labor, it was held that the secretary's decision was not conclusive on the alien; the secretary, as an executive officer, being without power within the time limited by statute to order the deportation of an alien without giving him an opportunity to be heard on the questions involving his right to remain in the United States. This

case was under the corresponding section of the Act of 1903. *Waterhouse v. U. S.*, (C. C. A. 9th Cir. 1908) 159 Fed. 876, 87 C. C. A. 56.

A fair hearing must be accorded an alien sought to be deported under this section. *Ex p. Chin Loy You*, (D. C. Mass. 1915) 223 Fed. 833, wherein it was held that the facts did not show that a fair hearing was granted. The court said: "Such hearing may be, and usually is, summary and administrative, rather than judicial in character and need not be conducted in accordance with the procedure and rules of evidence followed in courts of law. The essential thing is that there shall have been an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law. *Chin Yow v. U. S.*, (1908) 208 U. S. 8, 28 S. Ct. 201, 52 U. S. (L. ed.) 389.

An alien was arrested by the inspector in charge of immigration and was taken by him to the grand jury room in the United States courthouse, the door of which was part of the time locked, and was there examined and catechised by the said inspector and was refused permission to consult with counsel until after the examination by such inspector was completed, after which he was permitted to consult counsel. It was held that he was not accorded a fair and impartial trial before the inspector or the Department of Commerce and Labor. *Ex p. Lam Pui*, (E. D. N. C. 1914) 217 Fed. 456.

Right of counsel.—On the question whether an alien sought to be deported under this section is entitled to counsel on the hearing to determine whether he is entitled to remain, the District Court in *Ex p. Chin Loy You*, (D. C. Mass. 1915) 223 Fed. 833, said: "It is true that the right to counsel secured by the Constitution (Amendment 6, § 1) relates only to criminal prosecutions; but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner. See, too, Amendment 14. To make the defendant's substantial rights in a matter involving personal liberty depend on whether the proceeding be called 'criminal' or 'civil' seems to me unsound. Indeed, historically the right to counsel in civil cases and upon charges of misdemeanors antedates such right in cases of felony and treason. Cooley, *Constitutional Limitations*, p. 475. 'The presence, advice, and assistance of counsel' is said by Story to be necessarily included in 'due process of law.' Story on the Constitution, p. 668. Without undertaking to say that a prisoner has an absolute right to counsel before administrative boards, not composed of lawyers, or that the denial of

counsel would in every case prevent such proceedings from being fair, I am of opinion that, under such circumstances as are disclosed in this case, where counsel for a prisoner seasonably requests the privilege of conferring with him before the trial and of being present during the taking of the evidence, the refusal of that request puts upon the official so acting a great burden of explanation and of scrupulous regard for the prisoner's rights which in this case is not met."

In *Sire v. Berkshire*, (W. D. Tex. 1911) 185 Fed. 967, and *Ladaux v. Berkshire*, (W. D. Tex. 1911) 185 Fed. 971, it was held that where an alien in deportation proceedings did not deny her alienage nor that at the time of her arrest she was engaged in immoral business, and it appeared that she was represented by counsel on a hearing before the Secretary of Commerce and Labor, the deportation was pursuant to due process of law, though she was not permitted to consult an attorney before she was first examined by the immigration officers.

Kind of testimony.—In habeas corpus proceedings by a woman resisting deportation for prostitution her restraint is not illegal merely because affidavits were admitted against her in the hearing for deportation which she did not know were to be taken, the result being that she was not afforded the privilege of cross-examination. *Choy Gum v. Backus*, (C. C. A. 9th Cir. 1915) 223 Fed. 487, 139 C. C. A. 35, wherein the court said: "The affidavits were inspected by counsel for petitioner, and the only objection or protest made to their admission was that the petitioner was not afforded the opportunity to cross-examine the affiants; none was interposed on the ground that petitioner was not given the opportunity of answering them; nor was any request made for an extension of time in which to produce further testimony to refute the same. So, the question rests on the propriety of admitting affidavits in evidence against petitioner, without first having notified her of the intention of taking such affidavits, and without affording her the privilege of cross-examination. This kind of testimony, while not ordinarily competent for judicial inquiry in the sense of a trial in a court of justice, has nevertheless been resorted to before executive officers and boards of immigration inspectors for determining the right of aliens to remain in this country, and yet the aliens have been refused their liberty upon habeas corpus, where the inquiry appeared to be fair and impartial, and where the immigration officers had been guilty of no abuse of discretion reposed in them. Such a case was *Healy v. Backus*, [C. C. A. 9th Cir. 1915] 221 Fed. 358, [137 C. C. A. 166], recently decided by this

court. In that case many affidavits were taken and admitted, both for and against the petitioner, and a very wide range of inquiry was indulged in by which information was gathered by means of letters and reports, and yet the court was of the view that the inquiry was fairly conducted toward the aliens whom Healy represented, and without abuse of discretion on the part of the immigration officers, and consequently refused to liberate them upon habeas corpus; there being pertinent testimony adduced from which the finding made could be reasonably inferred."

Authority of Secretary of Labor to deport.—It is at the discretion of the Secretary of Labor to order an immigrant, under the age of 16 years, unaccompanied by either parent, to be deported, and he is not estopped by a prior ruling of his own in favor of admission, but may reverse such ruling. *U. S. v. Com'r Immigration*, (S. D. N. Y. 1913) 209 Fed. 137.

IV. EFFECT OF ORDER OF DEPORTATION

Finality of decision.—The direction of the Secretary of Commerce and Labor that an alien should be deported on the vessel by which he was brought to the United States is not conclusive on the officers and agents of the vessel, neither of whom has been a party to the proceedings before the Secretary. This case was under the Act of 1903. *Waterhouse v. U. S.*, (C. C. A. 9th Cir. 1908) 159 Fed. 876, 87 C. C. A. 56.

Marriage to citizen after deportation order.—Where, after an alien had been ordered deported because she was afflicted with a contagious disease, she married a citizen, it was held that she was not thereby relieved from the order of deportation, under R. S. sec. 1994 (title CITIZENSHIP), providing that any woman married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen. *Ex p. Kaprielian*, (1910) 188 Fed. 694. But see *Hopkins v. Fachant*, 130 Fed. 839, wherein it was held that where an alien woman, pending deportation proceedings, marries a citizen, she takes his status and is not subject to deportation. In that case however the deportation order was held to have been arbitrarily and unlawfully issued.

Exclusion permanent unless reversed.—In *U. S. v. Uhl*, (C. C. A. 2d Cir. 1914) 211 Fed. 628, 128 C. C. A. 560, it appeared that the relator had been previously excluded for violation of section 2. He contended that the statute was not to be construed to mean that a person who has once been refused admission because at the time under a disability imposed by the statute was forever thereafter to be regarded as belonging to the

excluded classes so that if at any subsequent time he entered the country he was to be held to have entered in violation of law and to be subject to the penalties of the Act. The court said: "It is said that such a construction of the Act would lead to absurd results. That if a person was once refused admission on the ground of pauperism and subsequently became a wealthy man he could not enter the country except in violation of law. That might possibly depend upon the course he pursued, and upon whether a subsequent investigation duly made disclosed the fact that he was at the time of his second application entitled to admission. We do not need to consider that question until it arises. In the case at bar the relator allowed the original finding to stand unreversed so that each time he subsequently came into the country we must hold that he entered in violation of law."

V. WARRANT OF DEPORTATION

Sufficiency of warrant for arrest or deportation.—A warrant for the arrest or deportation of an alien need only comply substantially with the law and need not conform to all technicalities of criminal pleading. *Ex p. Pouliot*, (E. D. Wash. (1912) 196 Fed. 437.

Neither the Immigration Act nor the promulgated regulations require that a warrant of arrest in deportation proceedings shall state the alleged grounds on which deportation will be demanded. *U. S. v. Williams*, (1910) 175 Fed. 274.

A warrant of arrest of an alien for deportation, charging that he had been induced or solicited to migrate to this country by an offer or promise of employment or in consequence of an oral agreement to perform unskilled labor in this country, was held to be sufficient, especially where unobjected to on the hearing and criticised for the first time after deportation was ordered and collaterally on a writ of habeas corpus. *Ex p. George*, (1910) 180 Fed. 785.

A warrant for the deportation of an alien charged to be unlawfully in the country is not insufficient because signed by the Assistant Secretary of Commerce and Labor instead of the Secretary. *U. S. v. Redfern*, (1910) 180 Fed. 506.

A deportation warrant charged that the alien was a member of the excluded classes, in that he was a contract laborer and had been induced to migrate by an offer or promise of employment under an agreement to perform manual labor in the United States. It was held that the charge was sufficiently set forth in the warrant. *Ex p. Michele*, (1911) 188 Fed. 449.

Amendment of warrant of deposition.—Where, on proceedings to deport Chinese persons because illegally in the United

States, they are erroneously ordered to be deported to China, the court, on habeas corpus proceedings, will not discharge them but will amend the warrant so as to require their deportation to the proper country from whence they came. *U. S. v. Sisson*, (C. C. A. 2d Cir. 1913) 206 Fed. 450, 124 C. C. A. 356. See *CHINESE EXCLUSION*.

VI. PLACE OF DEPORTATION

"Country whence he came."—There has been some conflict as to whether the immigration laws contemplated the deportation of an alien who had illegally entered the country to the country whence he came, regardless of the country of his nativity, or whether the words "returned to the country whence he came" refer to the country of the alien's nativity or citizenship. In *Ex p. Bun Chew*, (S. D. Cal. 1915) 220 Fed. 387, it was held that the phrase "country whence he came" refers to the country from which the alien originally came and not to some country from which he, being temporarily domiciled therein, came immediately to the United States.

Similarly, the Circuit Court of Appeals for the Sixth Circuit in the case of *Frick v. Lewis*, (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493, construed the words "country whence he came" to refer to the country of the alien's nativity or citizenship.

But in *Lewis v. Frick*, (1913) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967, affirming (C. C. A. 6th Cir. 1912) 195 Fed. 693, 15 C. C. A. 493, the distinction is pointed out between those cases involving aliens who are subject to deportation because of entry in violation of law and those cases in which cause for deportation may arise after a lawful entry. Respecting the determination of the country to which an alien is to be deported, the court said: "Respecting this matter, the sections are somewhat lacking in clearness. But, at least, section 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. This was recognized by rule 38 of the Immigration Regulations, in force December 12, 1910. . . . The theory of the Act, as expressed in section 2, is that undesirables ought to be excluded at the seaport or at the frontier; but sections 20, 21 and 35 recognize that this is not always practicable. Of course, if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But since his offense was

not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to us that the Act reasonably admits of his being returned to the land of his nativity; that being in fact 'the country whence he came' when he first entered the United States. And to the same effect see *Ex p. Chin Him*, (W. D. N. Y. 1915) 227 Fed. 131; *Ung Bak Foon v. Prentiss*, (C. C. A. 7th Cir. 1915) 227 Fed. 406, 142 C. C. A. 102; *Bun Chew v. Connell*, (C. C. A. 9th Cir. 1916) 233 Fed. 220, 147 C. C. A. 226; *Wong Back Sue v. Connell*, (C. C. A. 9th Cir. 1916) 233 Fed. 659, 147 C. C. A. 467. See also *Chin Teung v. Skeffinton*, (D. C. Mass. 1916) 220 Fed. 859.

On the contrary in *U. S. v. Sisson*, (C. C. A. 2d Cir. 1913) 206 Fed. 450, 124 C. C. A. 356, it was held that in proceedings for the deportation of Chinese persons under this Act where it is shown that they came into this country from Canada, and there is no proof that they were born in China, evidence that they are Chinese is no proof that China is the land from whence they came and they should be returned to Canada instead of China. See also *U. S. v. Sisson*, (C. C. A. 2d Cir. 1916) 232 Fed. 599, 146 C. C. A. 557.

So also, in *U. S. v. Redfern*, (E. D. La. 1911) 186 Fed. 603, it was held that the immigration laws contemplated the deportation of an alien who had illegally entered, to the country whence he came regardless of the country of his nativity; that the Secretary had no discretion in the matter and that a warrant attempting to deport an alien to a country other than that from whence he immediately came was illegal and void. And see to the same effect *U. S. v. Redfern*, (E. D. La. 1914) 210 Fed. 548. See also *U. S. v. Ruiz*, (C. C. A. 5th Cir. 1913) 203 Fed. 441, 121 C. C. A. 551; *Yee Suey v. Berkshire*, (C. C. A. 5th Cir. 1916) 232 Fed. 143, 146 C. C. A. 335.

Under section 12 of the Act of May 6, 1882, as amended by the Act of July 5, 1884 (title *CHINESE EXCLUSION*), providing that any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, it was held that the phrase "be removed . . . to the country whence he came" does not necessarily mean the country of which he is a subject by birth or allegiance but the country in which he last acquired a domicile. *U. S. v. Chong Sam*, (E. D. Mich. 1891) 47 Fed. 878; *In re Mah Wong Gee*, (D. C. Vt. 1891) 47 Fed. 433; *In re Leo Hem Bow*, (D. C. Wash. 1891)

47 Fed. 302. See also (1891) 20 Op. Atty.-Gen. 171.

See note "To what place deported" under section 35, *infra*, p. 695.

VII. ATTENDANTS

Authority to furnish.—The Secretary of Commerce and Labor is empowered by sections 20 and 21 to select attendants to accompany aliens ordered to be deported, where they are mentally or physically diseased in such a manner as to require attendance and care during the voyage. The steamship or transportation companies by which such aliens came to this country are required to receive the attendants so selected at the same time that they receive the aliens to be deported, and convey them, with the aliens, to the foreign places of destination. The steamship companies are required to furnish such attendants transportation to and from the alien's destination and to defray all expenses incident to such employment. (1907) 26 Op. Atty.-Gen. 381.

VIII. HABEAS CORPUS

When granted.—While the findings of the immigration officers on deportation proceedings are conclusive on questions of fact, if an alien is deprived of his liberty and is to be deported by the oppressive and arbitrary action of an inspector and without a fair hearing as contemplated by law, the federal courts will relieve him by review on writ of habeas corpus. *Whitfield v. Hanges*, (C. C. A. 8th Cir. 1915) 222 Fed. 746, 138 C. C. A. 199. Unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied before the immigration officers, the merits of the case are not open and the denial of a hearing cannot be established by proving that the decision is wrong. *Prentiss v. Seu Leung*, (C. C. A. 7th Cir. 1913) 203 Fed. 26, 121 C. C. A. 389.

The findings of the immigration officers on deportation proceedings under this section are conclusive on questions of fact if there is any evidence to support them, but errors of law may be reviewed on habeas corpus. *Ex p. Watchorn*, (S. D. N. Y. 1908) 160 Fed. 1014; *Ex p. Pettersen*, (D. C. Minn. 1908) 166 Fed. 536; *Botis v. Davies*, (N. D. Ill. 1909) 173 Fed. 996; *Ex p. Koerner*, (E. D. Wash. 1909) 176 Fed. 478; *Davies v. Manolis*, (C. C. A. 7th Cir. 1910) 179 Fed. 818, 103 C. C. A. 310; *U. S. v. Williams*, (C. C. A. 2d Cir. 1912) 200 Fed. 538, 118 C. C. A. 632. See also *Prentiss v. Di Giacomo*, (C. C. A. 7th Cir. 1911) 192 Fed. 467, 112 C. C. A. 605, *followed in* *Prentiss v. Stathakos*, (C. C. A. 7th Cir. 1911) 192 Fed. 469, 112 C. C. A. 607; *U. S. v. Williams*, (S. D. N. Y. 1913) 204 Fed. 828.

Where there is nothing to support a charge, the department cannot rightfully issue a warrant to deport. But where a

fair though summary hearing has been given, in ascertaining whether there is or is not any proof tending to sustain a charge, it is not open to courts to consider either admissibility or weight of proof according to the ordinary rules of evidence, even if it believe the proof was insufficient and the conclusion wrong. The question is whether anything was offered that tends, though slightly, to sustain the charge. *Frick v. Lewis*, (C. C. A. 8th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493.

Where an alien seeking to enter the United States is ordered deported by the Secretary of Commerce and Labor, a district judge has no jurisdiction to set aside such order on habeas corpus, unless the secretary violated the statute in respect to all of the grounds on which the deportation is based. *U. S. v. Williams*, (1910) 175 Fed. 274.

Where an alien not entitled to enter the United States was held under an illegal warrant directing his deportation to a country other than whence he came, it was held that he was entitled to a release on habeas corpus, under the rule that a prisoner is entitled to his liberty where the sentence is illegal. *U. S. v. Redfern*, (1911) 186 Fed. 603.

Where neither the application for the warrant of arrest nor any of the papers on which it was issued were shown to an alien or her counsel during the hearing, and before the passing of an order for deportation, as required by immigration rule 35e, it was held that she was entitled to a writ of habeas corpus to determine the validity of her detention. *Ex p. Avakian*, (1910) 188 Fed. 688.

On habeas corpus to determine the legality of the detention of an alien in deportation proceedings, the only question for review is the legality of the alien's detention on the return day of the writ, and matters subsequent thereto are not proper in a traverse to the return. *Ex p. Avakian*, (1910) 188 Fed. 688.

IX. DEPORTATION OF CHINESE

Violation of Chinese Exclusion Act.—The Immigration Act of 1907 is applicable to Chinese aliens illegally coming to this country, notwithstanding the special acts relating to the exclusion of Chinese. *U. S. v. Wong You*, (1912) 223 U. S. 67, 32 S. Ct. 195, 56 U. S. (L. ed.) 354, *reversing* (C. C. A. 2d Cir. 1910) 181 Fed. 313, 104 C. C. A. 535; *U. S. v. Prentiss*, (C. C. A. 7th Cir. 1912) 202 Fed. 65, 120 C. C. A. 381; *Billings v. Ham*, (C. C. A. 1st Cir. 1913) 202 Fed. 914, 121 C. C. A. 272. See CHINESE EXCLUSION.

Where the officers of the government see fit to bring proceedings for the deportation of Chinese under this Act instead of the Chinese Exclusion Acts they must follow strictly the provisions of this Act; they cannot invoke the provisions of

both. *U. S. v. Sisson*, (C. C. A. 2d Cir. 1913) 206 Fed. 450, 124 C. C. A. 356.

The Immigration Act applies to Chinese persons as well as other aliens and it applies to them when the ground of the proceeding is a violation of the Chinese Exclusion Act as distinguished from the Immigration Act. *Ex p. Woo Shing*, (N. D. Ohio 1915) 226 Fed. 141. And to the same effect see *Ex p. Lam Pui*, (E. D. N. C. 1914) 217 Fed. 456; *Ex p. Woo Shing*, (N. D. Ohio 1915) 226 Fed. 141; *Ex p. Wong Yee Toon*, (D. C. Md. 1915) 227 Fed. 247; *Sibray v. U. S.*, (C. C. A. 3d Cir. 1915) 227 Fed. 1, 141 C. C. A. 555; *Ex p. Chun Woi Sau*, (N. D. Cal. 1914) 230 Fed. 538; *Lam Fung Yen v. Frick*, (C. C. A. 6th Cir. 1916) 233 Fed. 393, 147 C. C. A. 329.

But in *Ex p. Woo Jan*, (E. D. Ky. 1916) 228 Fed. 927, in an exhaustive discussion of this question, the court distinguishing *U. S. v. Wong You*, (1912) 223 U. S. 67, 32 S. Ct. 195, 56 U. S. (L. ed.) 354, held that the Immigration Act was not intended to apply to Chinese laborers when the ground of a proceeding for their deportation is a violation of the Chinese Exclusion Act. Noting that the decision ran counter to the trend of federal judicial opinion on the subject the court said: "By this time this much at least must be accepted as true, to wit, that it is by no means clear—indeed it is extremely doubtful—whether Congress intended to subject Chinese laborers to deportation by the Immigration Department; and this being so, the doubt should be resolved against the existence of such power in that department. The right to a judicial hearing is a valuable right. An executive hearing is not its equivalent. . . . It is to be noted that though, if the Immigration Department has the power here claimed, it acquired it in 1907, there is no indication that it attempted to use it until after the decision in the *Wong You* case in 1912. If that decision was the cause of the attempt to use it such was the result of a misinterpretation thereof." And see to the same effect *U. S. v. Prentis*, (N. D. Ill. 1916) 230 Fed. 935.

In proceedings to deport a Chinese under the provisions of the Immigration Law for a violation of the Chinese Exclusion Act, an omnibus charge that the alien is in the country in violation of such Act is so broad as to convey no idea of the specific reason for which the alien has been ordered deported. It should be made apparent on the record, that the alien knew just what was specifically urged against him and that he was given an opportunity to meet the specific charge. See *Ex p. Chun Woi San*, (N. D. Cal. 1914) 230 Fed. 538.

The court will not undertake to prescribe rules of evidence for the immigration department, but where the jurisdiction of the department depends upon the

establishment of a certain fact, which fact, when established, takes the alien's case out of the jurisdiction of the courts of the United States where it is placed by the Chinese Exclusion Law, the court is entitled to regard, not perhaps the weight of the evidence but certainly the character of the evidence, by which such a transfer of jurisdiction is effected. *Ex p. Owe Sam Goon*, (N. D. Cal. 1915) 230 Fed. 654.

Clandestine entry at border port.—A Chinese alien entering the United States from Canada surreptitiously in the night, avoiding inspection and examination at a designated place of entry, enters in violation of section 36, and, like any other alien so entering, is subject to arrest on a warrant issued by the Secretary of Commerce and Labor and to be deported to Canada or to China, the "country whence he came," under the provisions of sections 20 and 21 of the Act, without regard to the provisions of the Chinese Exclusion Acts. And it is no defense that he is a domiciled merchant in the United States entitled to enter under such Acts; the deportation in such case being without prejudice to his right to subsequently apply for admission in a lawful way. *Ex p. Li Dick*, (1909) 174 Fed. 674.

X. COST OF REMOVAL

Not retroactive.—Where an alien lawfully entitled to enter under the Act of 1903, then in force, not being within one of the prohibited classes, arrived on Feb. 14, 1906, and was arrested on July 29, 1910, and ordered deported as a person practicing prostitution in the United States, the steamship company by which she was brought to the United States was not liable under the Act of 1907 for the cost of her deportation from the port of entry, since the provision of that Act for deportation at the expense of the steamship companies should be construed as prospective and only applicable to aliens brought to the United States after its adoption, since if otherwise construed it would be unconstitutional as depriving such companies of their property without due process of law. *U. S. v. North German Lloyd Steamship Co.*, (1911) 185 Fed. 158.

Cost of removal to port of deportation.—In *U. S. v. Hamburg American Line*, (C. C. A. 2d Cir. 1908) 159 Fed. 104, 86 C. C. A. 294, it was held under section 20 of the Act of 1903, that the "cost of inland transportation" included only the cost of carrying the alien from the inland place where he was found to the port of deportation, and that the government was therefore not entitled to recover under such section from the steamship company bringing the deported alien into the United States any part of the traveling expenses of an officer sent to bring the alien to the port of deportation.

SEC. 21. [Return of illegally entered aliens in three years — penalty for refusal of vessel owners, etc. — attendant when necessary.] That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Commerce and Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section nineteen of this Act: *Provided*, That when in the opinion of the Secretary of Commerce and Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in like manner. [34 Stat. L. 905.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Provisions similar to those of the text preceding the proviso were made by the Act of March 3, 1903, ch. 1012, § 21, 32 Stat. L. 1218, repealed by section 43 of this Act, *infra*, p. 699.

It is the duty of the Secretary of Commerce and Labor to satisfy himself that the alien has been found in the United States in violation of law and therefore subject to deportation, and being so satisfied, shall cause such alien to be returned to the country whence he came. The Secretary of Commerce and Labor cannot delegate or depute to a commissioner of immigration these duties nor leave it to such commissioner to be satisfied whether the law has been violated. *Low Kwai v. Backus*, (C. C. A. 9th Cir. 1916) 229 Fed. 481, 143 C. C. A. 549, wherein it appeared that the acting commissioner of immigration undertook to satisfy the Secretary of Commerce and Labor that the alien in question had violated the law.

Second arrest of alien.—The immigration authorities are clothed with executive, and not with judicial, duties. The finding of the Secretary of Commerce and Labor is not a technical *res judicata*, and there is nothing in the above section to prevent him from arresting an alien a second time to try the same question again, if he is satisfied that the alien has entered the United States in violation of the Act. This is no violation of the alien's rights, because he was admitted into the United States subject to the condition that he might be deported within three years thereafter if he entered in violation of the Act. *Ex p. Stancampiano*, (S. D. N. Y. 1908) 161 Fed. 164.

Deportation of alien residents.—Under the above provision of this Act it has

been held that an alien who has acquired a domicile in the United States, upon attempting to re-enter the country after a temporary absence in a foreign country, such visit having been made with no intention of abandoning the domicile so acquired, is subject to deportation. *Ex p. Petterson*, (1908) 166 Fed. 536. Here the court said: "The words of the Immigration Act here under consideration are broad, and include every case of an alien who at the time of its passage was out of this country, no matter for what reason, and seeks to come back. In the language of Mr. Justice Harlan [in *Lem Moon Sing v. U. S.*, (1895) 158 U. S. 538, 15 S. Ct. 967, 39 U. S. (L. ed.) 1082, passing upon the Chinese Exclusion Act of Oct. 1, 1888, ch. 1064; see title CHINESE EXCLUSION], 'He is none the less an alien because of his having a commercial domicile in this country.' In the case at bar, as in the *Lem Moon Sing* case, *supra*, the alien was out of this country at the time of the passage of the law."

In *U. S. v. Watchorn*, (1908) 164 Fed. 152, it appeared that the petitioner had lived in the United States for six years without having been naturalized, and had then gone to Italy for a visit. On his return to the United States he was prevented from landing because prior to his first arrival in this country he had been imprisoned in his native country for stabbing a man. It was held that the immigration officers had jurisdiction, notwithstanding the petitioner's prior residence in the United States, he being still an

alien, and the petitioner's writ of habeas corpus was dismissed. Rule 4 of the regulations of the bureau of immigration and naturalization of the Department of Commerce and Labor relating to the application of the Immigration Act, was held not to apply to the petitioner.

Deportation at expense of transportation line—constitutionality.—The provision of the Immigration Act declaring that an alien woman who subsequent to landing commits a specified offense shall be deported is a proper exercise of police power, but the provision that the cost of her deportation shall be imposed on another person who had nothing to do with the commission of such offense is not an exercise of such power. *U. S. v. North German Lloyd Steamship Co.*, (1911) 185 Fed. 158, holding that the provision of the Act for deportation at the expense of the steamship companies or transportation lines was prospective, a construction avoiding the constitutional objection of depriving such companies of their property without due process of law.

Procedure.—Officers of the government, to whom the determination of questions of deportation are intrusted, are not bound by the rules of criminal procedure, nor by rules of evidence applied in the courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony, or no record of the testimony or of the decision. No formal complaint or pleadings are required. The alien's opportunity to be heard need not be upon any regular set occasion, nor according to the forms of judicial procedure. It may be such as will secure the prompt, vigorous action contemplated by Congress and appropriate to the nature of the case. *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701, 115 C. C. A. 501.

Necessity for conviction under section 3.—The right to deport an alien under this section for bringing into this country an alien woman for purposes of prostitution does not depend upon a conviction under section 3 of this Act. *Frick v. Lewis*, (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493, *affirmed* (1913) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967. See also *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701, 115 C. C. A. 501.

"Any law of the United States."—The language of this section conferring upon the Secretary of Commerce power, upon being satisfied that the petitioner was subject to deportation under "any law of the United States," includes the Chinese exclusion laws. But if the immigration authorities elect to proceed in the arbitrary and summary manner authorized by the Immigration Act they must proceed strictly in conformity with its provisions. *Ex p. Lam Pui*, (E. D. N. C. 1914) 217 Fed. 456.

Failure to guard safely.—In *U. S. v. Pacy*, (E. D. N. Y. 1912) 193 Fed. 1006, the evidence was held to be insufficient to hold the captain of a vessel liable for the escape of an immigrant who was about to be deported.

Deportation to avoid necessity for extradition proceedings.—Where the record discloses that an alien is in this country in violation of the immigration laws, an abuse of discretion on the part of the immigration authorities cannot be predicated of the discharge of official duty simply because the government of the country of which the alien is a subject desired and requested his return thereto. *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701, 115 C. C. A. 501.

Class of transportation of attendant.—A regulation of the department which provides that "attendants will accompany aliens to official destination, and will, when proceeding abroad, be required to travel under the same conditions as the alien," is appropriate, if in nearly all cases the usefulness of the attendants would be seriously impaired unless they went in the same class as the alien; but the second part of the regulation, providing that all attendants "when returning shall travel second class," is not binding upon the vessel owners. If the attendant in going has traveled in a class in which he would not naturally travel, by reason of the necessity for his constant attendance upon the disordered alien; his ticket may be changed on the return trip. If there is a variety of cases properly admitting of the separate classification of the two persons, the Department of Commerce and Labor cannot determine arbitrarily to what class the attendant is to be assigned. The steamship company, on the other hand, cannot nullify the law by insisting that attendants travel in the steerage when they are not needed there and are persons who could not be reasonably expected to accept employment upon such conditions. (1907) 26 Op. Atty-Gen. 381.

"Expense incident to such service."—The phrase "expense incident to such service," as used in the proviso of this section, is all the expense directly and incidentally caused by the fact that such service has been required. This includes the return trip of the attendant and also his compensation. The expression "all the expenses incident to the employment and detail of attendants" comes under the same head. (1907) 26 Op. Atty-Gen. 381.

Arbitrary exercise of power to deport.—This section does not give the Secretary of the Treasury the arbitrary authority to order deportation without an opportunity to be heard before any officer or tribunal, either executive or judicial, as to the right of the person to be and to remain in the United States. This case

was under the Act of 1903. *Hopkins v. Fachant*, (C. C. A. 1904) 130 Fed. 839, 65 C. C. A. 1.

Similarly under the Act of 1888 it was held that in proceedings to deport an alien the fundamental principles that inhere in "due process of law" must be regarded. An alien could not be taken arbitrarily into custody and deported without an opportunity to be heard upon the questions involving his right to be and remain in the United States—not necessarily an opportunity according to the forms of judicial procedure but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. *Japanese Immigrant Case*, (1903) 189 U. S. 86, 23 S. Ct. 611, 47 U. S. (L. ed.) 721.

Fair trial.—An alien was arrested on Sept. 19, 1909, and was accorded a hearing before the immigration officers on the next day, when she was informed of her right to be represented by counsel, but, waiving such right, she was sworn and examined at length. She was again examined by the officers a few days later, when she was represented by counsel, who also examined three other witnesses before the officers, and she was again examined before one of the immigration inspectors on Nov. 23, 1909. It was held that she was accorded a fair trial before the department, which precluded a review of their conclusions of fact, reached on conflicting evidence, by the courts. *De Bruler v. Gallo*, (C. C. A. 1911) 184 Fed. 566, 106 C. C. A. 546.

Former jeopardy.—Const. Amend. 5, providing that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, applies only to criminal proceedings, and hence has no application to proceedings for the deportation of an alien. *Sire v. Berkshire*, (1911) 185 Fed. 967; *Ladaux v. Berkshire*, (1911) 185 Fed. 971.

Marriage after order to deport.—As the status of the wife follows that of the husband, the marriage of an alien immigrant woman to a naturalized citizen of the United States pending application for her release under writ of habeas corpus, after she was ordered deported, entitles her to be discharged. This case was under the Act of 1903. *Hopkins v. Fachant*, (C. C. A. 1904) 130 Fed. 839, 65 C. C. A. 1. But see *Ex p. Kaprelian*, 188 Fed. 694, laying down a contrary rule and distinguishing *Hopkins v. Fachant*, *supra*.

Habeas corpus to review deportation of alien residents.—In *Ex p. Greaves*, (N. D. Cal. 1915) 222 Fed. 157, two separate petitions, by a mother and her daughter, for writs of habeas corpus, were presented to the court. It appeared that the mother was born in England and the daughter in Canada; that neither was a citizen of the United States; that several years prior to

the presentation of the petitions, both arrived in the United States and were landed without inspection, because of the statement made by the mother that she was a citizen. Sustaining demurrers interposed by the government, the court said: "Under the Immigration Law all aliens arriving in this country are to undergo investigation as to their right to land. From such investigation citizens of this country are free. If an alien lands without such investigation, because of misleading statements as to his citizenship, he is subject to deportation. Nothing in the law is better settled than this. Indeed, any other construction would, as stated by the court in *Williams v. U. S.*, [C. C. A. 2d Cir. 1911], 186 Fed. 479, 108 C. C. A. 457, 'render the Immigration Act abortive.' As to the policy of deporting the petitioners here, in view of their long previous residence in this country, this is a matter into which the court is not at liberty to inquire. It might seem to the court that the rational thing to do would be to investigate now their right to land as aliens, and to permit them to remain if such right were established. But the court has no power to direct the method by which the executive officers shall administer the law. The enforcement of the immigration laws is committed to the Department of Labor, and the deportation of petitioners, because, being aliens, they entered the country without the preinvestigation which the law requires, is well within the power of the department. The court is no more authorized to interfere with the executive department, or to question its policy, when acting within the authority conferred upon it, than such department is authorized to interfere with the court. The power of the court is limited to the inquiry, 'Is the action of the executive within the law?' If it is, the remedy for any supposed hardship resulting therefrom is by application to the executive to be relieved from such hardship, and not by appeal to the court to prevent the enforcement of the law."

Review by court.—After an order of deportation has been entered in deportation proceedings against an alleged undesirable alien, the only issue reviewable on a writ of habeas corpus is whether the alien had been given a fair hearing by executive officers on an order to show cause why she should not be deported, and it is therefore error to refer the proceeding to a commissioner to take testimony on a new issue as to the alien's alleged marriage and whether her husband was a citizen. *De Bruler v. Gallo*, (C. C. A. 1911) 184 Fed. 566, 106 C. C. A. 546.

Procedure cannot be reviewed.—The political department of the government is charged with the duty not only of deciding who may come into the country, but who may remain in it. The department may make its own rules and regulations

respecting the manner in which its authority is to be exercised, and its proceeding of whatever character, or however conducted, is due process of law and not subject to review by the courts. This case was under the Act of 1903. *In re Lea*, (1903) 126 Fed. 231.

Re-entry after temporary absence.—Where an alien who has lived in this country three years leaves temporarily, the three-year period begins to run again from the time of his return, so that if he violates any provision of the Immigration Act on his return he may be deported any time within three years thereafter. *Frick v. Lewis*, (C. C. A. 6th Cir. 1912) 195 Fed. 693, 115 C. C. A. 493, *affirmed* (1913)

233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967; *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701, 115 C. C. A. 501.

Limitation.—The time fixed in section 21 of the Act of 1903 was held to govern the deportation of an alien who landed March 3, 1907. *U. S. v. Redfern*, (1910) 180 Fed. 506.

"Country whence he came." See notes under section 20, *supra*, p. 673.

Chinese Exclusion Act.—See note under section 20, *supra*, p. 673.

Vessel owner's liability after three years.—See note under section 3, *supra*, p. 649.

SEC. 23. [Commissioners of immigration — duties.] That the duties of the commissioners of immigration shall be of an administrative character, to be prescribed in detail by regulations prepared, under the direction or with the approval of the Secretary of Commerce and Labor. [*34 Stat. L. 906.*]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1903, ch. 1012, § 23, 32 Stat. L. 1219, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 24. [Immigrant inspectors, officers, etc. — appointment — compensation — duties — powers — decisions.] That immigrant inspectors and other immigration officers, clerks, and employees shall hereafter be appointed and their compensation fixed and raised or decreased from time to time by the Secretary of Commerce and Labor, upon the recommendation of the Commissioner-General of Immigration and in accordance with the provisions of the civil-service Act of January sixteenth, eighteenth hundred and eighty-three: *Provided*, That said Secretary, in the enforcement of that portion of this Act which excludes contract laborers, may employ, without reference to the provisions of the said civil service Act, or to the various Acts relative to the compilation of the official register, such persons as he may deem advisable and from time to time fix, raise, or decrease their compensation. He may draw from the "immigrant fund" annually fifty thousand dollars or as much thereof as may be necessary, to be expended for the salaries and expenses of persons so employed and for expenses incident to such employment; and the accounting officers of the Treasury shall pass to the credit of the proper disbursing officer expenditures from said sum without itemized account whenever the Secretary of Commerce and Labor certifies that an itemized account would not be for the best interests of the Government: *Provided further*, That nothing herein contained shall be construed to alter the mode of appointing commissioners of immigration at the several ports of the United States as provided by the sundry civil appropriation Act approved August eighteenth, eighteen hundred and ninety-four, or the official status of such commissioners heretofore appointed. Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence; and any person to whom such an oath has been administered

under the provisions of this Act who shall knowingly or wilfully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes. The decision of any such officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. [34 Stat. L. 906.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. The Civil Service Act of Jan. 16, 1883, ch. 27, mentioned in the text, is given under the title CIVIL SERVICE.

The provisions from the Act of Aug. 18, 1894, ch. 301, § 1, mentioned in the text are given *supra*, p. 629.

R. S. sec. 5392 mentioned in the text was repealed by section 341 of the Penal Laws of March 4, 1909, and re-enacted in substance in section 125 thereof. See the title PENAL LAWS.

Earlier provisions relating to inspection of immigrants by immigration officers were made by the Act of Aug. 3, 1875, ch. 141, § 5, 18 Stat. L. 477; the Act of March 3, 1891, ch. 551, § 8, 26 Stat. L. 1085, and the Act of March 3, 1893, ch. 206, § 5, 27 Stat. L. 570. The two Acts last cited, together with the Act of Aug. 18, 1894, ch. 301, 28 Stat. L. 390, likewise provided for the effect of the decisions of the immigration officers and appeals therefrom. These provisions were all in effect superseded by the Act of March 3, 1903, ch. 1012, § 24, 32 Stat. L. 1219, repealed by section 43 of this Act, *infra*, p. 699.

Limitation on authority to administer oath.—The power of an inspector to administer oaths is limited to the right of an alien to enter the United States. *Whitfield v. Hanges*, (C. C. A. 8th Cir. 1915) 222 Fed. 745, 138 C. C. A. 199, wherein it appeared that on a hearing for the deportation of aliens under section 3 of this Act, the inspector gathered, mainly by the use of police officers, a large number of witnesses in the grand jury room, and in the presence of police officers questioned them, wrote down in narrative form purported statements made by them, went through the form of administering oaths to them, and on these statements applied for and obtained a telegraphic warrant for the arrest of the accused aliens. The court held that the inspector had no authority to administer the oath

in the cases in hand and that such hearing was arbitrary, oppressive and violative of all fundamental rights and could not be sustained. This case is also reported in 209 Fed. 675, where the question under consideration was decided the same way by the district judge.

Duty of inspectors.—The statute does not require inspectors to take testimony, but allows them to decide on their own inspection and examination the question of the right of an alien immigrant to land. They are merely empowered to administer oaths, and to take and consider testimony, and the statute requires only testimony so taken to be entered of record. This case was under the Act of 1891. *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 651, 12 S. Ct. 336, 35 U. S. (L. ed.) 1146.

SEC. 25. [Special inquiry boards — composition — designation of other officials — authority, hearings, etc. — appeals — finality decisions.] That such boards of special inquiry shall be appointed by the commissioner of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner-General of Immigration, with the approval of the Secretary of Commerce and Labor, shall from time to time designate as qualified to serve on such boards: *Provided*, That at ports where there are fewer than three immigrant inspectors, the Secretary of Commerce and Labor,

upon the recommendation of the Commissioner-General of Immigration, may designate other United States officials for service on such boards of special inquiry. Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decision of any two members of a board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of Commerce and Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry: *Provided*, That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor; but nothing in this section shall be construed to admit of any appeal in the case of an alien rejected as provided for in section ten of this Act. [34 Stat. L. 906.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Earlier provisions relating to the finality of decisions of immigration officers and boards were made by the Act of March 3, 1891, ch. 551, § 8, 26 Stat. L. 1085; the Act of March 3, 1893, ch. 206, § 5, 27 Stat. L. 570, and the Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. L. 390. These were superseded by the Act of March 3, 1903, ch. 1012, § 25, 32 Stat. L. 1220, which was repealed by section 43 of this Act, *infra*, p. 699.

I. Special inquiry boards, 686.

II. Hearing, 686.

III. Finality of decisions of immigration officers, 687.

IV. Habeas corpus, 690.

I. SPECIAL INQUIRY BOARDS

Qualifications.—Where there were only three immigration inspectors at a port where an alien attempted to land, it was held that the inspector who examined her and had denied her right to enter was not competent to sit on a board of special inquiry, and that a board consisting of three inspectors, of which such inspector was one, was illegal and without jurisdiction. *U. S. v. Redfern*, (1910) 180 Fed. 500.

The term "officials" as used in this section includes "clerks." *Ex p. Momo Tomimatsu*, (N. D. Cal. 1916) 232 Fed. 376.

Extent of authority.—The authority of the board of special inquiry and the Secretary of Commerce and Labor on appeal in immigration proceedings to order the deportation of alien immigrants is confined to such aliens as come within the classes excluded by the Immigration Act. *Ex p. Saraceno*, (1910) 182 Fed. 955.

II. HEARING

Necessity for following rules of criminal procedure.—The rules which ordinarily obtain in criminal procedure need not be applied or followed, and formal pleadings are not required, as the taking of testimony of statements of witnesses is not surrounded by the limitations and barriers of judicial proceedings. *U. S. v. Martin*, (W. D. N. Y. 1912) 193 Fed. 795.

Fair trial.—Where certain alien prostitutes on being arrested in deportation proceedings were each granted a hearing on the question of deportation, and there voluntarily testified, and each admitted facts essential to authorize an order of deportation, an objection that they were not accorded a fair trial was held to be untenable. *U. S. v. Williams*, (1910) 183 Fed. 804.

Counsel to represent alien.—"There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the

alien, witnesses called to testify, and elaborate examination and cross-examination of them. On the contrary, Congress relegated this question to administrative boards who might act summarily and expeditiously, and, to provide against an abuse of their discretion, accorded to the alien a right of appeal to the Secretary of Commerce and Labor. Nor do the rules provide for the presence of counsel at such examinations. The only rule cited regulates the amount of fees which the attorney of an alien may exact." *U. S. v. Williams*, (S. D. N. Y. 1911) 190 Fed. 897.

"Public."—Counsel for a party are not "the public" as that word is used in this section. *In re Madeiros*, (D. C. Mass.) 1914) 225 Fed. 90.

Rules of evidence.—While the administrative boards are, generally speaking, entitled to make their own rules of evidence, and to consider any evidence which to their minds is of probative value, there are, nevertheless, certain fundamental principles which can hardly be disregarded, consistently with fair treatment to the prisoner. *Ex p. Chin Loy You*, (D. C. Mass. 1915) 223 Fed. 833.

Admissibility of evidence in deportation proceedings.—In *Hanges v. Whitfield*, (N. D. La. 1913) 209 Fed. 675, the court said: "Testimony may, no doubt, be taken in the form of affidavits, or otherwise, preliminary to and as a basis for an application for warrants of arrest of specified aliens when the immigration officers are credibly informed, or have good reason to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have issued, to determine whether or not they shall be deported; and may the officer in charge rightly deny to them the right to counsel upon such hearing until after the testimony against them has been completed? It is incumbent upon the government to establish by competent evidence that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the government; but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them be-

fore the Bureau of Immigration in determining whether or not they should be deported. The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact; and it is indispensable in all judicial proceedings in this country, civil or criminal, that *ex parte* testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him."

Information of right to appeal.—Under this section and rule 7 of the regulations established thereunder by the Secretary of Commerce and Labor, an immigrant who, on examination by a board of special inquiry, has been denied the right to enter the United States, has the right to be informed that he has a right of appeal therefrom, and the fact that he has been so informed must be entered of record in the minutes of the board's proceedings, and withholding of that right precludes finality in the decision of the board which may in such case be reviewed by the courts on a writ of habeas corpus. *Rogers v. U. S.*, (1907) 152 Fed. 346, 81 C. C. A. 454.

III. FINALITY OF DECISIONS OF IMMIGRATION OFFICERS

Rule stated.—That Congress may pass laws forbidding aliens or classes of aliens from coming within the United States and may provide for the expulsion of aliens or classes of aliens from its territory and may devolve upon the executive department or subordinate officials the right and duty of identifying and arresting such persons, is well settled. A long series of decisions has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *Low Wah Suey v. Backus*, (1912) 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165. And to the same effect see *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 651, 12 S. Ct. 336, 35 U. S. (L. ed.) 1146; *Japanese Immigrant Case*, (1903) 189 U. S. 86, 23 S. Ct. 611, 47 U. S. (L. ed.) 721; *U. S. v. Ju Toy*, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040; *Chin Yow v. U. S.*,

(1908) 208 U. S. 8, 28 S. Ct. 201, 52 U. S. (L. ed.) 369; *Gegiow v. Uhl*, (1915) 239 U. S. 3, 36 S. Ct. 2, *reversing* U. S. v. Uhl, (C. C. A. 2d Cir. 1914) 215 Fed. 573, 131 C. C. A. 641; *Chin Fong v. Backus*, (1916) 241 U. S. 1, 36 S. Ct. 490; *In re Day*, (S. D. N. Y. 1886) 27 Fed. 678; *In re O'Sullivan*, (S. D. N. Y. 1887) 31 Fed. 447; *In re Cummings*, (S. D. N. Y. 1887) 32 Fed. 75; *In re Dietze*, (S. D. N. Y. 1889) 40 Fed. 324; *In re Vito Rullo*, (S. D. N. Y. 1890) 43 Fed. 62; *In re Hirsch Berjanski*, (E. D. N. Y. 1891) 47 Fed. 445; *In re Howard*, (S. D. N. Y. 1894) 63 Fed. 263; *In re Moses*, (S. D. N. Y. 1897) 83 Fed. 995; *U. S. v. Yamasaka*, (C. C. A. 9th Cir. 1900) 100 Fed. 404, 40 C. C. A. 454; *In re Di Simone*, (E. D. La. 1901) 108 Fed. 942; *In re Gayde*, (S. D. N. Y. 1901) 113 Fed. 588; *Ex p. Watchorn*, (S. D. N. Y. 1908) 160 Fed. 1014; *Ex p. Lung Wing Wun*, (W. D. Wash. 1908) 161 Fed. 211; *U. S. v. Watchorn*, (S. D. N. Y. 1908) 164 Fed. 152; *In re Tang Tun*, (C. C. A. 9th Cir. 1909) 168 Fed. 488, 93 C. C. A. 644, *reversing* (W. D. Wash. 1908) 161 Fed. 618; *Ex p. Long Lock*, (N. D. N. Y. 1909) 173 Fed. 208; *Ex p. Lung Foot*, (N. D. N. Y. 1909) 174 Fed. 70; *Ex p. Chin Hen Lock*, (D. C. Vt. 1909) 174 Fed. 282; *Haw Moy v. North*, (C. C. A. 9th Cir. 1910) 183 Fed. 89, 105 C. C. A. 381; *Redfern v. Halpert*, (C. C. A. 5th Cir. 1911) 186 Fed. 150, 108 C. C. A. 262; *U. S. v. Williams*, (S. D. N. Y. 1911) 186 Fed. 354; *U. S. v. Williams*, (S. D. N. Y. 1911) 187 Fed. 470; *U. S. v. Sprung*, (C. C. A. 4th Cir. 1910) 187 Fed. 903, 110 C. C. A. 37, *reversing* (E. D. Va. 1909) 182 Fed. 330; *U. S. v. Williams*, (S. D. N. Y. 1911) 190 Fed. 897; *U. S. v. Williams*, (S. D. N. Y. 1911) 190 Fed. 686; *U. S. v. International Mercantile Marine Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 408, 114 C. C. A. 370; *Prentiss v. Cosmas*, (C. C. A. 7th Cir. 1912) 196 Fed. 372, 116 C. C. A. 419; *Ex p. Pouliot*, (E. D. Wash. 1912) 196 Fed. 437; *Lim Jew v. U. S.*, (C. C. A. 9th Cir. 1912) 196 Fed. 736, 116 C. C. A. 364; *U. S. v. Ruiz*, (C. C. A. 5th Cir. 1913) 203 Fed. 441, 121 C. C. A. 551; *Ex p. Pugliese*, (W. D. N. Y. 1913) 209 Fed. 720; *White v. Gregory*, (C. C. A. 9th Cir. 1914) 213 Fed. 768, 130 C. C. A. 282; *U. S. v. Greenawalt*, (E. D. Pa. 1914) 213 Fed. 901; *U. S. v. Petkos*, (C. C. A. 1st Cir. 1914) 214 Fed. 978, 131 C. C. A. 274; *U. S. v. Li Chiong*, (C. C. A. 9th Cir. 1914) 217 Fed. 45, 133 C. C. A. 31; *Lee Leong v. U. S.*, (C. C. A. 9th Cir. 1914) 217 Fed. 48, 133 C. C. A. 34; *U. S. v. Li Chiong*, (C. C. A. 9th Cir. 1914) 217 Fed. 45, 133 C. C. A. 31; *Ex p. Lam Pui*, (E. D. N. C. 1914) 217 Fed. 456; *Ex p. Hidekuni Iwata*, (S. D. Cal. 1915) 219 Fed. 610; *Healy v. Backus*, (C. C. A. 9th Cir. 1915) 221 Fed. 358, 137 C. C. A. 166; *Chu Tai Ngan v. Backus*, (C. C. A. 9th Cir. 1915)

226 Fed. 446, 141 C. C. A. 276; *Ex p. Chin Him*, (W. D. N. Y. 1915) 227 Fed. 131; *Ung Bak Foon v. Prentis*, (C. C. A. 7th Cir. 1915) 227 Fed. 406, 142 C. C. A. 102; *Lam Fung Yen v. Frick*, (C. C. A. 6th Cir. 1916) 233 Fed. 393, 147 C. C. A. 329.

"Congress by numerous Acts has declared who shall not be admitted into the United States. It has defined the grounds upon which such exclusion is based. It has committed the execution of these laws to designated officials whose duty it is made to determine the questions of whether particular alien applicants for admission are within or without the excluded classes. It has provided a complete system for the effective enforcement of its will. It has guarded with sedulous care against the danger of possible abuse of the power conferred upon the immigration officials by according the privilege of an appeal which may reach in due course the Secretary of Labor, and the order of exclusion does not become operative until the whole proceeding has his sanction and the order his approval. A search into the provisions of the immigration laws for any power or authority granted to the courts to interfere with this well-ordered system would be fruitless. No duty has been imposed upon them and no power conferred. The reasons for this are many and obvious. The judges of the courts have at least one reason to be grateful to Congress that it has so decreed. As therefore no express power has been conferred and no duty has been imposed upon the courts, it is clear that they cannot interpose and ought not to interfere between the relators and the government officers to whom Congress has committed the authority to execute the laws, unless a judicial question fairly arises out of the record." *U. S. v. Greenawalt*, (E. D. Pa. 1914) 213 Fed. 901.

"The finality of the decision of the political department of the government respecting the right of an alien to be admitted into the United States, as provided in the Act of 1907, is identical with that of the Act of 1891, and Congress must be held to have adopted the provision with full knowledge of the construction placed upon it by the judicial department of the government. Furthermore, the substitution in the later Act of a board of special inquiry, composed of three officers, at the port of arrival, for the inquiry of a single officer, that of the superintendent of immigration, provided in the earlier Act, with an appeal to the commissioner of immigration at the port of arrival, and from the commissioner of immigration to the Secretary of Labor, in place of review by the Secretary of the Treasury, indicates the purpose of Congress to give to the alien every opportunity to present to the political department of the government his claim of right

to be admitted into the United States, and to that department full authority to finally and conclusively determine such right." *White v. Gregory*, (C. C. A. 9th Cir. 1914) 213 Fed. 768, 130 C. C. A. 282.

The findings of executive officers touching the admission of aliens are, under this Act, deemed to be final and conclusive. Such findings, however, are as to matters of fact, and it follows that, in order that they may have the conclusive effect that the statute accords them, there must be some evidence tending to their support; otherwise there would be error of law on account of which the courts would entertain jurisdiction. *Healy v. Backus*, (C. C. A. 9th Cir. 1915) 221 Fed. 358, 137 C. C. A. 166.

The power of Congress to exclude aliens altogether from the United States, and to have its policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled. A statute passed in execution of that power is applicable to an alien who has acquired a commercial domicile within the United States, but who has voluntarily left the country, although for a temporary purpose, and claims the right under some law or treaty to re-enter. The question of his right to re-enter has been constitutionally committed by Congress to officers of the executive department of the government for final determination. *Lem Moon Sing v. U. S.*, (1895) 158 U. S. 538, 15 S. Ct. 967, 39 U. S. (L. ed.) 1082. See also *Lee Lung v. Patterson*, (1902) 186 U. S. 168, 22 S. Ct. 795, 46 U. S. (L. ed.) 1108, *affirming* (1900) 102 Fed. 132; *Fok Yung Yo v. U. S.*, (1902) 195 U. S. 296, 22 S. Ct. 686, 46 U. S. (L. ed.) 917; *Wong Wing v. U. S.*, (1896) 163 U. S. 228, 16 S. Ct. 977, 41 U. S. (L. ed.) 140; *U. S. v. Wong Chow*, (C. C. A. 1901) 108 Fed. 376, 47 C. C. A. 406; *U. S. v. Gin Fung*, (C. C. A. 1900) 100 Fed. 389, 40 C. C. A. 439; *In re Ota*, (1899) 96 Fed. 487; *In re Giovanna*, (1899) 93 Fed. 659; *In re Lee Yee Sing*, (1898) 85 Fed. 635; *U. S. v. Chung Shee*, (1895) 71 Fed. 277; (1897) 21 Op. Atty-Gen. 614. But see *U. S. v. Wong Chung*, (1899) 92 Fed. 141; *In re Monaco*, (1898) 86 Fed. 117; *U. S. v. Burke*, (1899) 99 Fed. 895.

The question whether or not the alien is an immigrant is one no longer for determination by the courts as it was when the cases of *In re Martorelli* (S. D. N. Y. 1894) 63 Fed. 437 and *In re Maiola* (S. D. N. Y. 1895) 67 Fed. 114 (under section 8 of the Act of March 3, 1891, see note under sec. 7 of said Act, *supra*, p. 628) were decided. *In re Gayde*, (1901) 113 Fed. 588.

Decision as res judicata.—Since the immigration officials are administrative officers and their decisions are those of the executive department of government, an order discharging an alien in deporta-

tion proceedings cannot operate as *res judicata* in a subsequent proceeding against the same alien. *Pearson v. Williams*, (1906) 202 U. S. 281, 26 S. Ct. 608, 60 U. S. (L. ed.) 1029, *affirming* (C. C. A. 2d Cir. 1905) 136 Fed. 734, 69 C. C. A. 386; *Sire v. Berkshire*, (1911) 185 Fed. 967; *Ladaux v. Berkshire*, (1911) 185 Fed. 971; *Lim Jew v. U. S.*, (C. C. A. 9th Cir. 1912) 196 Fed. 736, 116 C. C. A. 364.

Conclusiveness of favorable decision.—Since there is no statutory provision that a decision of the appropriate immigration or customs officer favorable to the admission of a Chinese alien is conclusive on the United States, the admission of a Chinese alien as a merchant is not conclusive against the United States on the application of the alleged merchant's son to enter, and does not prevent the son's expulsion on the ground that the father, while having a financial interest in a mercantile establishment, was in fact a laborer engaged in fruit culture as a tenant. *Lew Quen Wo v. U. S.*, (C. C. A. 1911) 184 Fed. 685, 106 C. C. A. 639.

A decision that a Chinese person applying to enter was entitled to enter as a native-born citizen was held not to be conclusive in her favor for three years thereafter. *Haw Moy v. North*, (C. C. A. 1910) 183 Fed. 89, 105 C. C. A. 381.

Originally the decision of the appropriate immigration officers was final if adverse to the admission of the alien; by the next amendment the decision was final whether adverse or favorable; and by this Act it is final only when adverse to the alien. *U. S. v. Lim Jew*, (N. D. Cal. 1910) 192 Fed. 644. To the same effect see *In re Li Foon*, (S. D. N. Y. 1897), 80 Fed. 881; *Li Sing v. U. S.*, (1901) 180 U. S. 486, 21 S. Ct. 449, 45 U. S. (L. ed.) 634.

Due process of law.—The constitutional guaranty of due process of law is not infringed by the provision of this Act making the decision of the appropriate department on the right of a person of Chinese descent to enter the United States conclusive on the federal courts in habeas corpus proceedings, in the absence of any abuse of authority even where citizenship is the ground on which the right of entry is claimed. *U. S. v. Ju Toy*, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040. In the hearings held by the departmental officers the ordinary judicial procedure, with its consequent limitations, is not necessarily to be followed. *Ex p. Hidekuni Iwata*, (S. D. Cal. 1915) 219 Fed. 610, wherein the court said: "Due process of law" is secured, as to such aliens as may be brought before the immigration officers, if they are given substantial notice of the reasons urged why they should be deported from this country, if they are given a fair and reasonable opportunity to present evi-

dence controverting any evidence adduced by the department and tending to exculpate them from the commission of the unlawful acts urged against them, if they are afforded at some stage of the hearing reasonably early therein, so as to be of some substantial advantage to them, the opportunity to secure and have the advice and assistance of counsel, and if it appears, upon the whole proceeding, that the department acted in good faith, and that its determination, as finally arrived at, was fair, and not an arbitrary one, or one induced by a manifest disregard of the alien's rights in the premises. The proceeding being of necessity essentially summary in its nature, over-refined niceties in the way of pleading are neither to be expected nor demanded. So, too, questions as to the weight of evidence and credibility of witnesses are peculiarly within the province of the departmental officers. . . . The power to refuse aliens admission to our country or to expel them, as is indicated in the opinion of Judge Dooling, in *Re Rhagat Singh*, (N. D. Cal. 1913) 209 Fed. 700, at page 702, is a 'vast' one, and one which it might well, perhaps, be argued ought not to be lodged definitely and conclusively in an executive department of the government; but, on the other hand, though questions juridical in their nature are presented, yet in the last analysis the ultimate question, viz., that of denial of entrance or expulsion, is purely political, and as such, together with all the incidents thereof, is properly determinable by the legislative branch of the government under such rules and regulations and through such administrative agencies as it may prescribe."

The hearings and examinations, though summary, must nevertheless afford the alien fair opportunity to establish his right to enter the United States, or remain therein after entry; and if such fair opportunity has not been accorded, he has not had due process of law, and may, for relief, avail himself of a writ of habeas corpus. *U. S. v. Martin*, (W. D. N. Y. 1912) 193 Fed. 795.

An applicant for entry into the United States of Chinese descent, but claiming to be a citizen thereof, is not deprived of his liberty without due process of law by reason of his detention by the immigration officers, if he is given a hearing as to his rights by the appropriate officers of the department. Such hearing, however, must be granted and conducted in good faith, and the officers must take the testimony of such witnesses as may be suggested by the applicant, if pertinent, although they are not required to permit him to be present in person or by counsel or to be informed of the nature of the testimony. *In re Can Pon*, (C. C. A. 1909) 168 Fed. 479, 93 C. C. A. 635, *reversing* (1908) 161 Fed. 618.

IV. HABEAS CORPUS

Generally.—The conclusiveness of the decisions of immigration officers under this section is conclusiveness upon matters of fact. But courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the Act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. *Geglow v. Uhl*, (1915) 239 U. S. 3, 38 S. Ct. 2, *reversing* *U. S. v. Uhl*, (C. C. A. 2d Cir. 1914) 215 Fed. 573, 131 C. C. A. 641.

The law is well settled that one seeking to enter the United States is entitled to a fair hearing as to his right to do so before the executive officers, though the hearing may be a summary one; that, having had such a hearing, the decision of the commissioner of immigration, or of the Secretary of Commerce and Labor on appeal, against his right to enter, is due process of law, and is conclusive upon the immigrant, even though wrong. If a fair, though summary, hearing has been denied the immigrant, the District Court has jurisdiction to hear the matter, upon the merits, upon habeas corpus, and release the immigrant, if it be shown on the hearing before it, even by evidence not offered on the hearing before the executive officers, that he does not belong to any one of the excluded classes. As a preliminary to entering upon a trial of the merits, the District Court must first determine that the immigrant was denied a fair hearing before the commissioner of immigration, or before the secretary upon appeal to him from the commissioner. *U. S. v. Williams*, (S. D. N. Y. 1911) 190 Fed. 897; *U. S. v. International Mercantile Marine Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 408, 114 C. C. A. 370; *Prentiss v. Cosmas*, (C. C. A. 7th Cir. 1912) 196 Fed. 372, 116 C. C. A. 419; *Ex p. Pouliot*, (E. D. Wash. 1912) 196 Fed. 437; *U. S. v. Ruiz*, (C. C. A. 5th Cir. 1913) 203 Fed. 441, 121 C. C. A. 551.

In Chinese cases.—In *U. S. v. Ju Toy*, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040, it was adjudged by the Supreme Court that under the Chinese exclusion and the immigration laws, where a person of Chinese descent asks admission to the United States upon the ground that he is a native-born citizen thereof, and the lawfully designated executive officers find that he is not, such action should be treated by the courts as having been made by a competent tribunal, with due process of law, and as final and conclusive, in the absence of a showing that there was abuse of discretion on the part of such executive

officers; and that in habeas corpus proceedings commenced thereafter, and based solely on the ground of the applicant's alleged citizenship, the court should dismiss the writ, and not direct new and further evidence as to the question of citizenship.

In the subsequent case of *Chin Yow v. U. S.*, (1908) 208 U. S. 8, 28 S. Ct. 201, 52 U. S. (L. ed.) 369, the same court held that where such a person is given only a semblance of a hearing by the executive officers, and is by them arbitrarily denied an opportunity to prove his right to enter the country, a court should, by writ of habeas corpus, take jurisdiction of the case, in which event the first question to be determined is whether the petitioner has in fact been denied by the executive officers a fair opportunity to present his case, if not, the court can proceed no further. The Supreme Court, in this case, further decided that the circumstance that the hearing before the executive officers may have been summary is of no consequence; that a denial of due process of law cannot be established by merely proving that the decision on the hearing that was had before such officers was wrong, and that jurisdiction in the courts "cannot be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

A Chinese person, denied admission to the United States after a full and fair hearing, who accepts such decision and deportation without appealing, is concluded thereby, and cannot, by applying for entry at a different port, have a rehearing on the same questions. *Ex p. Lung Foot*, (1909) 174 Fed. 70.

Where an applicant for entry into the United States, of Chinese descent, but claiming to be a native-born citizen, was denied the right of entry and detained for deportation by the immigration officers, and he took an appeal to the Sec-

retary of Commerce and Labor, it was held that the failure of such officers, through inadvertence or otherwise, to include in the record testimony taken on the hearing, and which bore upon the question of citizenship, was a substantial denial of the right of appeal given to the applicant by the statute, and entitled him to maintain habeas corpus proceedings, in which he might have a fair hearing on his right to enter and to be discharged from detention. *In re Can Pon*, (C. C. A. 1909) 168 Fed. 479, 93 C. C. A. 635, *reversed* (1908) 161 Fed. 618. The rule that the finding of immigration inspectors that a person apprehended for deportation is a Chinese person not entitled to enter the United States, when affirmed by the Secretary of Commerce and Labor, is final, does not prevent a citizen of the United States from invoking the protection of the courts to secure his right to live within the boundaries of his own country, guaranteed by the Constitution. *Ex p. Lung Wing Wun*, (1908) 161 Fed. 211.

The rule that the secretary's decision is reviewable on habeas corpus only to determine whether the alien had a proper hearing, was held to be applicable to an alien, or person claiming to be a citizen, who had been admitted into the United States from China and whom the immigration authorities were seeking to deport because they had since determined that such person was unlawfully within the United States. *Haw Moy v. North*, (C. C. A. 1910) 183 Fed. 89, 105 C. C. A. 381.

A petition for habeas corpus to inquire into the validity of the detention of a Chinese person in deportation proceedings was held to be insufficient to require a review of the fairness and good faith of the immigration officers, where copies of the warrant of arrest and proceedings were not annexed to the petition and were not substantially stated therein, and no cause was assigned for their omission. *Haw Moy v. North*, (C. C. A. 1910) 183 Fed. 89, 105 C. C. A. 381.

SEC. 26. [Admissions under bond permitted in certain cases.] That any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Commerce and Labor upon the giving of a suitable and proper bond or undertaking, approved by said Secretary in such amount and containing such conditions as he may prescribe, to the people of the United States, holding the United States or any State, Territory, county, municipality, or district thereof harmless against such alien becoming a public charge. The admission of such alien shall be a consideration for the giving of such bond or undertaking. Suit may be brought thereon in the name and by the proper law officers either of the

United States Government or of any State, Territory, district, county, or municipality in which such alien becomes a public charge. [34 Stat. L. 907.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Earlier provisions relating to bonds were made by the Act of March 3, 1893, ch. 206, § 7, 27 Stat. L. 570. These were superseded by the Act of March 3, 1903, ch. 1012, § 26, 32 Stat. L. 1220, which was repealed by section 43 of this Act, *infra*, p. 699.

Voluntary bond.—Where an intending immigrant was found by a special board of inquiry upon certificate of the medical examiner to be feeble-minded and was subject to immediate deportation to his native country, Russia, but an order for such deportation could not be made, or if made could not be executed, because Russia was at war, and his friends voluntarily offered to care for him and give a bond conditioned that the alien during his stay in the country would be committed to some institution having charge of feeble-minded persons for treatment and that reports would be made of the occupation and whereabouts of the alien, in an action for a breach of such conditions for the amount of the bond, it was held that such voluntary bond was not the bond authorized and under certain circumstances required to be given by the Immigration Acts, since the latter is given only in the case of an alien who may be admitted in the exercise of the discretion of the secretary. The bond in suit therefore was a voluntary bond, given and ac-

cepted not in pursuance of any Act of Congress. Such a bond is not an indemnity bond and the sum stipulated therein cannot be regarded as a penalty but as liquidated damages, although the damage flowing from its breach cannot be certainly traced into a money loss of any ascertainable amount. *U. S. v. Rubin*, (E. D. Pa. 1915) 227 Fed. 938.

Review.—The exercise by the Secretary of Commerce and Labor of the discretionary power conferred on him by this section, to admit alien immigrants after a finding that they are likely to become a public charge, if otherwise admissible, on the giving of a suitable bond, or his refusal to exercise such power, is not reviewable by the courts. *U. S. v. Williams*, (1910) 177 Fed. 689, 101 C. C. A. 315; *U. S. v. Williams*, (S. D. N. Y. 1913) 204 Fed. 847; *Norddeutscher Lloyd v. U. S.*, (C. C. A. 2d Cir. 1914) 213 Fed. 10, 130 C. C. A. 85.

Bond for admission of alien children.—See note under section 2, *supra*, p. 640.

SEC. 27. [Restriction on compromises, etc.] That no suit or proceeding for a violation of the provisions of this Act shall be settled, compromised, or discontinued without the consent of the court in which it is pending, entered of record, with the reasons therefor. [34 Stat. L. 907.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text relating to violations of the Act of Feb. 26, 1885, ch. 164, 33 Stat. L. 332, were made by the Act of March 3, 1891, ch. 551, § 2, 26 Stat. L. 1084. These were superseded by the Act of March 3, 1903, ch. 1012, § 27, 32 Stat. L. 1220, which was repealed by section 43 of this Act, *infra*, p. 699.

Compromise.—Under a substantially similar section of the Act of 1891, the attorney-general ruled that it was extremely doubtful whether R. S. sec. 3469, (title CLAIMS) gives authority to the Secretary of the Treasury to compromise such a judgment. As the remis-

sion of these penalties is within the pardoning power of the President, the inability of the secretary in the premises entails no hardship. (1893) 20 Op. Atty-Gen. 530. See also (1889) 19 Op. Atty-Gen. 344; (1900) 23 Op. Atty-Gen. 271.

SEC. 28. [Pending suits, etc., not affected.] That nothing contained in this Act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this Act; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters the laws or parts of laws repealed or amended by this Act are hereby continued in force and effect. [34 Stat. L. 907.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Similar provisions were made by the Act of March 3, 1891, ch. 551, § 12, 26 Stat. L. 1086, and the Act of March 3, 1903, ch. 1012, § 28, 32 Stat. L. 1220, repealed by section 43 of this Act, *infra*, p. 699.

The saving clause of this section by indentment continues in force the Act of 1903 (Act March 3, 1903, ch. 1012, 32 Stat. L. 1213), as it relates to the exclusion of prostitutes from admission to the United States. A prostitute who entered the country before the adoption of this Act is subject to deportation within three years from the time of entry. *Ex p. Durand*, (D. C. Ore. 1908) 160 Fed. 558;

Looe Shee v. North, (C. C. A. 9th Cir. 1909) 170 Fed. 566, 95 C. C. A. 646.

Subsequent prosecutions.—The saving clause in this section relates to subsequent prosecutions, as well as those already pending based upon prior violations of the law. *Lang v. U. S.*, (C. C. A. 1904) 133 Fed. 201, 66 C. C. A. 255.

Deportation of contract laborer.—See note under section 2, *supra*, p. 640.

SEC. 29. [Jurisdiction of federal courts.] That the circuit and district courts of the United States are hereby invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act. [34 Stat. L. 907.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

The provisions of the text relating to the Circuit Courts were superseded by the Judicial Code of March 3, 1911, which, by ch. 13, §§ 289-291, abolished the Circuit Courts and transferred their powers and duties to the District Courts, and by ch. 2, § 24 thereof, conferred on said District Courts jurisdiction of suits and proceedings arising under laws relating to immigration. See the title JUDICIARY.

Provisions similar to those of the text were made by the Act of March 3, 1891, ch. 551, § 13, 26 Stat. L. 1086. These were superseded by the Act of March 3, 1903, ch. 1012, § 29, 32 Stat. L. 1220, which was repealed by section 43 of this Act, *infra*, p. 699.

Under the Act of 1891 a similar section was held to refer to causes of judicial cognizance, already provided for, whether civil actions in the nature of debt for penalties under sections 3 and 4 or indictments for misdemeanors under sections 6, 8 and 10. *Nishimura Ekin v. U. S.*

(1892) 142 U. S. 651, 12 S. Ct. 336, 35 U. S. (L. ed.) 1146. See also *U. S. v. Yamasaka*, (C. C. A. 9th Cir. 1900) 100 Fed. 404, 40 C. C. A. 454.

See section 24, par. 22 of the Judicial Code, title JUDICIARY.

SEC. 30. [Immigrant station privileges — disposal of — liquors forbidden — receipts.] That all exclusive privileges of exchanging money, transporting passengers or baggage, or keeping eating houses, and all other like privileges in connection with any United States immigrant station, shall be disposed of after public competition, subject to such conditions and limitations as the Commissioner-General of Immigration, under the direction or with the approval of the Secretary of Commerce and Labor, may prescribe: *Provided*, That no intoxicating liquors shall be sold in any such immigrant station; that all receipts accruing from the disposal of such exclusive privileges as herein provided shall be paid into the Treasury of the United States to the credit of the "immigrant fund" provided for in section one of this Act. [34 Stat. L. 907.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

The provisions of the text that receipts from the disposal of privileges should be placed to the credit of the "immigrant fund" were superseded by provisions that all receipts should be covered into the Treasury to the credit of miscellaneous receipts contained in the Act of March 4, 1909, ch. 299, § 1, *infra*, p. 700.

Provisions similar to those of the text but relating only to Ellis Island immigrant station were made by the Act of March 3, 1893, ch. 206, § 9, 27 Stat. L. 571. These were superseded by the Act of March 3, 1903, ch. 1012, § 30, 32 Stat. L. 1220, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 31. [Local courts granted jurisdiction.] That for the preservation of the peace and in order that arrests may be made for crimes under the laws of the States and Territories of the United States where the various immigrant stations are located, the officers in charge of such stations, as occasion may require, shall admit therein the proper State and municipal

officers charged with the enforcement of such laws, and for the purpose of this section the jurisdiction of such officers and of the local courts shall extend over such stations. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Similar provisions were made by the Act of March 3, 1891, ch. 551, § 9, 26 Stat. L. 1086, which were superseded by the Act of March 3, 1903, ch. 1012, § 31, 32 Stat. L. 1220, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 32. [Entry along borders of Canada and Mexico.] That the Commissioner-General of Immigration, under the direction or with the approval of the Secretary of Commerce and Labor, shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico, so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries, and shall have power to enter into contracts with transportation lines for the said purpose. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Similar provisions were made by the Act of March 3, 1891, ch. 551, § 8, 26 Stat. L. 1085, which were superseded by the Act of March 3, 1903, ch. 1012, § 32, 32 Stat. L. 1221, which was repealed by section 43 of this Act, *infra*, p. 699.

SEC. 33. [Construction of term "United States" — aliens from Canal Zone.] That for the purpose of this Act the term "United States" as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone: *Provided*, That if any alien shall leave the canal zone and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

A provision similar to that of the text down to the words "except the Isthmian Canal Zone" was made by the Act of March 3, 1903, ch. 1012, § 33, 32 Stat. L. 1221, repealed by section 43 of this Act, *infra*, p. 699.

SEC. 34. [Commissioner of Immigration at New Orleans, La.] That the Commissioner-General of Immigration, with the approval of the Secretary of Commerce and Labor, may appoint a commissioner of immigration to discharge at New Orleans, Louisiana, the duties now required of other commissioners of immigration at their respective posts. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Further provisions relating to the appointment of a commissioner of immigration at New Orleans, repealing in part the foregoing section 34, were made by the Act of Aug. 1, 1914, ch. 223, § 1, *infra*, p. 702.

SEC. 35. [Ports of deportation.] The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

A similar provision was made by the Act of March 3, 1903, ch. 1012, § 35, 32 Stat. L. 1221, which was repealed by section 43 of this Act, *infra*, p. 699.

To what place deported.—In *Lewis v. Frick*, (1914) 233 U. S. 291, 34 S. Ct. 488, 58 U. S. (L. ed.) 967 (*affirming* C. C. A. 6th Cir. 1912), 195 Fed. 693, 115 C. C. A. 493, the court discussed the proper port of destination under sections 3, 20, 21 and 35 of the Immigration Act. In that case it appeared that petitioner was an alien and a native of Russia. He came thence to this country, entering at the port of New York, in the month of September, 1904, lived in or near New York city until March, 1910, then removed to Detroit, Michigan, and has since made that city his home. On November 17, 1910, he crossed the river from Detroit to Windsor, Canada, and brought back with him into the United States a woman, avowed by him to be his wife, but whose actual status was questioned, as will appear. A few days later he was arrested upon a warrant from the Department of Commerce and Labor, issued under the Immigration Act of February 20, 1907, as amended March 26, 1910, and after a hearing conducted by an inspector, the secretary on February 14, 1911, found "that said alien is a member of an excluded class in that he . . . procured, imported and brought into the United States a woman for an immoral purpose," etc., and thereupon ordered that he be deported to the country whence he came, to wit, Russia. The question arising in the Supreme Court whether the deportation was made to the proper country it was held that it was. The court said: "The final contention is that petitioner should have been deported to Canada, whence he came upon the occasion of his unlawful entry into this country, rather than to Russia, the land of his birth, from which he came six years earlier. By section 20, the alien is to be 'deported to the country whence he came at any time within three years after the date of his entry into the United States'; by section 21, the Secretary of Commerce and Labor, upon being satisfied that an alien is subject to deportation, 'shall cause such alien within the period of three years after landing or entry therein [within the United States] to be taken into custody and returned to the country whence he came, as provided by section 20 of this Act; by section 3, an alien convicted thereunder is at the expiration of his sentence to be 'returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections 20 and 21 of this Act'; and by section 35, 'The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens em-

barked for such territory.' Petitioner not having been convicted under section 3, his destination is to be determined rather in the light of sections 20, 21 and 35. And first, we take it to be clear (notwithstanding the peculiar phraseology of section 20) that the three-year period limits only the authority to deport, and does not affect the determination of the country to which an alien is to be deported. Respecting this matter, the sections are somewhat lacking in clearness. But, at least, section 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. This was recognized by rule 38 of the immigration regulations, in force December 12, 1910. It is to be noted that the classes of aliens who are subject to deportation are not wholly made up of those who enter in violation of the law; in some cases cause for deportation may arise after a lawful entry. And in many cases the unlawfulness of the entry may not be discovered until afterwards. The theory of the Act, as expressed in section 2, is that the undesirables ought to be excluded at the seaport or at the frontier; but sections 20, 21 and 35 recognize that this is not always practicable. Of course, if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded from entry at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to us that the Act reasonably admits of his being returned to the land of his nativity, that being in fact 'the country whence he came' when he first entered the United States. See *Lavin v. Le Fevre*, [C. C. A. 9th Cir. 1903] 125 Fed. 693, 696, [60 C. C. A. 425]; *Ex p. Hamaguchi*, [C. C. Ore. 1908] 161 Fed. 185, 190; *Ex p. Wong You*, [N. D. N. Y. 1910] 176 Fed. 933, 940; *U. S. v. Ruiz*, [C. C. A. 5th Cir. 1913] 203 Fed. 441, 444, [121 C. C. A. 551]. We need go no further, and may therefore leave undecided the question whether the Act leaves any room for discretion on the part of the Secretary of Commerce and Labor."

In *Lee Sim v. U. S.*, (C. C. A. 2d Cir. 1914) 218 Fed. 432, 134 C. C. A. 232, the question was whether the alien should have been deported to Canada, whence he came upon the occasion of his unlawful

entry into the country, rather than to China, whence he embarked for the United States, and the court held that the Act admitted of the return of the alien to China. The court followed *Lewis v. Frick*, *supra*, p. 695.

In determining the question to what place the alien shall be deported, this section must be read together with sections 20, 21 and 35 of the Immigration Act of February 20, 1907. *Ex p. Gyth*, (D. C. N. D. 1914) 210 Fed. 918, wherein the court said: "These three sections are to be read together, and a meaning arrived at, if possible, which will give effect to all their provisions. In the great majority of cases the alien comes direct from the country of his nativity, and in case of deportation should be returned there. The department, as the cases on the subject show, has been zealous to make this a universal rule. That would simplify matters. But, like most universal rules, it will work cruel hardship in individual cases. The general rule under the statute clearly is that the alien shall be deported to the country whence he came. This, of course, is not necessarily the country of his nativity or citizenship. Section 35 gives a specific definition of the words 'whence he came' in certain cases. The first clause of that section deals with aliens who embark directly for some port of the United States. They are to be deported to the place from which they embark. The second clause deals with aliens who embark for the United States, but land at some foreign contiguous territory. In my judgment the last clause, like the first, is confined to aliens who embark 'for the United States.' It was a well-known evil at the time the statute was passed that aliens seeking to enter the United States in violation of its laws frequently landed either in Mexico or Canada, and passed into the United States across the long and unguarded international boundary lines. The last clause was intended to meet that evil. If Mexico or Canada was simply used as a front porch for entering the United States, then the alien was to be dealt with the same as if the entry had been made at one of our own ports. The statute, however, clearly requires that, in order to come within its provisions, the alien must have embarked 'for the United States.' The words 'such embarkation' import into the second clause the embarkation referred to in the first clause, and that is an embarkation 'for the United States.' By this I do not mean that, in order to come within the provisions of section 35, the alien must have had a through ticket to some point in the United States at the time he embarked from the trans-Atlantic or trans-Pacific port. All that is required in order to bring him within the statute is that he should have formed the intent or purpose of entering the United States as the final object of his

embarkation. *Ex p. Wong You*, [N. D. N. Y. 1910] 176 Fed. 933. This is not inconsistent with his stopping in Canada, and presently renewing his journey for the United States. It is wholly a question of intent to be gathered from all the facts and circumstances. When these are subject to different inferences, the finding of the Labor Department would be conclusive upon the courts. An alien whose ultimate object was to enter the United States might tarry for some considerable time in Canada for the purpose of eluding or deceiving the immigration officers. In any such case his entry into the United States pursuant to a previous intent so to do would justify and require his deportation to the trans-Pacific or trans-Atlantic port at which he embarked. This interpretation will, in my judgment, fully meet the evil which the last clause of section 35 was intended to provide against."

Actual domicile in Canada or Mexico will prevent deportation to the European port of original embarkation, and this is for the alien to show. It is an open question whether an acquired domicile will change the result. *U. S. v. Sisson*, (S. D. N. Y. 1914) 220 Fed. 538; *U. S. v. Sisson*, (S. D. N. Y. 1915) 220 Fed. 541.

In *Ex p. Li Dick*, (N. D. N. Y. 1910) 176 Fed. 998, it was held that, where aliens come to the United States by sea from trans-Atlantic or trans-Pacific ports, this section fixes the place, on their illegal entry, to which they shall be returned, namely, to the trans-Atlantic or trans-Pacific port from which they embarked for the United States or contiguous territory, regardless of their native country or the country of their former residence. *Ex p. Li Dick*, (1910) 176 Fed. 998. See further the note *Country whence he came*, under section 20, *supra*, p. 678.

For evidence held sufficient to support the deportation of aliens to China, the land of their nativity, rather than to Canada, through which country they entered the United States, see *Wallis v. U. S.*, (C. C. A. 5th Cir. 1916) 230 Fed. 71, 144 C. C. A. 369. See also *Wallis v. Fei Nei*, (C. C. A. 5th Cir. 1916) 230 Fed. 77, 144 C. C. A. 375.

Contents of warrant of deportation.—A warrant of deportation is defective which does not name the port to which the alien shall be deported. This should be the port of embarkation as required by statute. Where there is no evidence of the port of embarkation, the problem is a practical one and is best solved by deportation to whatever port is nearest to the place where the alien was born and has his family. *U. S. v. Sisson*, (S. D. N. Y. 1914) 220 Fed. 538.

And it ought to be clear whether the alien is being deported under sections 3, 20, 21, or 35 of the Immigration Act. *Ex p. Yabucanion*, (D. C. Mont. 1912) 199 Fed. 365.

Amending warrant of deportation.—Where the warrant does not provide for deportation to the port required by statute it is illegal, and it is questionable

whether the District Court has power to change or amend it. *U. S. v. Sisson*, (S. D. N. Y. 1914) 220 Fed. 538.

SEC. 36. [Deportation unless entering at seaports, etc. — Canada and Mexico borders.] That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this Act: *Provided*, That nothing contained in this section shall affect the power conferred by section thirty-two of this Act upon the Commissioner-General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Sections 20, 21 and 32 of this Act, mentioned in the text, are given *supra*, pp. 673, 681, 694.

Clandestine entry at border port.—An alien who clandestinely has entered the United States from Canada at a place designated as a border port of entry, without submitting himself to the proper authorities for inspection in accordance with the rules of the Commissioner-General of Immigration, is unlawfully within the United States, and his deportation properly is directed, as prescribed by the above section. *Ex p. Hamaguchi*, 161 Fed. 185; *Ex p. Li Dick*, (N. D. N. Y. 1910) 176 Fed. 998.

Chinese aliens, entering into the United States surreptitiously in a manner prohibited by this Act and the rules made in pursuance of it, may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. *U. S. v. Wong You*, (1912) 223 U. S. 67, 32 S. Ct. 195, 56 U. S. (L. ed.) 354, followed in *Frick v. Lee Tung Jung*, (C. C. A. 6th Cir. 1913) 205 Fed. 38, 123 C. C. A. 311; *Ex p. Li Dick*, (N. D. N. Y. 1910) 176 Fed. 998.

SEC. 37. [Families of aliens, having contagious diseases — temporary detention — admission.] That whenever an alien shall have taken up his permanent residence in this country, and shall have filed his declaration of intention to become a citizen, and thereafter shall send for his wife, or minor children to join him, if said wife or any of said children shall be found to be affected with any contagious disorder, such wife or children shall be held, under such regulations as the Secretary of Commerce and Labor shall prescribe, until it shall be determined whether the disorder will be easily curable, or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable or that they can be permitted to land without danger to other persons, they shall, if otherwise admissible, thereupon be admitted. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

Provisions similar to those of the text were made by the Act of March 3, 1903, ch. 1012, § 37, 32 Stat. L. 1221, repealed by section 43 of this Act, *infra*, p. 699.

Right to hospital treatment.—In *Ex p. Momo Tomimatsu*, (N. D. Cal. 1916) 232 Fed. 376, it was held that the petitioner, a Japanese woman afflicted with trachoma, was not entitled to hospital treatment as a matter of right under this sec-

tion, as her husband had not filed his declaration to become a citizen, and was incapable of doing so.

Minor children of naturalized father.—See note under section 19, *supra*, p. 670.

SEC. 38. [Anarchists, etc., prohibited entry — enforcement — penalty for assisting illegal entries.] That no person who disbelieves in or who is

opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof. This section shall be enforced by the Secretary of Commerce and Labor under such rules and regulations as he shall prescribe. That any person who knowingly aids or assists any such person to enter the United States or any territory or place subject to the jurisdiction thereof, or who connives or conspires with any person or persons to allow, procure, or permit any such person to enter therein, except pursuant to such rules and regulations made by the Secretary of Commerce and Labor shall be fined not more than five thousand dollars, or imprisonment for not more than five years, or both. [34 Stat. L. 908.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637. Provisions similar to those of the text were made by the Act of March 3, 1903, ch. 1012, § 38, 32 Stat. L. 1221, repealed by section 43 of this Act, *infra*, p. 699.

Provisions constitutional.—The provisions of this Act for the exclusion and deportation of alien anarchists are not unconstitutional either as in contravention of section 1 of article 3 of the Constitution or of articles 1, 5, and 6 of the Amendments, whether such aliens are an-

archists in the philosophical sense of the word or in the popular sense as defined by the Act. *U. S. v. Williams*, (1904) 194 U. S. 279, 24 S. Ct. 719, 48 U. S. (L. ed.) 979, *affirming* (1903) 126 Fed. 253.

SEC. 39. This section was as follows:

"SEC. 39. That a commission is hereby created, consisting of three Senators, to be appointed by the President of the Senate, and three members of the House of Representatives, to be appointed by the Speaker of the House of Representatives, and three persons, to be appointed by the President of the United States. Said commission shall make full inquiry, examination, and investigation by subcommittee or otherwise into the subject of immigration. For the purpose of said inquiry, examination, and investigation, said commission is authorized to send for persons and papers, make all necessary travel, either in the United States or any foreign country, and through the chairman of the commission or any member thereof to administer oaths and to examine witnesses and papers respecting all matters pertaining to the subject, and to employ necessary clerical and other assistance. Said commission shall report to the Congress the conclusions reached by it and make such recommendations as in its judgment may seem proper. Such sums of money as may be necessary for the said inquiry, examination, and investigation are hereby appropriated and authorized to be paid out of the "immigrant fund" on the certificate of the chairman of said commission, including all expenses of the commissioners and a reasonable compensation, to be fixed by the President of the United States, for those members of the commission who are not members of Congress; and the President of the United States is also authorized, in the name of the Government of the United States, to call, in his discretion, an international conference, to assemble at such point as may be agreed upon, or to send special commissioners to any foreign country, for the purpose of regulating by international agreement, subject to the advice and consent of the Senate of the United States, the immigration of aliens to the United States; of providing for the mental, moral and physical examination of such aliens by American consuls or other officers of the United States Government at the ports of embarkation, or elsewhere; of securing the assistance of foreign governments in their own territories to prevent the evasion of the laws of the United States governing immigration to the United States; of entering into such international agreements as may be proper to prevent the immigration of aliens who, under the laws of the United States, are or may be excluded from entering the United States, and of regulating any matters pertaining to such immigration." [34 Stat. L. 909.]

These provisions may be regarded as temporary and executed, since the commission was required to complete their entire work, make their final report and cease on

March 1, 1910, by an Act of March 4, 1909, ch. 299, § 1, 35 Stat. L. 982, the time being extended to the first Monday of December, 1910, by the Act of Feb. 25, 1910, ch. 62, § 1, 36 Stat. L. 215.

SEC. 41. [Foreign officials, etc.] That nothing in this Act shall be construed to apply to accredited officials of foreign governments nor to their suites, families, or guests. [34 Stat. L. 910.]

See the notes to R. S. sec. 2164, *supra*, p. 632, and section 1 of this Act, *supra*, p. 637.

SEC. 42. Repealed. See the notes to section 1 of this Act, *supra*, p. 637.

SEC. 43. [Repeal — Chinese exclusion.] That the Act of March third, nineteen hundred and three, being an Act to regulate the immigration of aliens into the United States, except section thirty-four thereof, and the Act of March twenty-second, nineteen hundred and four, being an Act to extend the exemption from head tax to citizens of Newfoundland entering the United States, and all Acts and parts of Acts inconsistent with this Act are hereby repealed: *Provided*, That that Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, nor to repeal, alter, or amend section six, chapter four hundred and fifty-three, third session Fifty-eighth Congress, approved February sixth, nineteen hundred and five, or, prior to January first, nineteen hundred and nine, section one of the Act approved August second, eighteen hundred and eighty-two, entitled "An Act to regulate the carriage of passengers by sea." [34 Stat. L. 911.]

For a discussion of the various Acts cited in the text see the notes to section 1 of this Act, *supra*, p. 637.

A similar provision with respect to Chinese persons was made by the Act of March 3, 1893, ch. 206, § 10, 27 Stat. L. 571.

For the Acts relating to Chinese immigration see the title CHINESE EXCLUSION.

Chinese.—The proviso of the above section does not exempt Chinese persons from the operation of section 2 of this Act, and such persons who are suffering from the contagious disease trachoma are properly excluded, though they would otherwise be entitled to admission under the Chinese Exclusion Acts. *Es p. Lee Sher Wing*, (1908) 164 Fed. 506.

The object of the proviso in the corresponding section of the Act of 1903, as ruled by the Attorney-General, was to prevent a misinterpretation of the repealing clause, and to forestall any attempt to secure the admission of Chinese, theretofore prohibited from entering the United States, under a claim that this Act was

intended to contain all provisions regulating the immigration of aliens, and that it expressly repealed the Chinese exclusion laws. (1903) 24 Op. Atty.-Gen. 706. The proviso of this section was not inserted for the purpose of giving a special form of trial or special privilege to Chinese immigrants, but for the express purpose of imposing upon such immigrants the obligations of the Immigrant Act, and also of making sure that the additional obligations of the Chinese Exclusion Act would not be disturbed or affected. *Es p. Woo Shing*, (N. D. Ohio 1915) 226 Fed. 141. See also note under section 20 of this Act, *supra*, p. 673.

SEC. 44. [Effect.] That this Act shall take effect and be enforced from and after July first, nineteen hundred and seven: *Provided, however*, That section thirty-nine of this Act and the last proviso of section one shall take effect upon the passage of this Act and section forty-two on January first, nineteen hundred and nine. [34 Stat. L. 911.]

See the notes to section 1 of this Act, *supra*, p. 637.

[SEC. 1.] **[Medical examination — reimbursement — repeal.]** * * * In all, * * * dollars, which shall include the amount necessary for the medical inspection of aliens, as required by section seventeen of the Act of Congress approved February twentieth, nineteen hundred and seven, and the provision of said section of said Act requiring the reimbursement by the immigration fund for said expenses is hereby repealed. [35 Stat. L. 969.]

This and the following paragraph are from the Sundry Civil Appropriation Act of March 4, 1909, ch. 299, following an appropriation for the Public Health and Marine-Hospital Service. Said service is now known as the Public Health Service, see HEALTH AND QUARANTINE. The Act of Feb. 20, 1907, ch. 1134, § 17, in part repealed by the provisions of the text is given *supra*, p. 668.

[Head tax, etc., to be covered into the Treasury.] That on and after July first, nineteen hundred and nine, all head tax collected pursuant to the provisions of section one of the said Act of February twentieth, nineteen hundred and seven, together with all fines, rentals collected, and moneys received from other sources under the laws regulating the immigration of aliens into the United States, shall be covered into the Treasury to the credit of miscellaneous receipts. [35 Stat. L. 982.]

See the notes to the preceding paragraph of this section.

The Act of Feb. 20, 1907, ch. 1134, § 1, mentioned in the text, is given *supra*, p. 637.

This section is considered in U. S. v. Holland-America Line, (S. D. N. Y. 1913) 205 Fed. 943.

An Act Relative to outward alien manifests on certain vessels.

[Act of March 4, 1909, ch. 305, 35 Stat. L. 1060.]

[List of aliens not required on vessels for Canada and Mexico:] That until the provisions of section twelve of the immigration Act of February twentieth, nineteen hundred and seven, relating to outward alien manifests, shall be made applicable to passengers going out of the United States to Canada by land carriage, said provisions shall not apply to passengers going by vessels employed exclusively in the trade between the ports of the United States and the Dominion of Canada and the Republic of Mexico. [35 Stat. L. 1060.]

The Act of Feb. 20, 1907, ch. 1134, § 12, mentioned in the text, is given *supra*, p. 663.

[SEC. 1.] **[Credit of reimbursements.]** * * * That from and after July first, nineteen hundred and eleven, all moneys paid into the Treasury to reimburse the Immigration Service for expenses of detained aliens paid from the appropriation for expenses of regulating immigration, shall be credited to the appropriation for the expenses of regulating immigration for the fiscal year in which the expenses were incurred. [36 Stat. L. 1442.]

This is from the Sundry Civil Appropriation Act of March 4, 1911, ch. 285.

An Act To extend the power of the Commissioner General of Immigration, subject to the approval of the Secretary of Commerce and Labor.

[*Act of February 25, 1913, ch. 73, 37 Stat. L. 682.*]

[SEC. 1.] [Immigrant stations to be established at interior places.] That for the purpose of making effective the power of establishing rules and regulations for protecting the United States and aliens migrating thereto from fraud and loss, conferred upon the Commissioner General of Immigration, subject to the direction and with the approval of the Secretary of Commerce and Labor, by section twenty-two of an Act entitled "An Act to regulate the immigration of aliens into the United States," approved February twentieth, nineteen hundred and seven, the Secretary of Commerce and Labor shall establish and maintain immigrant stations at such interior places as may be necessary, and, in the discretion of the said Secretary, aliens in transit from ports of landing to such interior stations shall be accompanied by immigrant inspectors: *Provided*, That nothing in this Act shall be construed as authorizing the Commissioner General of Immigration to pay the cost of transportation of any arriving alien. [37 Stat. L. 682.]

The Act of Feb. 20, 1907, ch. 1134, § 22, mentioned in the text, is given *supra*, p. 630. As to the authority of the Secretary of Commerce and Labor, see the notes to the Act of March 3, 1891, ch. 551, § 7, *supra*, p. 628.

Section 2 of this Act, omitted as executed, authorized and made an appropriation for a station in the city of Chicago.

By a provision of the Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223, § 1, 38 Stat. L. 666, the Secretary of Labor was authorized to execute a lease for office quarters for the Immigration Service at Montreal, Canada, for a period of four years from July 1, 1914, at a rate of rental not exceeding \$4,500 per annum.

[SEC. 1.] [Temporary detention of aliens—expenses to be paid by transportation lines.] * * * Whenever aliens arriving at any port of the United States are temporarily removed from a vessel in accordance with the provisions of section sixteen of the immigration Act approved February twentieth, nineteen hundred and seven, the transportation lines which brought them and the masters, owners, agents, and consignees of the vessel on which they arrive shall pay all expenses of such removal and all expenses arising during subsequent detention pending decision of the eligibility of such aliens to enter the United States and until they are either allowed to land or returned to the care of the line or to the vessel which brought them, and such expenses shall include those of maintenance, medical treatment in hospital or elsewhere, burial in the event of death, and charges for transfer to the vessel in the event of deportation, excepting only where such expenses arise under the terms of any of the provisos of section nineteen of the said immigration Act; and aliens shall not be temporarily removed from any vessel unless the master, owner, agent, or consignee thereof shall guarantee in a manner prescribed by and to the satisfaction of the Secretary of Labor that said expenses will be paid. [38 Stat. L. 226.]

This is from the Deficiencies Appropriation Act of Oct. 22, 1913, ch. 32.

The Act of Feb. 20, 1907, ch. 1134, § 16, mentioned in the text, is given *supra*, p. 666.

[SEC. 1.] [Commissioner of Immigration at New Orleans.] * * * That the Commissioner of Immigration to discharge at New Orleans, Louisiana, the duties now required of other commissioners of immigration at the respective ports of the United States shall be appointed in the same manner and for the same term as the said other commissioners, and shall have the same official status as they; and that section thirty-four of the immigration Act approved February twentieth, nineteen hundred and seven, is hereby repealed in so far as it conflicts with the foregoing provision: *Provided further, however,* That the salary of the said commissioner of immigration at New Orleans, Louisiana, shall be reduced to the sum of \$2,900 per annum. [38 Stat. L. 666.]

This is from the Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223.

The Act of Feb. 20, 1907, ch. 1134, § 34, affected by this section, is given *supra*, p. 694.

III. THE COOLY TRADE

Sec. 2158. [Cooly trade prohibited.] No citizen of the United States, or foreigner coming into or residing within the same, shall, for himself or for any other person, either as master, factor, owner, or otherwise, build, equip, load, or otherwise prepare, any vessel, registered, enrolled, or licensed, in the United States, for the purpose of procuring from any port or place the subjects of China, Japan, or of any other oriental country, known as "coolies," to be transported to any foreign port, or place, to be disposed of, or sold, or transferred, for any time, as servants or apprentices, or to be held to service or labor. [R. S.]

Act of Feb. 19, 1862, ch. 27, 12 Stat. L. 340; Act of Feb. 9, 1869, ch. 24, 15 Stat. L. 269.

See the note to R. S. sec. 2164, *supra*, p. 632.

Sec. 2159. [Vessels employed in cooly trade shall be forfeited.] If any vessel, belonging in whole or in part to a citizen of the United States, and registered, enrolled, or otherwise licensed therein, be employed in the "coolly-trade," so called, contrary to the provisions of the preceding section, such vessel, her tackle, apparel, furniture, and other appurtenances, shall be forfeited to the United States, and shall be liable to be seized, prosecuted, and condemned in any of the circuit courts or district courts of the United States for the district where the vessel may be found, seized, or carried. [R. S.]

Act of Feb. 19, 1862, ch. 27, 12 Stat. L. 340.

Sec. 2160. [Building vessels to engage in cooly trade, how punished.] Every person who so builds, fits out, equips, loads, or otherwise prepares, or who sends to sea, or navigates, as owner, master, factor, agent, or otherwise, any vessel, belonging in whole or in part to a citizen of the United States, or registered, enrolled, or licensed within the same, knowing or intending that such vessel is to be or may be employed in that trade, contrary to the provisions of section twenty-one hundred and fifty-eight, shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding one year. [R. S.]

Act of Feb. 19, 1862, ch. 27, 12 Stat. L. 340.

R. S. sec. 2158 mentioned in the text is given *supra*, this page.

Sec. 2161. [Punishment for violation of section 2158.] Every citizen of the United States who, contrary to the provisions of section twenty-one hundred and fifty-eight, takes on board of any vessel, or receives or transports any such subjects as are described in that section, for the purpose of disposing of them in any way as therein prohibited, shall be liable to a fine not exceeding two thousand dollars and be imprisoned not exceeding one year. [R. S.]

Act of Feb. 19, 1862, ch. 27, 12 Stat. L. 340.

Sec. 2162. [This Title not to interfere with voluntary emigration.] Nothing herein contained shall be deemed to apply to any voluntary emigration of the subjects specified in section twenty-one hundred and fifty-eight, or to any vessel carrying such person as passenger on board the same, but a certificate shall be prepared and signed by the consul or consular agent of the United States residing at the port from which such vessel may take her departure, containing the name of such person, and setting forth the fact of his voluntary emigration from such port, which certificate shall be given to the master of such vessel; and the same shall not be given until such consul or consular agent is first personally satisfied by evidence of the truth of the facts therein contained. [R. S.]

Act of Feb. 19, 1862, ch. 27, 12 Stat. L. 341.

R. S. sec. 2158 mentioned in the text is given *supra*, p. 702.

See the Act of March 3, 1875, ch. 141, § 1, *infra*, this page.

Vessels of the United States.—The U. S. v. Mosby, (1890) 133 U. S. 273,
provisions of this section as to the duties 10 S. Ct. 327, 33 U. S. (L. ed.) 625.
of consuls do not refer to foreign vessels.

Sec. 2163. [Examination of vessels.] The President is empowered, in such way and at such time as he may judge proper, to direct the vessels of the United States, and the masters and commanders thereof, to examine all vessels navigated or owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed under the laws thereof, whenever in the judgment of such master or commanding officer, reasonable cause exists to believe that such vessel has on board any subjects of China, Japan, or other oriental country, known as "coolies;" and, upon sufficient proof that such vessel is employed in violation of the preceding provisions, to cause her to be carried, with her officers and crew, into any port or district within the United States, and delivered to the marshal of such district, to be held and disposed of according to law. [R. S.]

Act of Feb. 19, 1862, ch. 27, 12 Stat. L. 341.

"The preceding provisions" above referred to are R. S. secs. 2158-2162, given *supra*.

An act supplementary to the acts in relation to immigration.

[Act of March 3, 1875, ch. 141, 18 Stat. L. 477.]

[SEC. 1.] **[Consular inquiry and certificate.]** That in determining whether the immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary, as provided by section two thousand one hundred and sixty-two of the Revised Code, title "Immigration," it shall be the duty of the consul-general or consul of the United

States residing at the port from which it is proposed to convey such subjects, in any vessels enrolled or licensed in the United States, or any port within the same, before delivering to the masters of any such vessels the permit or certificate provided for in such section, to ascertain whether such immigrant has entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes; and if there be such contract or agreement, the said consul-general or consul shall not deliver the required permit or certificate. [18 Stat. L. 477.]

R. S. sec. 2162 mentioned in the text is given *supra*, p. 703.

Sections 3 and 5 of this Act relating to the importation and immigration of convicts and women for purposes of prostitution were superseded by the Act of Feb. 20, 1907, ch. 1134, §§ 1 and 3, *supra*, pp. 637, 649.

State quarantine laws.—"Without undertaking to analyze the provisions of these Acts, it suffices to say that, after scrutinizing them, we think they do not purport to abrogate the quarantine laws of the several states, and that the safeguards which they create and the regulations which they impose on the introduction of immigrants are ancillary, and

subject to such quarantine laws." The statutes referred to, as well as this, were those of Aug. 3, 1882; of June 28, 1884; of Feb. 26, 1885; of March 23, 1887; and March 3, 1891. *Compagnie Francaise, etc., v. Louisiana State Board of Health*, (1902) 186 U. S. 380, 22 S. Ct. 811, 46 U. S. (L. ed.) 1209.

SEC. 2. [Transportation of subjects of China or Japan, etc., without free consent, how punished — contracts void.] That if any citizen of the United States, or other person amenable to the laws of the United States, shall take, or cause to be taken or transported, to or from the United States any subject of China, Japan, or any Oriental country, without their free and voluntary consent, for the purpose of holding them to a term of service, such citizen or other person shall be liable to be indicted therefor, and, on conviction of such offense, shall be punished by a fine not exceeding two thousand dollars and be imprisoned not exceeding one year; and all contracts and agreements for a term of service of such persons in the United States, whether made in advance or in pursuance of such illegal importation, and whether such importation shall have been in American or other vessels, are hereby declared void. [18 Stat. L. 477.]

See the note to the preceding section 1 of this Act.

SEC. 4. [Contracting to supply labor of cooly in violation of law.] That if any person shall knowingly and willfully contract, or attempt to contract, in advance or in pursuance of such illegal importation, to supply to another the labor of any cooly or other person brought into the United States in violation of section two thousand one hundred and fifty-eight of the Revised Statutes, or of any other section of the laws prohibiting the cooly-trade or of this act, such person shall be deemed guilty of a felony, and upon conviction thereof, in any United States court, shall be fined in a sum not exceeding five hundred dollars and imprisoned for a term not exceeding one year. [18 Stat. L. 477.]

R. S. sec. 2158, above referred to, is given *supra*, p. 702.

See the note to section 1 of this Act, *supra*, this page.

IMPORTS AND EXPORTS

- I. GENERAL PROVISIONS, 707.
 - II. ARTICLES SIMULATING DOMESTIC TRADEMARKS, 712.
 - III. PRODUCTS OF CONVICT LABOR, 713.
 - IV. OBSCENE BOOKS AND ARTICLES, 713.
 - V. FOOD PRODUCTS, 715.
 - VI. TEA, 716.
 - VII. OPIUM, 722.
 - VIII. MATCHES, 727.
 - IX. WAR MATERIAL, 728.
-

I. General Provisions, 707.

- R. S. 265. *Printing Statement of Exports and Imports*, 707.
- R. S. 2611. *Oath of Special Examiners of Drugs*, 707.
- R. S. 2612. *Instructions to Prevent Importation of Adulterated Drugs*, 707.
- R. S. 2933. *Examination of Medicines*, 708.
- R. S. 2934. *Name of Proprietor and Place of Preparation to be Affixed to Medicines*, 708.
- R. S. 2935. *Return upon Examination*, 708.
- R. S. 2936. *Appeal from Examination*, 708.
- R. S. 2937. *Exportation of Rejected Articles*, 709.
- R. S. 2938. *Appraiser as Special Examiner*, 709.
- Act of Oct. 3, 1913, ch. 16 ("Underwood Tariff Act")*, 709.
- Sec. IV. F. Subsec. 1. *Country of Origin to Be Marked on Articles*, 709.
 - 2. *Punishment for False Marking, etc.*, 710.
- Subsec. 2. *Imports Restricted to American Vessels, or of Country of Origin*, 710.
 - 3. *Not Applicable if No Similar Restriction Exists*, 711.

II. Articles Simulating Domestic Trademarks, 712.

- Act of Feb. 20, 1905, ch. 592*, 712.
- Sec. 27. *Importation Forbidden — Regulations*, 712.

III. Products of Convict Labor, 713.

- Act of Oct. 3, 1913, ch. 16*, 713.
- Sec. IV. I. *Convict Labor Manufactures*, 713.

IV. Obscene Books and Articles, 713.

- Act of Oct. 3, 1913, ch. 16*, 713.
- Sec. IV. G. Subsec. 1. *Obscene Books, Articles, etc., Lottery Tickets*, 713.
 - 2. *Punishment for Officials Aiding Violations*, 714.
 - 3. *Proceedings for Seizure, etc., of Objectionable Articles*, 714.

V. Food Products, 715.

Act of Aug. 30, 1890, ch. 839, 715.

Sec. 1. Salted Pork and Bacon for Export — Inspection and Certification — Forging Marks — Punishment, 715.

4. Suspension by President of Importation of Adulterated Articles, 716.

VI. Tea, 716.

Act of March 2, 1897, ch. 358 ("Impure Tea Importation Act"), 716.

Sec. 1. Tea — Importation, Inferior to Standards, Prohibited — Exceptions, 716.

2. Board of Experts Created, 717.

3. Standards to Be Fixed — Samples, 718.

4. Importer's Bond — Samples for Examiner or Collector, 718.

5. Permit, if Equal to Standard — Re-examination — Partial Permit, 719.

6. Re-examination by General Appraisers — Permit, If equal to Standards — If Inferior, to Be Exported — Destroyed, If Not Exported, 719.

7. Examination by Qualified Examiner — Where No Examiner at Port of Entry, 720.

8. Procedure on Re-examination — Expert Advice, 720.

9. Rejected Teas Not to Be Reimported, 721.

10. Regulations, 721.

11. Tea on Shipboard, 721.

12. Repeal, 721.

VII. Opium, 722.

Act of Feb. 23, 1887, ch. 210 ("Opium Act of 1887"), 722.

Sec. 1. Importation of Opium by Chinese Prohibited, 722.

2. Forfeiture, 722.

3. Citizens of United States Prohibited from Traffic in Opium in China — Punishment — Jurisdiction — Forfeiture, 722.

Act of Feb. 9, 1909, ch. 100 ("Opium Act of 1909"), 723.

Sec. 1. Opium — Importation Prohibited, 723.

2. Penalty for Violation — Possession, Proof of Guilt, 725.

3. Presumption — Burden of Proof, 726.

4. Persons Liable to Penalty — Evidence — Forfeiture, 726.

5. Admission for Transportation to Another Country Prohibited, 726.

6. Exportation Prohibited — Regulations, 726.

7. Penalty for Exportation — Informers, 727.

8. Liability of Vessel, 727.

VIII. Matches, 727.

Act of April 9, 1912, ch. 75, 727.

Sec. 10. Matches — Importation, 727.

11. Matches — Exportation, 728.

IX. War Material, 728.

Res. of April 22, 1898, No. 25, 728.

Sec. 1. Exportation of War Material, 728.

2. Punishment for Violations, 730.

CROSS-REFERENCES

Grains, Seeds and Nursery Stock, Insect Pests, Insecticides and Fungicides, see *AGRICULTURE*.

Animals and Animal Products, see *ANIMALS*.

Duties on Imports, Collection Districts, Ports and Officers, Payment, Draw-back and Refund, see *CUSTOMS DUTIES*.

Articles Bearing False Copyright Notices, see *COPYRIGHT*.

Discriminating Duties on Goods Imported in Foreign Vessels, see *DISCRIMINATING LAWS AND DUTIES*.

Falsely Stamped Gold or Silver Articles, see *FALSE STAMPING*.

Viruses, Serums, Toxins, etc., see *FOOD AND DRUGS*.

Regulations as to Insular Possessions, see *HAWAIIAN ISLANDS; PHILIPPINE ISLANDS; PORTO RICO*.

Contract Labor, see *IMMIGRATION*.

Women for Immoral Purposes, see *IMMIGRATION; WHITE SLAVE TRAFFIC*.

Articles Subject to Internal Revenue Tax, see *INTERNAL REVENUE*.

Tokens, etc., Similar to Coins, see *PENAL LAWS*.

I. GENERAL PROVISIONS

Sec. 265. [Printing statement of exports and imports.] The Secretary of the Treasury shall furnish to the Congressional Printer on or before the first day of November of each year, the manuscript, prepared for printing, of a condensed statement of the aggregate amount of the exports and imports from foreign countries during the preceding fiscal year. [R. S.]

Res. No. 27, March 3, 1863, 12 Stat. L. 826.

The duties here required of the Secretary of the Treasury would seem to be imposed on the Secretary of Commerce by virtue of the Act of Feb. 14, 1903, ch. 552, given under the title *COMMERCE DEPARTMENT*, which transferred the Bureau of Statistics (now known as the Bureau of Foreign and Domestic Commerce) from the jurisdiction of the Department of the Treasury to the Department of Commerce.

Sec. 2611. [Oath of special examiners of drugs.] Special examiners of drugs, medicines, chemicals, and so forth, shall, before entering upon their duties, take and subscribe an oath faithfully and diligently to perform such duties, and to use their best endeavors to prevent and detect frauds upon the revenue of the United States; which oath shall be administered by the collector of the port or district where the examiner making it is employed. [R. S.]

Act of June 26, 1848, ch. 70, 9 Stat. L. 239.

Sec. 2612. [Instructions to prevent importation of adulterated drugs.] The Secretary of the Treasury shall give to the collectors of districts for which an examiner of drugs, medicines, and chemicals is not provided by law, such instructions as he may deem necessary to prevent the importation of adulterated and spurious drugs and medicines. [R. S.]

Act of June 26, 1848, ch. 70, 9 Stat. L. 238.

Sec. 2933. [Examination of medicines.] All drugs, medicines, medicinal preparations, including medicinal essential oils and chemical preparations, used wholly or in part as medicine, imported from abroad, shall, before passing the custom-house, be examined and appraised, as well in reference to their quality, purity, and fitness, for medical purposes, as to their value and identity specified in the invoice. [R. S.]

Act of June 26, 1848, ch. 70, 9 Stat. L. 237.

Sec. 2934. [Name of proprietor and place of preparation to be affixed to medicines.] All medicinal preparations, whether chemical or otherwise, usually imported with the name of the manufacturer, shall have the true name of the manufacturer and the place where they are prepared, permanently and legibly affixed to each parcel by stamp, label, or otherwise; and all medicinal preparations imported without such names so affixed shall be adjudged to be forfeited. [R. S.]

Act of June 26, 1848, ch. 70, 9 Stat. L. 238.

Sec. 2935. [Return upon examination.] If, on examination, any drugs, medicines, medicinal preparations, whether chemical or otherwise, including medicinal essential oils, are found, in the opinion of the examiner, to be so far adulterated, or in any manner deteriorated, as to render them inferior in strength and purity to the standard established by the United States, Edinburgh, London, French, and German pharmacopœias and dispensaries, and thereby improper, unsafe, or dangerous to be used for medicinal purposes, a return to that effect shall be made upon the invoice, and the articles so noted shall not pass the custom-house, unless, on a re-examination of a strictly analytical character, called for by the owner or consignee, the return of the examiner shall be found erroneous, and it is declared as the result of such analysis, that the articles may properly, safely, and without danger, be used for medicinal purposes. [R. S.]

Act of June 26, 1848, ch. 70, 9 Stat. L. 238.

Effect of Food and Drugs Act of June 30, 1906.—This section and the Act of June 30, 1906 (title FOOD AND DRUGS), are generally speaking cumulative, and should both be given effect, and an importation of drugs should not be admitted if it fails to conform to the standard established by the former or to the tests imposed under the latter. (1907) 26 Op. Atty-Gen. 311.

Importations from Italy.—On importations originating in Italy, the standard of strength and purity to be enforced is that established by the Pharmacopœia of the

United States, and not that of Italy or any other foreign country. (1907) 26 Op. Atty-Gen. 311.

Importations from Scotland, England, France and Germany.—Importations originating in any of the countries whose pharmacopœias are mentioned in this section must conform to the pharmacopœia of their origin; but if produced in any other country, whose pharmacopœias are not thus standardized, then the Pharmacopœia of the United States must control. (1907) 26 Op. Atty-Gen. 311.

Sec. 2936. [Appeal from examination.] The owner or consignee shall at all times, when dissatisfied with the examiner's return, have the privilege of calling, at his own expense, for a re-examination; and the collector, upon receiving a deposit of such sum as he may deem sufficient to defray such expense, shall procure some competent analytical chemist possessing the confidence of the medical profession, as well as of the colleges of medicine and pharmacy, if any such institutions exist in the State in which the

collection-district is situated, to make a careful analysis of the articles included in the return, and a report upon the same under oath. In case this report, which shall be final, shall declare the return of the examiner to be erroneous, and the articles to be of the requisite strength and purity, according to the standards referred to in the next preceding section, the entire invoice shall be passed without reservation, on payment of the customary duties. [R. S.]

Act of June 26, 1848, ch. 70, § Stat. L. 238.

By the Act of Feb. 27, 1877, ch. 69, § Stat. L. 247, this section was amended to read as above given by inserting the words "to make" after the word "situated."

Repeal.—The provisions of the Drugs and Medicine Act of 1848, incorporated in this section, that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary du-

ties," were repealed by implication, as applied to importations which are subject to rejection under tests of the Food and Drugs Act of June 30, 1906 (title FOOD AND DRUGS). (1907) 26 Op. Atty.-Gen. 311.

Sec. 2937. [Exportation of rejected articles.] If the examiner's return, however, shall be sustained by the analysis and report, the articles shall remain in charge of the collector, and the owner or consignee, on payment of the charges of storage and other expenses necessarily incurred by the United States, and on giving a bond with sureties satisfactory to the collector to land the articles out of the limits of the United States, shall have the privilege of re-exporting them at any time within the period of six months after the report of the analysis; but if the articles shall not be sent out of the United States within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed, and hold the owner or consignee responsible to the United States for the payment of all charges, in the same manner as if the articles had been re-exported. [R. S.]

Act of June 26, 1848, ch. 70, § Stat. L. 238.

Sec. 2938. [Appraiser as special examiner.] One of the assistant appraisers at the port of New York, to be appointed with special reference to his qualifications for such duties, shall, in addition to the duties that may be required of him by the appraiser, perform the duties of a special examiner of drugs, medicines, chemicals, and so forth. [R. S.]

Act of July 27, 1866, ch. 284, § Stat. L. 302.

For the number, salary, etc., of appraisers, see the plan for the reorganization of the customs service given in the title CUSTOMS DUTIES.

The supervision of the appraiser.—See (1900) 23 Op. Atty.-Gen. 238.

F. Subsection 1. [Country of origin to be marked on articles.] That all articles of foreign manufacture or production, which are capable of being marked, stamped, branded, or labeled, without injury, shall be marked, stamped, branded, or labeled in legible English words, in a conspicuous place that shall not be covered or obscured by any subsequent attachments or arrangements, so as to indicate the country of origin. Said

marking, stamping, branding, or labeling shall be as nearly indelible and permanent as the nature of the article will permit.

All packages containing imported articles shall be marked, stamped, branded, or labeled so as to indicate legibly and plainly, in English words, the country of origin and the quantity of their contents, and until marked in accordance with the directions prescribed in this section no articles or packages shall be delivered to the importer.

Should any article or package of imported merchandise be marked, stamped, branded, or labeled so as not accurately to indicate the quantity, number, or measurement actually contained in such article or package, no delivery of the same shall be made to the importer until the mark, stamp, brand, or label, as the case may be, shall be changed so as to conform to the facts of the case.

The Secretary of the Treasury shall prescribe the necessary rules and regulations to carry out the foregoing provision. [38 Stat. L. 194.]

This and the following paragraphs of the text are from the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § IV. For other sections of this Act see *infra*, p. 713, and see the titles CUSTOMS DUTIES; DISCRIMINATING LAWS AND DUTIES; INTERNAL REVENUE.

Provisions similar to those of this and the following paragraph were made by the Tariff Act of Aug. 5, 1909, ch. 6, §§ 7, 8, 36 Stat. L. 85, 86. These superseded similar provisions in earlier Tariff Acts, and were repealed by section IV S of this Act, given under the title CUSTOMS DUTIES.

F. Subsection 2. [Punishment for false marking, etc.] If any person shall fraudulently violate any of the provisions of this Act relating to the marking, stamping, branding, or labeling of any imported articles or packages; or shall fraudulently deface, destroy, remove, alter, or obliterate any such marks, stamps, brands, or labels with intent to conceal the information given by or contained in such marks, stamps, brands, or labels, he shall upon conviction be fined in any sum not exceeding \$5,000, or be imprisoned for any time not exceeding one year, or both. [38 Stat. L. 194.]

See the notes to the preceding paragraph of the text.

J. Subsection 2. [Imports restricted to American vessels, or of country of origin.] That no goods, wares, or merchandise, unless in cases provided for by treaty, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture, or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation. All goods, wares, or merchandise imported contrary to this section, and the vessel wherein the same shall be imported, together with her cargo, tackle, apparel, and furniture, shall be forfeited to the United States; and such goods, wares, or merchandise, ship, or vessel, and cargo shall be liable to be seized, prosecuted, and condemned in like manner, and under the same regulations, restrictions, and provisions as have been heretofore established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. [38 Stat. L. 196.]

See the notes to subdivision F, subsection 1, of this section, *supra*, this page.

By an Act of March 4, 1915, ch. 171, § 1, 38 Stat. L. 1193, entitled "An Act to repeal penalties on foreign-built vessels owned by Americans" there was repealed so

much of the foregoing subsection 2 "as provides for the forfeiture of any vessel owned by citizens of the United States but not a vessel of the United States, together with her cargo, tackle, apparel, and furniture, are hereby repealed. Any such . . . discriminating duties collected since the passage of the Act of August eighteenth, nineteen hundred and fourteen, shall be refunded, and any such forfeitures incurred are hereby remitted: *Provided, however,* That the provisions of this Act shall apply only in case that any vessel of the character above described after entering an American port shall, before leaving the same, be registered as a vessel of the United States."

Section 2 of said repealing Act provided that it should take effect immediately.

Section 1 of said repealing Act also repealed in part section IV J, subsection 1, of this Act of Oct. 3, 1913, ch. 16, which is set out under the title DISCRIMINATING LAWS AND DUTIES.

Provisions similar to the foregoing and the following paragraphs of the text were made by R. S. secs. 2497, 2498 and the various subsequent Tariff Acts. These were superseded by the Tariff Act of Aug. 5, 1909, ch. 6, §§ 16 and 17, 36 Stat. L. 87, which were repealed by section IV S of this Act given under the title CUSTOMS DUTIES.

Vessels of the United States.—That a vessel is owned by citizens of the United States does not make her a vessel of the United States. Only ships which have been registered in the manner provided by the statute are denominated or deemed vessels of the United States, entitled to the benefits or privileges appertaining to such ships. This case was under the corresponding section of the Tariff Act of 1897. *The Merritt*, (1873) 17 Wall. 582, 21 U. S. (L. ed.) 682.

Foreign vessels.—A bark built in the British province of Canada, coming to this country laden with productions of Canada, was held not to be a foreign vessel, within the meaning of the corresponding section of the Tariff Act of 1897, where it appeared that her owners were American citizens. *The Merritt*, (1873) 17 Wall. 582, 21 U. S. (L. ed.) 682.

"The privilege, however, of owning foreign vessels is usually of comparatively little value, since, in order to carry on a foreign trade, the coasting trade, or the fisheries, they must be entitled either to registry or to enrolment and license, a privilege, as above stated, not granted to foreign built vessels though owned by American citizens." This case was under section 23 of the Tariff Act of 1897. *The Conqueror*, (1896) 166 U. S. 110, 17 S. Ct. 510, 41 U. S. (L. ed.) 937.

"The term 'country' . . . is considered as embracing all the possessions of a foreign state, however widely separated, which are subjected to the same executive and legislative authority. The productions and manufactures of a foreign state, and of its colonies, may be imported into the United States in vessels owned by the citizens or subjects of such state, without regard to their place of residence within its possessions." The foregoing instructions were given by the Secretary of the

Treasury to the officers of customs throughout the United States at the time the original Act was passed, in 1817, and having been the recognized construction of the statute for thirty years, its construction is not an open one for the government. This decision was rendered under section 23 of the Tariff Act of 1897, corresponding to the present subdivision J, subsection 2. *U. S. v. The Recorder*, (1847) 1 Blatchf. 218, 27 Fed. Cas. No. 16,129.

The term "imported" is used in its commercial sense, which is that merchandise not the product of this country is brought from a foreign jurisdiction into the United States, and does not refer to merchandise carried from one port of the United States to another, when the vessel freighted with the merchandise temporarily stops on her voyage at a foreign port. This case was under the corresponding section of the Tariff Act of 1897. *U. S. v. The Forrester*, (1856) Newb. Adm. 81, 25 Fed. Cas. No. 15,132. See *Ten Cases Opium*, (1864) Deady 62, 23 Fed. Cas. No. 13,828.

The statute does not permit an indirect carrying trade by foreign ships.—A Belgian vessel arriving at Boston from Buenos Ayres laden with hides and wool, the productions of Buenos Ayres, is subject to forfeiture, although it appears that Belgium has thrown open her ports to the indirect trade of vessels of the United States and other nations. (1817) 4 Op. Atty-Gen. 69, construing the corresponding section of the Tariff Act of 1897.

A treaty with Denmark, dated April 26, 1826, took out of the operation of the general terms of prohibition used in this statute (section 23 of the Tariff Act of 1897), a case of the importation of a cargo of coffee from Rio Janeiro in a vessel wholly belonging to subjects of Denmark. (1844) 4 Op. Atty-Gen. 300.

J. Subsection 3. [Not applicable if no similar restriction exists.] That the preceding subsection shall not apply to vessels or goods, wares, or merchandise imported in vessels of a foreign nation which does not maintain a similar regulation against vessels of the United States. [38 Stat. L. 196.]

See the notes to subdivision F, subsection 1, of this Act, *supra*, p. 709, and the preceding paragraph of the text.

II. ARTICLES SIMULATING DOMESTIC TRADEMARKS

SEC. 27. [Importation forbidden—regulations.] That no article of imported merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this Act, or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any custom-house of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trade-marks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark, issued in accordance with the provisions of this Act, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the Department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs. [*33 Stat. L. 730.*]

This is from the Trademark Act of Feb. 20, 1905, ch. 592. For the other sections of this Act see the title **TRADEMARKS**.

Provisions somewhat similar to this section were contained in R. S. sec. 2496 and in the Tariff Acts of Oct. 1, 1890, ch. 1244, § 7, 26 Stat. L. 613; Aug. 28, 1894, ch. 349, § 6, 28 Stat. L. 547, and July 24, 1897, ch. 11, § 11, 30 Stat. L. 207.

A mandamus, as an original and independent proceeding, cannot be issued by the United States Circuit Courts to compel a collector to examine into the facts and decide whether entry should be refused or not. This decision was rendered prior to the abolition of the Circuit Courts (see **JUDICIARY**) and under section 11 of the Tariff Act of 1897, corresponding to the present section 27. *In re Vintschger*, (1892) 50 Fed. 459.

Determination of administrative officers.—The questions whether a domestic manufacturer has adopted a name or trademark, and whether any articles of imported merchandise copy or simulate such name or trademark, are to be determined, in the first instance, by the administrative officers to whom the execution of the tariff laws is intrusted. This case was under the substantially similar section of the Tariff Act of 1897. *In re Vintschger*, (1892) 50 Fed. 459.

Record—evidence.—The provision that a record shall be kept in the Treasury

Department, describing such trademarks, does not make that record conclusive evidence of the fact that the person who “may require his name and residence and a description of his trademarks to be recorded,” is a domestic manufacturer, or has any trademark. The record book is, in the language of the statute, but an “aid” to the customs officers, and the prohibition is directed only against articles which copy or simulate the genuine trademarks of *bona fide* domestic manufacturers.” This case was under the similar provisions of section 11 of the Tariff Act of 1897. *In re Vintschger*, (1892) 50 Fed. 459.

The fact that the foreign trademark was the one first filed in the Treasury Department has no bearing on the question of the right to entry of imported goods which copy or simulate the name or trademark of any domestic manufacture. “A foreigner cannot obtain the right to send fraudulently marked goods into the country merely by recording his fraudulent

mark in your department before the domestic manufacturer whose goods are to be simulated has taken the steps necessary to protect them." Opinion rendered under the corresponding provisions of the Tariff Act of 1897. (1895) 21 Op. Atty.-Gen. 260.

Whether one trademark is a simulation of another presents a question of fact which the Attorney-General is not authorized to answer. (1895) 21 Op. Atty.-Gen. 260.

III. PRODUCTS OF CONVICT LABOR

I. [Convict labor manufactures.] That all goods, wares, articles, and merchandise manufactured wholly or in part in any foreign country by convict labor shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. [38 Stat. L. 195.]

This was from the Tariff Act of Oct. 3, 1913, ch. 16, § IV.

See the notes to subdivision F, subsection 1 of this section, *supra*, p. 709.

Provisions similar to those of the text were made by the various early Tariff Acts. These were superseded by the Tariff Act of Aug. 5, 1909, ch. 6, § 14, 36 Stat. L. 87, which was repealed by section IV S of this Act given under the title CUSTOMS DUTIES.

IV. OBSCENE BOOKS AND ARTICLES

G. Subsection 1. [Obscene books, articles, etc., lottery tickets.] That all persons are prohibited from importing into the United States from any foreign country any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any advertisement of any lottery. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles shall be proceeded against, seized, and forfeited by due course of law. All such prohibited articles and the package in which they are contained in the course of importation shall be detained by the officer of customs, and proceedings taken against the same as hereinafter prescribed, unless it appears to the satisfaction of the collector of customs that the obscene articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee: *Provided*, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subsection. [38 Stat. L. 194.]

The provisions of this and the two paragraphs of the text following were from the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § IV.

See the notes to subdivision F, subsection 1, of this Act, *supra*, p. 709. Provisions somewhat similar to those of the text were made by R. S. sec. 2491 (see CUSTOMS DUTIES) and the various subsequent Tariff Acts. These were superseded by the Tariff Act of Aug. 5, 1909, ch. 6, § 9, 36 Stat. L. 86, which was repealed by section IV S of this Act given under the title CUSTOMS DUTIES.

Provisions somewhat similar to those of the text were made by the Penal Laws of March 4, 1909, ch. 9, §§ 237 and 245. See the title PENAL LAWS.

Remit forfeiture.—Under R. S. sec. 2491 (relating to "Duties on Imports" and long since superseded by successive tariff acts; see CUSTOMS DUTIES) it was ruled that the Secretary of the Treasury had no power to remit the forfeiture of articles not obscene contained in the same invoice or package with such as were prohibited. (1886) 18 Op. Atty.-Gen. 424.

Forfeiture of decent articles.—Under R. S. sec. 2491 (superseded by later tariff acts; see CUSTOMS DUTIES) it was held that on a seizure and prosecution for the forfeiture of stereoscopic slides, upon a

verdict finding part indecent and the remainder not indecent or obscene, a judgment of forfeiture of the decent ones could not be pronounced when the libel charged all the articles with being corrupt. To warrant a judgment of forfeiture of articles not indecent or obscene, it must have been averred and found that such nonobjectionable articles were included in and formed part of the same invoice and package which contained objectionable articles. *U. S. v. One Case Stereoscopic Slides*, (1859) 1 Sprague 467, 27 Fed. Cas. No. 15,927.

G. Subsection 2. [Punishment for officials aiding violations.] That whoever, being an officer, agent, or employee of the Government of the United States, shall knowingly aid or abet any person engaged in any violation of any of the provisions of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail obscene or indecent publications or representations, or means for preventing conception or procuring abortion, or other articles of indecent or immoral use or tendency, shall be deemed guilty of a misdemeanor, and shall for every offense be punishable by a fine of not more than \$5,000, or by imprisonment at hard labor for not more than ten years, or both. [*38 Stat. L. 195.*]

See the notes to the preceding paragraph of the text.

Provisions similar to those of the text were made by R. S. 2492 and the various subsequent Tariff Acts. These were superseded by the Tariff Act of Aug. 5, 1909, ch. 6, § 10, 36 Stat. L. 86, which was repealed by section IV S of this act given under the title CUSTOMS DUTIES.

Provisions similar to those of the text were made by the Penal Laws of March 4, 1909, ch. 5, § 102. See the title PENAL LAWS.

G. Subsection 3. [Proceedings for seizure, etc., of objectionable articles.] That any circuit or district judge of the United States, within the proper district, before whom complaint in writing of any violation of the two preceding sections is made, to the satisfaction of such judge, and founded on knowledge or belief, and if upon belief, setting forth the grounds of such belief, and supported by oath or affirmation of the complainant, may issue, conformably to the Constitution, a warrant directed to the marshal or any deputy marshal in the proper district, directing him to search for, seize, and take possession of any such article or thing mentioned in the two preceding sections, and to make due and immediate return thereof, to the end that the same may be condemned and destroyed by proceedings, which shall be conducted in the same manner as other proceedings in the case of municipal seizure, and with the same right of appeal or writ of error. [*38 Stat. L. 195.*]

See the notes to subdivision G, subsection 1, of this section, *supra*, p. 713.

Provisions somewhat similar to those of the text were made by R. S. sec. 2492 (re-enacted by R. S. sec. 2493 by Act March 3, 1883, ch. 121, 22 Stat. L. 490) and the various subsequent Tariff Acts. These were superseded by the Tariff Act of Aug. 5, 1909, ch. 6, § 11, 36 Stat. L. 86, which was repealed by section IV S of this Act given under the title CUSTOMS DUTIES.

Subdivision H, subsections 1 and 2 of this section, relating to the importation of meat, cattle and hides, is given under the title ANIMALS, vol. 1, p. 371.

Fees of marshal.—Under section 18 of the Tariff Act of 1897, corresponding to the present subdivision G, subsection 3,

it was held that, for the service of a libel *in rem*, brought under the provisions of this and the preceding sections for the

seizure and condemnation of several articles imported by different persons and at different times, the marshal was entitled to a single fee of two dollars for the serv-

ice of the warrant of seizure, and not to a fee of two dollars for services upon each article named in the libel. *Jacobus v. U. S.*, (1898) 87 Fed. 99.

V. FOOD PRODUCTS

An act providing for an inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases, and for other purposes.

[*Act of Aug. 30, 1890, ch. 839, 26 Stat. L. 414.*]

[SEC. 1.] [Salted pork and bacon for export — inspection and certification — forging marks — punishment.] That the Secretary of Agriculture may cause to be made a careful inspection of salted pork and bacon intended for exportation, with a view to determining whether the same is wholesome, sound, and fit for human food whenever the laws, regulations, or orders of the Government of any foreign country to which such pork or bacon is to be exported shall require inspection thereof relating to the importation thereof into such country, and also whenever any buyer, seller, or exporter of such meats intended for exportation shall request the inspection thereof. Such inspection shall be made at the place where such meats are packed or boxed, and each package of such meats so inspected shall bear the marks, stamps, or other device for identification provided for in the last clause of this section: *Provided*, That an inspection of such meats may also be made at the place of exportation if an inspection has not been made at the place of packing, or if in the opinion of the Secretary of Agriculture, a re-inspection becomes necessary. One copy of any certificate issued by any such inspector shall be filed in the Department of Agriculture; another copy shall be attached to the invoice of each separate shipment of such meat, and a third copy shall be delivered to the consignor or shipper of such meat as evidence that packages of salted pork and bacon have been inspected in accordance with the provisions of this act and found to be wholesome, sound, and fit for human food; and for the identification of the same such marks, stamps, or other devices as the Secretary of Agriculture may by regulation prescribe shall be affixed to each of such packages. Any person who shall forge, counterfeit, or knowingly and wrongfully alter, deface, or destroy any other marks, stamps, or other devices provided for in this section on any package of any such meats, or who shall forge, counterfeit, or knowingly and wrongfully alter, deface, or destroy any certificate in reference to meats provided for in this section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [26 Stat. L. 414.]

Sections 2 and 3 of this Act, relating to the importation of adulterated or unwholesome food, drugs, etc., were superseded by the Act of June 30, 1906, ch. 3915, given under the title FOOD AND DRUGS.

Section 4 is given in the following section of the text.

Section 5, relating to the suspension of importation of products of certain countries, is given under the title **DISCRIMINATING LAWS AND DUTIES**.

Sections 6-10 are given under the title **ANIMALS**.

By the Act of May 9, 1902, ch. 784, § 5, given under the title **FOOD AND DRUGS**, all the parts of this Act were to apply, as far as possible, to process or renovated butter.

SEC. 4. [Suspension by President of importation of adulterated articles.] That whenever the President is satisfied that there is good reason to believe that any importation is being made, or is about to be made, into the United States, from any foreign country, of any article used for human food or drink that is adulterated to an extent dangerous to the health or welfare of the people of the United States, or any of them, he may issue his proclamation suspending the importation of such articles from such country for such period of time as he may think necessary to prevent such importation; and during such period it shall be unlawful to import into the United States from the countries designated in the proclamation of the President any of the articles the importation of which is so suspended. [26 Stat. L. 415.]

See the notes to section 1 of this Act, *supra*, p. 715.

VI. TEA

An Act To prevent the importation of impure and unwholesome tea.

[Act of March 2, 1897, ch. 358, 29 Stat. L. 604.]

[SEC. 1.] **[Tea — importation, inferior to standards, prohibited — exceptions.]** That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this Act, and the importation of all such merchandise is hereby prohibited: *Provided*, That nothing herein shall affect or prevent the importation into the United States, under such regulations as the Secretary of the Treasury may prescribe, of any merchandise as tea which may be inferior in purity, quality, and fitness for consumption to the standards established by the Secretary of the Treasury, or of any tea waste, tea siftings, or tea sweepings, for the sole purpose of manufacturing theine, caffeine, or other chemical products whereby the identity and character of the original material is entirely destroyed or changed; and that importers and manufacturers who import or bring into the United States such tea, tea waste, tea siftings, or tea sweepings shall give suitable bond, to be approved as to amount and securities by the Secretary of the Treasury, conditioned that said imported material shall be only used for the purposes herein provided, under such regulations as may be prescribed by the Secretary of the Treasury. [29 Stat. L. 605, as amended by 35 Stat. L. 163.]

This is the first section of the "Impure Tea Importation Act." As originally enacted this section contained only the first sentence thereof. The rest of the section, beginning with the word "provided," was added by the amending Act of May 16, 1908, ch. 170, making the section to read as here given.

Constitutionality.—No individual has such a vested right to trade with foreign nations as precludes Congress, in the exercise of its plenary power to regulate foreign commerce, from prohibiting, on considerations of public policy, the importations of teas inferior to the government standards, on the theory that the importer is thereby deprived of his property without due process of law. *Buttfield v. Stranahan*, (1904) 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525; *Buttfield v. Bidwell*, (1904) 192 U. S. 498, 24 S. Ct. 356, 48 U. S. (L. ed.) 536; *Buttfield v. U. S.*, (1904) 192 U. S. 499, 24 S. Ct. 356, 48 U. S. (L. ed.) 537; *Sang Lung v. Jackson*, (N. D. Cal. 1898) 85 Fed. 502; *U. S. v. Twenty Chests of Tea*, (N. D. N. Y. 1913) 208 Fed. 89; *Curtice Bros. Co. v. Barnard*, (C. C. A. 7th Cir. 1913) 209 Fed. 589, 126 C. C. A. 411.

The purpose of the Act is to keep out of the country impure and unwholesome teas. It is in the nature of a police regulation. *U. S. v. Twenty Chests Tea*, (N. D. N. Y. 1913) 208 Fed. 89.

Construction.—The question to be answered upon every examination is: Are the teas of inferior purity, quality and fitness for consumption to the standards. Although the sentence is conjunctive, it may fairly be construed disjunctively, as providing that tea shall be prohibited which falls below the standard either in purity, in quality or in fitness for consumption. *Macy v. Browne*, (C. C. A. 2d Cir. 1915) 224 Fed. 359, 140 C. C. A. 45.

Coloring or facing matter.—Tea which is fully equal or superior to the standard, in purity, in quality and in fitness for consumption is not subject to rejection merely because it contains coloring or facing matter, "unless the coloring matter plus other impurities makes the tea below standard in purity, or the coloring matter makes the tea below standard in quality or the coloring matter makes the tea less fit for consumption than the standard."

If Congress had intended that tea should be rejected because of coloring matter which was not sufficient in quantity, or such in character as to bring it below standard in the three particulars specified, it must be presumed that Congress would have so stated in the Act. *Macy v. Browne*, (C. C. A. 2d Cir. 1915) 224 Fed. 359, 140 C. C. A. 45, *reversing* (S. D. N. Y. 1914) 215 Fed. 456.

Powers of board of examiners.—Within the field of investigation confided to them the board of examiners are the sole judges; but they have been given no authority to extend the field of investigation beyond the limits staked out by Congress. *Macy v. Browne*, (C. C. A. 2d Cir. 1915) 224 Fed. 359, 140 C. C. A. 45, *distinguishing* *Buttfield v. Sahnahan*, (1904) 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525.

Effect of Act of June 30, 1906.—There is no such repugnancy between this Act and the general Food and Drugs Act of June 30, 1906 (title FOOD AND DRUGS), as to prevent them, generally speaking, from standing together. The Food and Drugs Act does not appear to have been intended as a substitute for the earlier statute in the matter of the importation of tea, but both statutes are cumulative in so far as the importation of tea is concerned and both should be given effect. An importation of tea is therefore subject to the provision of both Acts; that is it must comply with the standards established by the Secretary of the Treasury under the Tea Inspection Act and must also stand the tests in reference to adulteration and misbranding imposed by the Food and Drugs Act. Imported tea, although meeting the requirements of the Tea Inspection Act of 1897, is still subject to the provisions of the Food and Drugs Act of 1906 regarding adulteration, labeling, misbranding and guaranty. (1907) 26 Op. Atty.-Gen. 166.

SEC. 2. [Board of experts created.] That immediately after the passage of this Act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the

appropriation for "expenses of collecting the revenue from customs." [29 Stat. L. 605.]

SEC. 3. [Standards to be fixed — samples.] That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof. [29 Stat. L. 605.]

Uniform standards.—By this Act the Secretary of the Treasury is authorized to adopt uniform standards "which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity or unfit for consumption, or presumably or possibly so because of their inferior quality." *Buttfield v. Bidwell*, (C. C. A. 1899) 96 Fed. 328, 37 C. C. A. 506.

Opportunity for hearing.—Assuming that no opportunity is afforded by this Act to an importer of teas for a hearing with reference to the establishing of government standards of purity, quality and fitness for consumption, or on the question whether his tea should be rejected as not entitled to admission into the United States because inferior to the standards, the statute is not thereby rendered objectionable as a denial of due process of

law. *Buttfield v. Stranahan*, (1904) 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525.

No delegation of legislative power.—An unconstitutional delegation of legislative power to the Secretary of the Treasury is not made by the provision of this Act forbidding the importation of teas inferior to the government standards of purity, quality and fitness for consumption, which authorized him to establish such standards upon the recommendation of a board of tea experts, but such provision merely leaves the Secretary the executive duty to effectuate the legislative policy declared in the statute. *Buttfield v. Stranahan*, (1904) 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525; *Sang Lung v. Jackson*, (N. D. Cal. 1898) 85 Fed. 502.

SEC. 4. [Importer's bond — samples for examiner or collector.] That on making entry at the custom-house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this Act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said

officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however,* That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this Act. [29 Stat. L. 605.]

Seizures.—See note under section 6 of this Act, *infra*, this page.

Review by courts of appraisers' deci-

sion.—See note under section 6 of this Act, *infra*, this page.

SEC. 5. [Permit, if equal to standard — re-examination — partial permit.] That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reexamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a reexamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided,* That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section six. [29 Stat. L. 605.]

SEC. 6. [Re-examination by general appraisers — permit, if equal to standards — if inferior, to be exported — destroyed, if not exported.] That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed. [29 Stat. L. 606.]

Seizures.—“Manifestly the seizure of importations of teas purchased after the approval of the Act and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other

injury than what it must be assumed was anticipated, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of

the invalidity of the law." *Cruikshank v. Bidwell*, (1900) 176 U. S. 73, 20 S. Ct. 280, 44 U. S. (L. ed.) 377.

Joinder of action when destruction threatened.—Where each of the complainants has his separate and distinct interest in the tea which the defendant, the collector of customs, threatens to destroy, under this Act, but they all have a common interest in the question whether he is authorized by law to destroy such tea, they all may, in order to prevent a multiplicity of suits, join together in an equitable action for injunction. *Sang Lung v. Jackson*, (1898) 85 Fed. 502.

Due process of law.—Due process of law is not denied an importer of teas by the provision of this Act commanding the destruction of teas not exported within six months after their final rejection as not entitled to admission into the United States because inferior to the government standards. *Buttfield v. Stranahan*, (1904) 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525.

Review by courts of appraisers' decision.—Congress undoubtedly has the power to exclude all teas, or to admit them under the most arbitrary regulations it may choose to prescribe. By the Act the whole matter is turned over to the administrative officers with no review of the facts in the court. *Macy v. Loeb*, (C. C. A. 2d Cir. 1913) 205 Fed. 727, 124 C. C. A. 21.

Certain tea known in the trade as Canton tea was rejected by the board of appraisers as not being pure or wholesome. Such board being the tribunal named in the Act, and the decision being on a question of fact, such decision was held not a subject for review by the courts upon any allegation of mistake either of law or fact, on the ground that no standard of quality for Canton tea was mentioned in the regulations adopted by the Secretary of the Treasury for the purpose of determining the quality of imported teas. *Sang Lung v. Jackson*, (1898) 85 Fed. 502.

SEC. 7. [Examination by qualified examiner — where no examiner at port of entry.] That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this Act shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this Act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis. [29 Stat. L. 606.]

For the ports of entry see the title CUSTOMS DUTIES.

SEC. 8. [Procedure on re-examination — expert advice.] That in cases of reexamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said deci-

sion or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars. [29 Stat. L. 606.]

SEC. 9. [Rejected teas not to be reimported.] That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this Act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition. [29 Stat. L. 606.]

Intent.—Intent to defraud is not a prerequisite to forfeiture. *U. S. v. Twenty Chests of Tea*, (N. D. N. Y. 1913) 208 Fed. 89, wherein the court said: "Does section 9 subject tea once rejected and sent out of the country, to forfeiture if offered for reimportation by any one, one ignorant of the facts? Must the government re-examine tea offered in fact for reimportation whenever the importer offers it and alleges that he had no knowledge of its previous history, that is, its examination, rejection, etc., or go to the trouble and expense of hunting up evidence to show that the one offering it for importation had knowledge of such facts? The government has the right and power

to enact and enforce the most arbitrary laws as to the importation of goods from foreign countries. He who offers them subjects himself and his goods offered for importation to the operation of those laws. This court does not intend to hold that in exercising this power the United States may seize and forfeit goods offered for importation for the reason such goods are not up to the standard prescribed, but when once offered, examined, condemned as impure and rejected and sent out of the United States, it seems to me clear that Congress intended that a subsequent offer of the same goods by any person for importation subjects such goods to forfeiture."

SEC. 10. [Regulations.] That the Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations. [29 Stat. L. 607.]

Rules and regulations inconsistent with statute.—For certain regulations providing for the so called "Read test" to determine whether tea contains "artificial coloring or facing matter," held to be in-

consistent with the statute, see *Macy v. Browne*, (C. C. A. 2d Cir. 1915) 224 Fed. 359, 140 C. C. A. 45, *reversing* (S. D. N. Y. 1914) 215 Fed. 456.

SEC. 11. [Tea on shipboard.] That teas actually on shipboard for shipment to the United States at the time of the passage of this Act shall not be subject to the prohibition hereof, but the provisions of the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto. [29 Stat. L. 607.]

The Act of March 2, 1883, ch. 64, 22 Stat. L. 451, mentioned in the text was repealed by the following section 12 of this Act.

SEC. 12. [Repeal.] That the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this Act goes into effect. [29 Stat. L. 607.]

The Act of March 2, 1883, ch. 64, above mentioned, is contained in 22 Stat. L. 451.

VII. OPIUM

An act to provide for the execution of the provisions of article two of the treaty concluded between the United States of America and the Emperor of China on the seventeenth day of November eighteen hundred and eighty, and proclaimed by the President of the United States on the fifth day of October, eighteen hundred and eighty-one.

[*Act of Feb. 23, 1887, ch. 210, 24 Stat. L. 409.*]

[SEC. 1.] **[Importation of opium by Chinese prohibited.]** That the importation of opium into any of the ports of the United States by any subject of the Emperor of China is hereby prohibited. Every person guilty of a violation of the preceding provision shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars nor less than fifty dollars, or by imprisonment for a period of not more than six months nor less than thirty days, or by both such fine and imprisonment, in the discretion of the court. [*24 Stat. L. 409.*]

This is the first section of the "Opium Act of 1887."

The treaty with China, mentioned in the title of this Act, is given in 22 Stat. L. 828.

The first and second sections of this Act would seem to be superseded by the more general provisions of the Act of Feb. 9, 1909, ch. 100, given, as amended, *infra*, p. 723. The prohibition made by section 3 of this Act is not however repeated in the last cited Act of Feb. 9, 1909, ch. 100.

SEC. 2. **[Forfeiture.]** That every package containing opium, either in whole or in part, imported into the United States by any subject of the Emperor of China, shall be deemed forfeited to the United States; and proceedings for the declaration and consequences of such forfeiture may be instituted in the courts of the United States as in other cases of the violation of the laws relating to other illegal importations. [*24 Stat. L. 409.*]

SEC. 3. **[Citizens of United States prohibited from traffic in opium in China — punishment — jurisdiction — forfeiture.]** That no citizen of the United States shall import opium into any of the open ports of China, nor transport the same from one open port to any other open port, or buy or sell opium in any of such open ports of China, nor shall any vessel owned by citizens of the United States, or any vessel, whether foreign or otherwise, employed by any citizen of the United States, or owned by any citizen of the United States, either in whole or in part, and employed by persons not citizens of the United States, take or carry opium into any of such open ports of China, or transport the same from one open port to any other open port, or be engaged in any traffic therein between or in such open ports or any of them. Citizens of the United States offending against the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars nor less than fifty dollars, or by both such punishments, in the discretion of the court. The consular courts of the United States in China, concurrently with any district court of the United States in the district in which any offender may be found, shall have jurisdiction to hear, try, and determine all cases arising under the foregoing provisions of this section, subject to the general regulations provided by law. Every package of opium

or package containing opium, either in whole or in part, brought, taken, or transported, trafficked, or dealt in contrary to the provisions of this section, shall be forfeited to the United States, for the benefit of the Emperor of China; and such forfeiture, and the declaration and consequences thereof, shall be made, had, determined, and executed by the proper authorities of the United States exercising judicial powers within the Empire of China. [24 Stat. L. 409.]

An Act To prohibit the importation and use of opium for other than medicinal purposes.

[Act of Feb. 9, 1909, ch. 100, 35 Stat. L. 614.]

[SEC. 1.] [Opium — importation prohibited.] That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law. [35 Stat. L. 614, as amended by 38 Stat. L. 275.]

This is the first section of the "Opium Act of 1909."

As originally enacted the Act of Feb. 9, 1909, ch. 100, contained only sections 1 and 2. By an Act of Jan. 17, 1914, ch. 9, entitled "An Act To amend an Act entitled: 'An Act to prohibit the importation and use of opium for other than medicinal purposes,' approved February ninth, nineteen hundred and nine," said sections 1 and 2 were re-enacted without change except that in section 2 the figures "\$5,000" and "\$50" were substituted for the words "five thousand dollars" and "fifty dollars" which appeared in the original section. By said Amending Act of Jan. 17, 1914, ch. 9, new sections 3-8 inclusive were added to the original Act.

The provisions of this Act apparently superseded those of the Opium Act of 1887, ch. 210, given, *supra*, p. 722, except section 3 thereof.

Scope of statute.—While the Act of 1909 prohibits the importation of opium except for medicinal purposes, it does not make it a criminal offense to divert it for other purposes unless the party so using it knows "the same to have been imported contrary to law" and it does not apply to opium imported before its enactment. Obviously also it has nothing to do with domestic grown opium. *Marks v. U. S.*, (C. C. A. 2d Cir. 1912) 196 Fed. 476, 116 C. C. A. 205.

Constitutionality.—The constitutionality of this section is so well settled that a writ of error from the United States Supreme Court to a District Court based on its unconstitutionality will be dismissed on the ground that the question has become frivolous. *Brolan v. U. S.*, (1915) 236 U. S. 216, 35 S. Ct. 285, 59 U. S. (L. ed.) 544, wherein the court said: "The entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the

wholly unsubstantial and frivolous character of the constitutional question based upon such contention."

In *Buttfield v. Stranahan*, (1904) 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525, in stating the previously settled doctrine on the subject it was said: "The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case* *Champion v. Ames*, 188 U. S. 321, 353-356, 47 U. S. (L. ed.) 492, 500, 501, 23 S. Ct. 321, 13 Am. Crim. Rep. 561; *Leisy v. Hardin*, 135 U. S. 100, 108, 34 U. S. (L. ed.) 128, 132, 3 Int. Com. Rep. 36, 10 S. Ct. 681. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries;

not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States, and excluding such as did not equal the standards adopted. 9 Stat. at L. 237, ch. 70, Rev. Stat. § 2933 [*supra*, p. 708]. And see *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 334, 335, 53 U. S. (L. ed.) 1013, 1020, 29 S. Ct. 671; the *Abby Dodge*, 223 U. S. 166, 176, 56 U. S. (L. ed.) 390, 32 S. Ct. 310. Nor is there any ground upon which to rest the contention that although, under this settled doctrine, it is frivolous to question the power of Congress to prohibit importations and punish a violation of such prohibition, it is open to controversy, and therefore not frivolous, to contend that there is a want of power to prohibit and punish the act of knowingly concealing or moving merchandise which has been successfully imported from a foreign country in violation of the prohibitions against such importations. This conclusion is inevitable since it is obvious that to concede that the wrongful and successful evasion of the prohibition against bringing in imported merchandise, or of knowingly, in violation of a further prohibition, dealing with such merchandise, was beyond the scope of the complete power to prohibit importation, would be in substance to deny any power whatever. Indeed, it is evident that a power to prohibit which is operative and effective only as long as its prohibitions are not disobeyed is not an absolute power, but is scarcely worthy of being denominated a relative one. But the authority being absolute, it follows that the right to assert it must endure and reach beyond the mere capacity of persons to evade its commands to the control of those things which are essential to make the power existing and operative,—a conclusion the truth of which cannot be escaped in the light of the doctrine on that subject, so luminously stated in *Gibbons v. Ogden*, 9 Wheat. 1, 6 U. S. (L. ed.) 23, and which has been the guide by which the Constitution has been successfully interpreted and applied from that day to this."

In *Steinfeldt v. U. S.*, (C. C. A. 9th Cir. 1915) 219 Fed. 879, 135 C. C. A. 549, it appeared that the plaintiff in error was convicted under an indictment brought under the latter portion of this section. It was conceded that the first portion of the section, which prohibits the importa-

tion of opium into the United States, is constitutional, but it was contended that the provision making punishable one who "shall receive, conceal, buy, or sell" opium is unconstitutional on the ground that the point at which opium unlawfully imported into the United States is transferred to the possession of another, is the disappearing point of the authority of the United States over the same, and that at that point the opium loses its identity as an article of foreign commerce, and becomes mixed with the taxable property of the state, and becomes subject to the police power of the state to regulate the public health, morals, and social welfare of the citizens of the state, and is no longer subject to federal authority. The court said: "The contention cannot be sustained. We may assume, as the plaintiff in error contends, that the Act under consideration was passed under the authority of Congress to regulate commerce with foreign nations, and that it is an absolute prohibition of the importation of opium, and is not the exercise of the authority of Congress to levy duties, imposts, and excises; but we find no ground for holding that the authority of Congress does not go to the full extent of the legislative Act in question. To receive or conceal opium after it is imported, and with knowledge of its illegal importation, is in effect to participate in the illegal importation. It is an act which encourages, induces, and supplements the act of the illegal importer. This is what the plaintiff in error did. Opium was found in his possession, and he knew that it had been imported contrary to law. In a similar case, Judge McPherson said that: 'The offender's possession of such opium within the territory of the United States—his possession of it elsewhere is not now in question—is sufficient evidence of guilt to justify a jury in convicting.' U. S. v. *Caminata*, (E. D. Pa. 1912) 194 Fed. 903. The Act of February 9, 1909, is similar in its general provisions to section 3082 of the Revised Statutes (title CUSTOMS DUTIES), which provides that one who 'shall fraudulently or knowingly . . . receive, conceal,' etc., 'merchandise, contrary to law, . . . knowing the same to have been imported contrary to law, shall be' subject to fine, etc. Under that law it has been held that, where a defendant was found in possession of smuggled goods, it was incumbent upon him to explain his possession to the satisfaction of the jury, and that otherwise he would be found guilty. U. S. v. *Fraser*, (C. C. S. C. 1890) 42 Fed. 140; *Reagan v. U. S.*, (1895) 157 U. S. 301, 15 S. Ct. 610, 39 U. S. (L. ed.) 709. In the case last cited, Reagan was found guilty of receiving into his possession and concealing 40 head of cattle which had been smuggled into the United States fraudulently and knowingly and with intent to defraud the United States. Those

cases are analogous to the case at bar, and the principle involved is the same. 'The case is distinguishable from *U. S. v. Gould*, (1860) 8 Am. L. Reg. 525), 25 Fed. Cas. No. 15,239, and *Keller v. U. S.*, (1909) 213 U. S. 138, 29 S. Ct. 470, 53 U. S. (L. ed.) 737, 16 Ann. Cas. 1066, cited by the plaintiff in error. In the first of those cases the indictment did not allege that the defendant held the slave knowing her to have been unlawfully imported, and although in the *Keller* Case it was held that the portion of Act of February 20, 1907, c. 1134, § 3, 34 Stat. 898 (title IMMIGRATION), which makes it a felony to harbor alien prostitutes, was unconstitutional as to one who harbored such a person without knowledge of her alienage or her unlawful coming into the United States, on the ground that such a regulation was matter within the police power reserved to the state, the distinction to be observed between that case and this is the fact that the harboring which was forbidden by law had nothing to do with the unlawful importation, was entirely disassociated therefrom, and was purely a regulation as to dealings by persons who, in the matter involved, were subject only to state regulation.'

The presumption arising from unexplained possession of opium, though beyond any in revenue laws or elsewhere, appears to come within the limits of legislative power. Doubtless it goes far to prevent possession, use and intrastate traffic in opium which are subject only to state police power; but this is only incidental to regulation of foreign commerce over which Congress has exclusive authority. This section provides for presumptions or *prima facie* proof of the offense, which, while sufficient to sustain a verdict of guilty, may or may not be sufficient to satisfy the jury of the guilt of the accused beyond a reasonable doubt. It is but what is commonly styled a rule of evidence and not a substantive law creating a new offense and does not

deprive the jury of its function of weighing evidence and determining facts. Like presumptions are familiar to common and statutory law in England and this country. So too, to civil law, they dictate the burden of evidence as public policy may require. Conforming to ancient procedure, when not prohibited by constitutions, legislative bodies have power to create them and in their application is "due process of law," provided there is rational connection between the facts therefrom inferred, that the inferences are not so unreasonable as to be mere arbitrary mandates and that the party affected is free to oppose them. *U. S. v. Yee Fing*, (D. C. Mont. 1915) 222 Fed. 154.

When offense complete.—The offense described in this section is committed whenever smoking opium is fraudulently and knowingly brought within the territorial limits of the United States although the opium may not have been landed from the ship or been carried across the customs lines. *U. S. v. Caminata*, (E. D. Pa. 1912) 194 Fed. 903.

Weight of circumstantial evidence.—A conviction, in a criminal prosecution, for a violation of this section, founded upon circumstantial evidence will not be disturbed, and the court's rulings in admitting evidence of that character will be sustained if such testimony tends even remotely to establish the ultimate fact. *Louie v. U. S.*, (C. C. A. 9th Cir. 1914) 218 Fed. 36, 134 C. C. A. 58.

The Act of October 1, 1890 (see section 1, Act of Jan. 17, 1914, ch. 10, under title INTERNAL REVENUE), section 36 *et seq.* relating to the manufacture of smoking opium in the United States was not repealed by this Act. (1911) 29 Op. Atty.-Gen. 108.

Cited without specific application in a comparison with section 8 of the Act of Dec. 17, 1914, ch. 1 (see title INTERNAL REVENUE), in *Wilson v. U. S.*, (C. C. A. 2d Cir. 1916) 229 Fed. 344, 143 C. C. A. 464.

SEC. 2. [Penalty for violation — possession, proof of guilt.] That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding \$5,000 nor less than \$50 or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless

the defendant shall explain the possession to the satisfaction of the jury. [35 Stat. L. 614, as amended by 38 Stat. L. 276.]

See the notes to the preceding section 1 of this Act.

Instructions.—In a prosecution on an indictment for conspiring to commit a crime against the United States by importing opium from Mexico, the trial court, in charging the jury, quoted the provisions of this Act. Error was assigned to that portion of the charge, but the court declined to review it, no exception having been taken. *Andrews v. U. S.*,

(C. C. A. 9th Cir. 1915) 224 Fed. 418, 139 C. C. A. 646.

Summary destruction.—This section authorizes the summary destruction, without judicial proceedings, of opium imported into the United States in violation of section one of this Act. (1912) 29 Op. Atty.-Gen. 603.

SEC. 3. [Presumption—burden of proof.] That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption. [38 Stat. L. 276.]

See the notes to section 1 of this Act, *supra*, p. 723.

SEC. 4. [Persons liable to penalty—evidence—forfeiture.] That any person subject to the jurisdiction of the United States who shall, either as principal or as accessory, receive or have in his possession, or conceal on board of or transport on any foreign or domestic vessel or other water craft or railroad car or other vehicle destined to or bound from the United States or any possession thereof, any smoking opium or opium prepared for smoking, or who, having knowledge of the presence in or on any such vessel, water craft, or vehicle of such article, shall not report the same to the principal officer thereof, shall be subject to the penalty provided in section two of this Act. Whenever on trial for violation of this section the defendant is shown to have or to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury: *Provided, however,* That any master of a vessel or other water craft, or person in charge of a railroad car or other vehicle, shall not be liable under this section if he shall satisfy the jury that he had no knowledge and used due diligence to prevent the presence of such article in or on such vessel, water craft, car, or other vessel, and any such article shall be forfeited and shall be destroyed. [38 Stat. L. 276.]

See the notes to section 1 of this Act, *supra*, p. 723.

SEC. 5. [Admission for transportation to another country prohibited.] That no smoking opium or opium prepared for smoking shall be admitted into the United States, or into any territory under the control or jurisdiction thereof, for transportation to another country, nor shall such opium be transferred or transhipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose. [38 Stat. L. 276.]

See the notes to section 1 of this Act, *supra*, p. 723.

SEC. 6. [Exportation prohibited — regulations.] That hereafter it shall be unlawful for any person subject to the jurisdiction of the United States to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any opium or cocaine, or any salt, derivative, or preparation of opium or cocaine, to any other country: *Provided*, That opium or cocaine, and salts, derivatives, or preparations thereof, except smoking opium or opium prepared for smoking, the exportation of which is hereby absolutely prohibited, may be exported to countries regulating their entry under such regulations as are prescribed by such country for the importation thereof into such country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

“ The Secretary of State shall request all foreign Governments to communicate through the diplomatic channels copies of laws and regulations promulgated in their respective countries which prohibit or regulate the importation of the aforesaid drugs, and when received advise the Secretary of the Treasury and the Secretary of Commerce thereof; whereupon the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce shall make and punish all proper regulations for carrying the provisions of this section into effect. [38 Stat. L. 276.]

See the notes to section 1 of this Act, *supra*, p. 723.

SEC. 7. [Penalty for exportation — informers.] That any person who exports or causes to be exported any of the aforesaid drugs in violation of the preceding section shall be fined in any sum not exceeding \$5,000 nor less than \$50 or by imprisonment for any time not exceeding two years, or both. And one-half of any fine recovered from any person or persons convicted of an offense under any section of this Act may be paid to the person or persons giving information leading to such recovery, and one-half of any bail forfeited and collected in any proceedings brought under this Act may be paid to the person or persons giving the information which led to the institution of such proceedings, if so directed by the court exercising jurisdiction in the case: *Provided*, That no payment for giving information shall be made to any officer or employee of the United States. [38 Stat. L. 277.]

See the notes to section 1 of this Act, *supra*, p. 723.

SEC. 8. [Liability of vessel.] That whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes. [38 Stat. L. 277.]

See the notes to section 1 of this Act, *supra*, p. 723.

R. S. secs. 2806 and 2807 mentioned in the text are given under the title CUSTOMS DUTIES.

VIII. MATCHES

SEC. 10. [Matches — importation.] That on and after January first, nineteen hundred and thirteen, white phosphorus matches, manufactured wholly or in part in any foreign country, shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited. All matches imported into the United States shall be accompanied by such certificate of official inspection by the government of the country in which such matches were manufactured as shall satisfy the Secretary of the Treasury that they are not white phosphorus matches. The Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of the provisions of this section. [37 Stat. L. 83.]

This and the following section 10 are from an Act of April 9, 1912, ch. 75, entitled "An Act to provide for a tax upon white phosphorus matches, and for other purposes." For the other sections of this Act see the title INTERNAL REVENUE.

This Act was not to be held repealed or modified by the Tariff Act of Oct. 3, 1913, ch. 16, § I, N, par. 345, by a proviso thereof. See the title CUSTOMS DUTIES.

SEC. 11. [Matches — exportation.] That after January first, nineteen hundred and fourteen, it shall be unlawful to export from the United States any white phosphorus matches. Any person guilty of violation of this section shall be fined not less than one thousand dollars and not more than five thousand dollars, and any white phosphorus matches exported or attempted to be exported shall be confiscated to the United States and destroyed in such manner as may be prescribed by the Secretary of the Treasury, who shall have power to issue such regulations to customs officers as are necessary to the enforcement of this section. [37 Stat. L. 83.]

See the notes to the preceding section 10 of this Act.

IX. WAR MATERIAL

Joint Resolution To prohibit the export of coal or other material used in war from any seaport of the United States.

[Res. of April 22, 1898, No. 25, 30 Stat. L. 739.]

[SEC. 1.] [Exportation of war material.] That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress. [30 Stat. L. 739, as amended by 37 Stat. L. 630.]

As originally enacted this resolution contained but one section, reading as follows: "That the President is hereby authorized, in his discretion, and with such limitations and exceptions as shall seem to him expedient, to prohibit the export of coal or other material used in war from any seaport of the United States until otherwise ordered by the President or by Congress." [30 Stat. L. 739.]

It was amended to read as given in the text, and the following section 2 was added by a resolution of March 14, 1912, No. 10, 37 Stat. L. 630.

Shipment to foreign territory.—Constructing this Act, in a case wherein the indictment charged the defendants with the shipment of munitions of war from New Haven in the state of Connecticut to Tucson, Arizona, with the intent that they should be transhipped to the state of Sonora, Mexico, the court said: "The indictment, it is true, charges that the defendants caused the munitions of war to be shipped from New Haven, Conn., to Tucson, Ariz.; but the shipment of munitions of war from one point in the United States of America to another point within the United States of America cannot within itself be deemed to be an offense under the joint resolution of Congress quoted above, because that resolution distinctly makes the shipping of the forbidden goods from some point in the United States in the forbidden territory an offense, and nowhere does it prohibit the shipping of the goods from one point in the United States to another point in the United States, no matter how near the point of destination within the United States may be to the forbidden territory; so that, when this indictment is stripped of the surplusage which it contains, it charges nothing on its face except the intent to ship the goods into Mexico. A careful examination of the joint resolution of Congress above referred to discloses no provision, either in its express terms or which could follow from necessary implication, that the mere intent to ship the goods into the forbidden territory should be deemed an offense under the resolution, and so long as the defendants confine themselves to mere intent, they are guilty of no offense under the resolution; it is only when they put that intent into effect by causing an actual shipment to be made from some point in the United States to some point within the forbidden territory—that is, within the United States of Mexico—that they become chargeable with an offense." *U. S. v. Steinfeld*, (D. C. Ariz. 1913) 209 Fed. 904. To the same effect see *U. S. v. Phelps-Dodge Mercantile Co.*, (D. C. Ariz. 1913) 209 Fed. 910.

Jurisdiction.—The jurisdiction of the courts under this Act inheres in the district of the initial point of the offense. Thus where the indictment charged that the defendants made and caused to be made a certain shipment of munitions of war from the city of New Haven in the state of Connecticut, to the city of Tucson in the state and district of Arizona, the court in denying jurisdiction said: "The shipment of the goods is the thing forbidden by the statute, and not the mere ordering of a shipment to be made, if, indeed, an order was made, as does not clearly appear; and as the term 'shipment' means the act of shipping any-

thing, or the act of putting the thing to be shipped on board of the means of transportation, it seems clear that the initial point of this shipment was New Haven, Conn., and not Tucson, Ariz., and, such being the case, it is plain that the jurisdiction of the initial point of the offense alleged was in the District Court of the United States for the District of Connecticut, rather than in the District Court of the United States for the District of Arizona." *U. S. v. Steinfeld*, (D. C. Ariz. 1913) 209 Fed. 904. To the same effect see *U. S. v. Phelps-Dodge Mercantile Co.*, (D. C. Ariz. 1913) 209 Fed. 910.

Indictment.—An indictment, under this Act, must name the place of destination and the person or persons to whom the shipment is alleged to have been consigned; otherwise it is lacking in "that degree of certainty which is required in criminal pleadings in order to notify the defendant, as well as the court, of the nature of the offense charged and to enable the defendant to plead any judgment which may be rendered in the case as a bar to subsequent prosecution for the same offense." *U. S. v. Steinfeld*, (D. C. Ariz. 1913) 209 Fed. 904. To the same effect see *U. S. v. Phelps-Dodge Mercantile Co.*, (D. C. Ariz. 1913) 209 Fed. 910.

Meaning of "export."—Accurately speaking, exportation in the complete sense consists of two essential ingredients, the sending of merchandise from this to a foreign country and its landing in such country. But as used in the statute "export" includes a shipment to a foreign country which has not been landed. *U. S. v. Chavez*, (1913) 228 U. S. 525, 33 S. Ct. 595, 57 U. S. (L. ed.) 950, wherein the court said: "Putting out of view the parenthetical clause in the text of the resolution concerning the proclamation of the President, it reads as follows: 'It shall be unlawful to export any arms or munitions of war from any place in the United States to such country,' that is, the country brought within the terms of the resolution by a proclamation of the President. Conceding for argument's sake that if the words 'to export' stood alone in the text, that is, were not accompanied by explanatory or defining words, they would have to be interpreted with reference to the meaning of export in the complete sense, that is, as including landing in the foreign country, such concession is not here controlling or persuasive. We say this because, as we have seen, the words 'to export' are expressly qualified by a clause which serves, in a sense, to define their meaning, and, at all events, to make clear the nature and character of the acts intended to be embraced by the prohibition against exporting. In other

words, the resolution does not say it shall be unlawful to export, but it adds, 'any arms or munitions of war from any place in the United States to such foreign country.' In view of the accepted significance of the words 'to export' when used in their complete sense, and of the fact that in the preceding sentences of the resolution the causes leading to its adoption are expressly stated to be the violence and confusion sometimes promoted in foreign countries 'by the use of arms or munitions of war procured from the United States,' the insertion of words of definition and the omission from such words of all reference to landing of the prohibited merchandise would seem to make it clear that the prohibition of the resolution was directed against the act of sending from this to the foreign and prohibited country without reference to the completion of such act by the landing or delivery of the prohibited merchandise at its destination; in other words, that the object was to forbid the act of shipment from the United States of the prohibited munitions of war to a foreign country, without reference to the fulfillment of the complete act of export by the landing of the contraband goods. If there be room for hesitancy, that is to say, ambiguity, as to the correctness of this construction of the first section, we think there can be no ground for such doubt if the context of the resolution be considered, that is, if the second section be taken into view as illustrating and making clear the text of the first section. There can be no doubt that the object of the second section was to make the prohibition of the first section operative by punishing violations of its provisions. Now, the second section does not purport to punish the act of exporting, but in express terms it only punishes 'any shipment,' thus affixing the construction which we have given to the first section and causing it in reason to be impossible to say that the first section simply prohibits export in the completed sense. And this construction of the second section becomes irresistible when it is observed that for the purpose of preventing misconception the words 'any shipment' are explained and their meaning made more emphatic by the declaration that they constitute the act 'hereby made unlawful,' thus again in express terms affixing a significance to the first section and confirming the meaning which we have given it." See also *U. S. v. Mesa*, (1913) 228 U. S. 533, 33 S. Ct. 597, 57 U. S. (L. ed.) 953.

Meaning of arms and munitions of war.—The words "arms or munitions of war," within the meaning of the joint resolution of March 14, 1912, authorizing the President by proclamation to prohibit the export of arms or munitions of war to any American country in which conditions

of domestic violence are found to exist, embrace weapons used for the destruction of life, together with ammunition and equipment useful in connection with them, and explosives and other equipment of a military character, or articles used for the construction of such equipment. The articles which come within the definition of arms and munitions of war are as follows: "1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts. 2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts. 3. Powder and explosives specially prepared for use in war. 4. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts. 5. Clothing and equipment of distinctively military character. 6. All kinds of harness of a distinctively military character. 7. Saddle, draft, and pack animals suitable for use in war. 8. Articles of camp equipment and their distinctive component parts. 9. Armor plates. 10. Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war. 11. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea." (1912) 29 Op. Atty-Gen. 375.

The exportation of saddles, bridles, canteens and carbine scabbards, by merchants in the United States to other merchants in Mexico falls within the purview of the President's proclamation of March 14, 1912, issued pursuant to the joint resolution of the same date, prohibiting the export of arms or munitions of war to that country. (1912) 29 Op. Atty-Gen. 394.

Foodstuffs, ordinary clothing, and ordinary articles of peaceful commerce, are not included in the prohibition. (1912) 29 Op. Atty-Gen. 375.

Question of fact.—The question of what articles would be considered within the President's proclamation of March 14, 1912, issued pursuant to the joint resolution of the same date, prohibiting the export of arms or munitions of war to Mexico, is one of fact, dependent upon the character of the articles sought to be imported. Thus paper caps for toy pistols could hardly be considered within the prohibition, whereas air rifles might well be regarded within the prohibition. (1912) 29 Op. Atty-Gen. 570.

The validity of this section has been recognized in the following cases: *U. S. v. Chavez*, (1913) 228 U. S. 525, 33 S. Ct. 595, 57 U. S. (L. ed.) 950; *U. S. v. Mesa*, (1913) 228 U. S. 533, 33 S. Ct. 597, 57 U. S. (L. ed.) 953; *Talbott v. U. S.*, (C. C. A. 5th Cir. 1913) 208 Fed. 144, 125 C. C. A. 360.

SEC. 2. [Punishment for violations.] That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both. [37 Stat. L. 630.]

See the notes to the preceding section 1 of this resolution.

IMPURE TEA IMPORTATION ACT

See IMPORTS AND EXPORTS

INCEST

See PENAL LAWS

INCOME TAX

See INTERNAL REVENUE

INDIAN DEPREDATIONS ACTS

See CLAIMS

INDIANS

- I. COMMISSIONER OF INDIAN AFFAIRS, 746.
 - II. OFFICERS OF INDIAN AFFAIRS — THEIR DUTIES AND COMPENSATION, 751.
 - III. PERFORMANCE OF ENGAGEMENTS BETWEEN UNITED STATES AND INDIANS, 770.
 - IV. GOVERNMENT AND PROTECTION OF INDIANS, 793.
 - V. GOVERNMENT OF INDIAN COUNTRY, 805.
 - VI. INDIAN HOMESTEADS AND ALLOTMENTS OF LAND IN SEVERALTY, 819.
 - VII. RIGHTS OF WAY THROUGH INDIAN LANDS, 893.
 - VIII. INSTRUCTION OF INDIANS, 905.
 - IX. TRAFFIC IN INTOXICATING LIQUORS, 913.
-

I. Commissioner of Indian Affairs, 746.

R. S. 462. *Commissioner of Indian Affairs*, 746.

R. S. 463. *Duties of Commissioner*, 746.

R. S. 464. *Accounts for Claims and Disbursements*, 747.

R. S. 465. *Regulations Relating to Indian Affairs*, 748.

Act of May 17, 1882, ch. 163, 749.

Sec. 7. Statutes, etc., to Be Furnished to Agents, etc., by Commissioner, 749.

Act of July 26, 1892, ch. 256, 749.

Sec. 1. Recording of Deeds, etc., Legalized, 749.

2. Records to be Kept of All Deeds by Indians Requiring Approval, 749.

3. Seal for Indian Office — Copies, How Certified — Evidence, 749.

4. Certified Copies of Records to be Furnished — Fees, 750.

Act of Feb. 27, 1906, ch. 510, 750.

Sec. 1. Private Secretary to Commissioner, 750.

Act of April 30, 1908, ch. 153, 750.

Sec. 1. Agent to Negotiate with Indians, 750.

Act of March 3, 1909, ch. 263, 751.

Sec. 1. Designation by Commissioner of Employee to Sign Letters, 751.

Act of March 3, 1911, ch. 210, 751.

Sec. 17. Employee to Sign Approval of Secretary of Interior to Tribal Deeds, etc., 751.

Act of July 16, 1914, ch. 141, 751.

Sec. 1. Assistant Commissioner of Indian Affairs, 751.

II. Officers of Indian Affairs — Their Duties and Compensation, 751.

R. S. 2039. *Board of Indian Commissioners*, 751.

R. S. 2042. *Investigation of Contracts*, 752.

R. S. 2043. *Appointment of Indian Inspectors; Term of Office*, 752.

R. S. 2044. *Salary and Expenses*, 752.

R. S. 2045. *Powers and Duties of Inspectors*, 752.

- R. S. 2052. *Indian Agents — Appointments, Salaries*, 754.
R. S. 2053. *Services of Certain Agents and Superintendents to Be Dispensed with*, 754.
R. S. 2055. *Indian Agents — Salary*, 754.
R. S. 2056. *Term of Office*, 754.
R. S. 2057. *Bond of Indian Agents*, 755.
R. S. 2058. *Duties of Indian Agents*, 756.
R. S. 2059. *Discontinuance and Transfer of Agencies*, 756.
R. S. 2060. *Residence of Indian Agents*, 756.
R. S. 2061. *Limitation on Visits to Washington by Agents for Indians in California*, 757.
R. S. 2063. *Compensation for Extra Services Performed by Agents and Sub-agents*, 757.
R. S. 2064. *Acknowledgment of Deeds, etc., by Agents*, 757.
R. S. 2065. *Appointment of Indian Sub-agents*, 758.
R. S. 2066. *Limits of Superintendencies, Agencies, and Sub-agencies*, 758.
R. S. 2067. *Special Agents and Commissioners*, 758.
R. S. 2068. *Interpreters to the Agencies*, 758.
R. S. 2069. *Preference to Indians for Interpreters*, 758.
R. S. 2073. *Discontinuance of the Offices of Agents, Interpreters, etc.*, 759.
R. S. 2074. *No Person to Hold Two Offices — Leave of Absence*, 759.
R. S. 2075. *Additional Security*, 759.
R. S. 2076. *Compensation Prescribed to Be in Full*, 759.
R. S. 2077. *Allowance for Traveling Expenses*, 760.
R. S. 2078. *Persons Employed in Indian Affairs Not to Trade with the Indians*, 760.

Act of June 22, 1874, ch. 389, 760.

Sec. 10. Employees, etc., of United States Not to Be Interested in Indian Contracts, etc., 760.

Act of March 3, 1875, ch. 132, 761.

Sec. 1. Number of Inspectors, 761.

Visit to and Examination of Agencies, 761.

10. Book of Expenditures — Contents — False Entries, 761.

Act of Aug. 15, 1876, ch. 289, 762.

Sec. 4. Form of Estimates for Indian Appropriations, 762.

Act of May 17, 1882, ch. 163, 762.

Sec. 1. Powers and Duties of Indian Commissioners, 762.

Per Diem Pay to Certain Clerks, etc., Detailed for Special Duty in Indian Service, 762.

Act of July 4, 1884, ch. 180, 762.

Sec. 6. Consolidation and Abolition of Agencies — Preference to Indian Employees, 762.

Act of March 3, 1893, ch. 209, 763.

Sec. 1. Cherokee, North Carolina, Training School Superintendent to Act as Agent — Agent Abolished, 763.

Repeal of Law Fixing Compensation of Agents, 763.

Act of Aug. 15, 1894, ch. 290, 763.

Sec. 10. Indian Employees Preferred, 763.

Act of June 7, 1897, ch. 3, 763.

Sec. 1. Limit to Expenditures for Employees at Agencies, etc., 763.

Act of July 1, 1898, ch. 545, 764.

*Sec. 1. Army Officers Detailed as Indian Agents, 764.
Indian Agents to Account for Funds, 764.*

Act of March 1, 1899, ch. 324, 764.

Sec. 1. Special Agents, etc., May Administer Oaths, etc., 764.

Act of April 21, 1904, ch. 1402, 765.

Sec. 1. Special Bond for Disbursing Officers of Large per Capita Payments, 765.

Act of March 3, 1905, ch. 1479, 765.

Sec. 1. Indian Inspectors — Engineers, 765.

Act of March 1, 1907, ch. 2285, 765.

*Sec. 1. Transfer of Funds — Detail of Employees, 765.
Matrons to Teach Housekeeping, 765.
Appropriations for Salaries, 765.
Duties of Agents Imposed on Superintendent of Indian
Schools — Bond — Pay, 766.*

Act of April 30, 1908, ch. 153, 766.

*Sec. 1. Disbursing Officers' Bonds — Acceptance of New Bond—
Effect on Sureties on Prior Bond, 766.
2. Farmers and Stockmen, 766.*

Act of March 4, 1909, ch. 297, 767.

Indian Inspectors — Not Required to be Engineers, 767.

Act of March 3, 1911, ch. 210, 767.

*Sec. 27. Annual Statements to be Made of Fiscal Affairs of Indians,
767.*

Act of Aug. 23, 1912, ch. 350, 767.

*Sec. 1. Indian Office — Estimates for All Personal Services to Be
Submitted — Restriction, 767.*

Act of Aug. 24, 1912, ch. 388, 768.

Sec. 1. Secretary to Board of Indian Commissioners — Pay, 768.

Act of June 30, 1913, ch. 4, 768.

*Sec. 1. Oaths of Employees in Indian Service, 768.
26. Bureau of Indian Affairs — System of Bookkeeping — Annual
Report — Allotment of Appropriations Before Expendi-
tures — Estimates, 768.*

Act of Aug. 1, 1914, ch. 221, 769.

*Sec. 1. Heat and Light for Employees' Quarters, 769.
17. Five Civilized Tribes — Superintendent to be Appointed, 769.*

III. Performance of Engagements between United States and Indians, 770.

R. S. 2079. No Future Treaties with Indian Tribes, 770.

R. S. 2080. Abrogation of Treaties, 771.

R. S. 2081. Payment of Certain Annuities in Coin, 771.

R. S. 2082. Payment of Annuities in Goods, 771.

R. S. 2083. Purchase of Goods for the Indians, 771.

R. S. 2084. Manner of Purchase, 772.

R. S. 2085. Claims for Supplies for Indians, 772.

R. S. 2086. Modes of Paying Annuities and Distributing Goods, 772.

**R. S. 2087. Withholding of Annuities on Account of Intoxicating
Liquors, 772.**

R. S. 2088. Persons to Be Present at Delivery of Annuities, 773.

R. S. 2089. Mode of Disbursements, 773.

- R. S. 2090. *Mode of Distribution of Goods*, 773.
- R. S. 2092. *Restriction on Advances to Superintendents, Agents, Officers, etc.*, 774.
- R. S. 2093. *Disposal of Proceeds of Sales of Indian Lands*, 774.
- R. S. 2094. *Appropriation of Moneys to Carry Out Indian Treaties*, 774.
- R. S. 2095. *Investments of Stock Required by Treaties*, 774.
- R. S. 2096. *Investment of Proceeds of Lands*, 774.
- R. S. 2097. *Misapplication of Funds Belonging to the Indians Prohibited*, 775.
- R. S. 2098. *Indian Depredations, How Paid*, 775.
- R. S. 2100. *Annuities of Indians Hostile to United States*, 775.
- R. S. 2101. *Goods Withheld from Chiefs Who Have Violated Treaty Stipulations*, 776.
- R. S. 2103. *Contracts with the Indians*, 776.
- R. S. 2104. *Payments under Contracts Restricted*, 778.
- R. S. 2105. *Penalty for Receiving Moneys from Indians under Prohibited Contracts*, 778.
- R. S. 2106. *Assignments of Contracts Restricted*, 779.
- R. S. 2107. *Restriction on Payments to Contractors, etc., Until Accounts and Vouchers Submitted, etc.*, 779.
- R. S. 2108. *Moneys Due Incompetent or Orphan Indians*, 780.
- R. S. 2109. *Number of Indians Present and Receiving Food, etc., to Be Reported*, 780.
- R. S. 2110. *Rations for Indians*, 780.

Act of March 3, 1875, ch. 132, 780.

Sec. 1. No Payments to Indians Holding Any Captives Other than Indians, 780.

- 2. *Appropriations for Indian Service Not to be Paid to Indians at War with United States*, 781.
- 3. *Indians to be Required to Labor on Reservations to Amount of Supplies and Annuities Distributed*, 781.
- 4. *Agents to Make Rolls of Indians Entitled to Supplies — How to Distribute Supplies*, 781.
- 6. *Appropriations for Indian Supplies to Be so Distributed as to Prevent Deficiencies*, 781.
- 7. *Copies of Contracts to be Furnished Before Payment*, 782.
- 9. *Bids for Supplies, etc., for Indian Service — Certified Check, Draft, or Bond to Accompany Bids*, 782.

Act of June 10, 1876, ch. 122, 783.

Custodian of Indian Trust Securities — Interest. Certificates of Deposit — Purchases — Sales, etc., 783.

Act of Aug. 15, 1876, ch. 289, 783.

Sec. 3. Bids or Proposals — Preservation — Filing Abstract, 783.

Act of March 3, 1877, ch. 101, 783.

Sec. 1. Transportation of Supplies by Wagon, Indian Labor, 783.

Act of April 1, 1880, ch. 41, 784.

Deposit of Indian Trust Funds in Treasury — Interest and Permanent Appropriation, 784.

Act of May 11, 1880, ch. 85, 784.

Sec. 1. Secretary of Interior May Purchase Articles Made at Indian Training Schools, 784.

Act of March 3, 1883, ch. 141, 785.

Sec. 1. Proceeds of Timber, etc., from Indian Reservations to Be Covered in, etc., 785.

Act of July 4, 1884, ch. 180, 785.

Sec. 8. Officers and Others Presenting False Vouchers to Forfeit All Claims, etc., 785.

10. Expense of Land Service Not Chargeable to Indian Lands, 786.

Act of Aug. 15, 1894, ch. 290, 786.

Sec. 4. Advertisement and Contract before Appropriations, 786.

Act of June 10, 1896, ch. 398, 787.

Sec. 1. Officer of Government to Make Payments, etc., 787.

Act of July 1, 1898, ch. 545, 787.

Sec. 7. Commutation of Rations to Civilized Indians, 787.

Act of July 7, 1898, ch. 571, 787.

Sec. 1. Indian Supplies, etc., How Transported, 787.

Act of March 1, 1899, ch. 324, 787.

Sec. 8. Indians Eighteen Years Old May Receipt for Annuity Money, 787.

Act of March 1, 1907, ch. 2285, 788.

Sec. 1. Appropriations for Subsistence — Use of Surplus — Report — Stock Cattle — Treaty Funds Excluded, 788.

Diversion to Other Use of Appropriations for Employees and Supplies — Report, 788.

Appropriations for Supplies — When Available — Time of Distribution, 788.

Act of March 2, 1907, ch. 2523, 789.

Sec. 1. Indian Tribal Funds — Allotment, etc., of, to Individual Indians, 789.

2. Payment to Helpless, etc., Indians, 789.

Act of April 30, 1908, ch. 153, 789.

Sec. 1. Purchase of Supplies for Indian Service to Be Advertised — Exception — Irrigation — Indian Labor, 789.

Deposit in Bank of Indian Moneys — Bond, 790.

Warehouses for Goods for Indian Service, 790.

Supplies — Transportation by Land Grant Railroads — Compensation, 790.

Act of April 4, 1910, ch. 140, 791.

Sec. 1. Indian Tribes — Annual Statement of Reimbursable Accounts, 791.

Act of June 25, 1910, ch. 431, 791.

Sec. 23. Indian Supplies — Purchases under Regular Contracts, 791.

Act of March 3, 1911, ch. 210, 792.

Sec. 28. Judgments to Indians — Payments — Accounting, 792.

Act of June 30, 1913, ch. 4, 792.

Sec. 1. Payment for Wagon Transportation of Supplies, 792.

18. Contracts as to Tribal Funds, etc., Subject to Official Approval, 792.

Res. of March 4, 1915, No. 16, 792.

Appropriations for Current Expenses Continued, 792

IV. Government and Protection of Indians, 793.

- R. S. 2111. *Sending Seditious Messages — Penalty*, 793.
- R. S. 2112. *Carrying Seditious Messages — Penalty*, 793.
- R. S. 2113. *Correspondence with Foreign Nations to Excite Indians to War — Penalty*, 793.
- R. S. 2114. *General Superintendence by the President over Tribes Removed West of the Mississippi*, 794.
- R. S. 2115. *Survey of Indian Reservations*, 794.
- R. S. 2116. *Purchases or Grants from Indians*, 794.
- R. S. 2117. *Driving Stock to Feed on Indian Lands*, 795.
- R. S. 2118. *Settling on or Surveying Lands Belonging to Indians by Treaty*, 796.
- R. S. 2119. *Protection of Indians Desiring Civilized Life*, 796.
- R. S. 2120. *Indians Trespassing upon Lands of Civilized Indians*, 797.
- R. S. 2121. *Suspension of Chief for Trespass*, 797.
- R. S. 2122. *Sale of Buildings Belonging to the United States*, 797.
- R. S. 2123. *Sale of Lands with Buildings*, 797.
- R. S. 2124. *Penalties, How Recovered*, 798.
- R. S. 2125. *Proceedings against Goods*, 798.
- R. S. 2126. *Burden of Proof*, 798.

Act of Aug. 9, 1888, ch. 818, 798.

- Sec. 1. *White Men Marrying Indian Women Not to Acquire Tribal Rights*, 798.
- 2. *Indian Women Marrying Citizens Become Citizens*, 799.
- 3. *Evidence of Marriage of White Men with Indian Women*, 799.

Act of Feb. 16, 1889, ch. 172, 799.

Indians on Reservations May be Allowed to Cut, Remove, etc., Dead Timber, 799.

Act of May 2, 1890, ch. 182, 800.

Sec. 38. *Tribal Marriages Valid, Issue Legitimate*, 800.

Act of June 7, 1897, ch. 3, 801.

- Sec. 1. *Dead Timber May be Cut, etc., by Minnesota and Chippewa Indians*, 801.
- Children of White Man and Indian Woman to Have Rights of Mother*, 801.

Act of July 1, 1898, ch. 545, 801.

Sec. 6. *Property Not Required for Use — Sale or Removal*, 801.

Act of March 1, 1907, ch. 2285, 802.

- Sec. 1. *Property Not Required for Use — Removal*, 802.
- Access to Records of Five Civilized Tribes*, 802.

Act of March 3, 1911, ch. 210, 802.

Sec. 1. *Encouraging Farming Industry Among Indians — Repayment — Reuse of Fund — Report*, 802.

Act of June 30, 1913, ch. 4, 803.

Sec. 1. *Encouraging Farming Industry Among Indians — Repayment — Report*, 803.

Act of Aug. 1, 1914, ch. 222, 803.

Sec. 1. *Irrigation and Drainage of Indian Lands — Costs — Engineers — Report*, 803.

Hospitals — Isolation and Quarantine of Diseased Indians, 804.

Incarceration of Indians — Report, 805.

Encouragement of Farming Industry Among Indians — Appropriation — Report, 805.

V. Government of Indian Country, 805.

R. S. 2127. *Sale of Cattle, etc., of the Indians by Agents, 805.*

R. S. 2132. *Prohibition of Trade by the President, 807.*

R. S. 2133. *Penalty for Trading without a License, 807.*

R. S. 2134. *Penalty upon Foreigners Entering Indian Country without Passports, 808.*

R. S. 2135. *Prohibited Purchases and Sales, 808.*

R. S. 467. *Sale of Arms, etc., to Indians Prohibited, 808.*

R. S. 2136. *Trading or Selling Arms, etc., in Any District Occupied by Uncivilized or Hostile Indians, 808.*

R. S. 2137. *Prohibition of Hunting on Indian Lands, 809.*

R. S. 2138. *Penalty for Removing Cattle from Indian Country, 809.*

R. S. 2142. *Assault, 809.*

R. S. 2143. *Arson, 809.*

R. S. 2144. *The Laws Defining, etc., Forgery and Depredations on Mails, Extended to Indian Country, 810.*

R. S. 2145. *General Laws as to Punishment of Crimes Extended to Indian Country, 810.*

R. S. 2146. *Exceptions to the Operation of the Preceding Sections, 812.*

R. S. 2147. *Removal of Persons from Indian Country, 812.*

R. S. 2148. *Penalty for Return, 813.*

R. S. 2149. *Removal from Reservations, 814.*

R. S. 2150. *Employment of the Military in Apprehending Persons Violating the Law, 814.*

R. S. 2151. *Detention of Persons Apprehended by the Military, 815.*

R. S. 2152. *Arrest of Absconding Indians Guilty of Crime, 815.*

R. S. 2153. *Executing Process, 815.*

R. S. 2154. *Reparation for Injured Property, 816.*

R. S. 2155. *Payment Where the Offender Is Unable, 816.*

R. S. 2156. *Injuries to Property by Indians, 816.*

R. S. 2157. *Superintendents, Agents, and Sub-agents Authorized to Take Depositions, 817.*

Act of Aug. 15, 1876, ch. 289, 817.

Sec. 5. Indian Traders, How Appointed, etc., 817.

Act of July 4, 1884, ch. 180, 817.

Sec. 1. Sale of Cattle of Indians to Persons Not Members of Same Tribe Prohibited, 817.

Act of March 3, 1901, ch. 832, 818.

Sec. 1. Regulation of Trade with Indians, 818.

VI. Indian Homesteads and Allotments of Lands to Indians in Severalty, 819.

Act of March 3, 1875, ch. 131, 819.

Sec. 15. Certain Indians Entitled to Benefit of Homestead Laws, 819.

16. Entries Heretofore Made, Confirmed, 819.

Act of July 4, 1884, ch. 180, 820.

Sec. 1. Further Application of Homestead Laws to Indians — Patented Lands Held in Trust, 820.

Act of Feb. 8, 1887, ch. 119 ("General Allotment Act" or "Dawes Act"), 821.

Sec. 1. Allotments on Reservations — Irrigable and Non-irrigable Lands — Effect of Treaty Provisions, 821.

2. Selection of Allotments, 823.

3. Allotments, by Whom to Be Made — Certificates, 824.

4. Indians Not on Reservations, etc., May Make Selection of Public Lands — Fees of Land Officers to Be Paid from Treasury, 825.

5. Patents to Be Held in Trust — Descent and Partition — Purchase of Unallotted Lands — Disposition of Purchase Money — Confirmation of Prior Occupancy — Preference as to Employees — Indians of Siletz Reservation, 825.

6. Citizenship Rights to Allottees on Issue of Fee Simple Title — Restrictions Removed — Jurisdiction in Trust Patents Continued — Indian Territory Not Included, 830.

7. Secretary of Interior to Prescribe Rules for Use of Waters for Irrigation, 834.

8. Act Not to Extend to Lands of Certain Tribes, 835.

9. Appropriation for Surveys, 835.

10. Rights of Way for Railroads, etc., Not Affected, 835.

11. Removal of Southern Utes Not Affected by Act, 835.

Act of Oct. 19, 1888, ch. 1214, 835.

Sec. 1. Acceptance of Surrender of Land Patents from Indians, 835.

2. Indians May Surrender Patents, and Receive Allotments in Severalty, 836.

Act of March 2, 1889, ch. 422, 836.

Sec. 1. Provisions of Allotment Act Extended to Certain Tribes, 836.

Act of Feb. 28, 1891, ch. 383, 836.

Sec. 2. Existing Allotments in Certain Cases to Be Augmented — No Existing Approved Allotment to Be Reduced, 836.

3. Leases of Allotments, When Permitted, 837.

4. Allotment of Public Lands to Indians — Patents — Officers' Fees, 838.

5. Determination of Descent — "Cherokee Outlet" Lands Excepted, 839.

Act of March 3, 1893, ch. 209, 840.

Sec. 1. Costs of Legal Contests by or against Indians — One-half Fees — District Attorneys to Represent Indians, 840.

Act of Aug. 15, 1894, ch. 290, 841.

Sec. 1. Lease of Surplus Lands of Tribe, 841.

Jurisdiction of Actions for Allotments — Parties — Judgment — Appeals, 841.

2. Service of Petition — District Attorney to Represent Government — Failure to Plead — Claim to Be Established by Proof, 844.

Act of Jan. 26, 1895, ch. 50, 844.

Errors in Allotments and Patents to Be Corrected — Cancellation of Patents — Opening of Land to Settlement, 844.

Act of May 31, 1900, ch. 598, 845.

Leases of Indian Lands of Disabled Allottee, 845.

Act of March 3, 1901, ch. 832, 846.

Sec. 3. Condemnation of Allotted Lands for Public Purposes, 846.

Act of May 27, 1902, ch. 888, 846.

Sec. 7. Sale by Heirs of Allotted Lands, 846.

Act of May 31, 1902, ch. 946, 847.

Sec. 1. State Statutes of Limitation Applicable to Actions for Lands Patented in Severalty, 847.

Act of April 21, 1904, ch. 1402, 847.

Sec. 1. Restrictions on Alienation of Lands Removed, 847.

Exchange of Private Lands in Indian Reservation, 848.

Act of March 3, 1905, ch. 1479, 848.

Sec. 1. Leases of Allotted Lands — Investigation — Cancellation — Approval, 848.

Act of June 21, 1906, ch. 3504, 849.

Sec. 1. Continuing Alienation Restrictions, 849.

Allotments in Severalty — Lands Not Liable for Prior Debts, 849.

Trust Funds, 849.

Interest on Funds Held for Minors — Disposition, 849.

Sale of Allotted Lands — Disposition of Proceeds, 850.

Nez Percés — Leases Permitted — Certificate, 850.

Alienation Restrictions Removed — Leases by Nonresident Allottees — Lands of Minors, 850.

Act of March 1, 1907, ch. 2285, 850.

Sec. 1. Payment of Taxes from Share of Allottee in Tribal Funds — Restriction, 850.

Noncompetent Indians — Sale of Allotments — Proceeds — Fee Title to Issue, 851.

Act of May 29, 1908, ch. 216, 851.

Sec. 1. Indian Allotments — Sale on Petition of Allottee — Excepted Lands — Lands of Minors, etc. — Heirs to Have Fee Simple Title — Use of Proceeds — Patent to Purchaser — States Excepted, 851.

Act of March 3, 1909, ch. 263, 852.

Sec. 1. Allotments in Severalty — Lease of Mineral Lands — Regulations, 852.

Exchange of Lands Unsuitable for Allotment, etc. — Restriction — Regulations, 852.

Irrigation of Allotted Lands, 853.

Act of April 4, 1910, ch. 140, 853.

Sec. 1. Report of Cost of Survey and Allotment Work, 853.

Act of June 25, 1910, ch. 431, 853.

Sec. 1. Indian Trust Allotments — Disposal to Heirs of Intestate Indians — Partition — Sales, etc. — Patents in Fee — Proceeds — Competency Certificates — Deposit of Indian Funds in Banks — Indemnity Bond, 853.

2. Disposal by Will of Land Held under Trust, Patent, etc. — Approval of Will — Effect — Sale of Land as Issuance of Patent in Fee — Exceptions, 855.

3. Surrender of Trust Allotments to Children — Conditions, 856.

4. Leases of Trust Allotments, 856.

- Sec. 5. Inducing Conveyances by Indians of Trust Interests Unlawful — Punishment for, 856.*
- 7. Indian Reservations — Sales of Timber on Unallotted Lands in, 857.*
- 8. Sales of Timber on Trust Allotments, 857.*
- 10. Indians in Washington — Inalienable Patents to Lots in Indian Villages, 857.*
- 13. Indian Reservations — Power, etc., Sites in, May be Reserved, 857.*
- 14. Trust Allotments — Canceling Patents in Power Sites, etc. — Reimbursing Indians — Lieu Allotments, 858.*
- 31. National Forests — Allotments to Indians Living in — Applications, etc., 858.*
- 32. Five Civilized Tribes — Title to Lands Deeded to Deceased Indians, 858.*
- 33. Provisions Not Affecting Osages, etc., 859.*

Act of March 3, 1911, ch. 210, 859.

Sec. 17. Deposit of Tribal Funds, 859.

Act of Aug. 1, 1914, ch. 222, 859.

Sec. 1. Administration of Oaths — Heirs of Deceased Indians — Witnesses at Hearings, 859.

- 17. Five Civilized Tribes — Contracts for Services in Relation to Enrollment — Interest on Funds Deposited — Per Capita Payments, 860.*

Act of March 27, 1914, ch. 46, 860.

Five Civilized Tribes — Drainage District — Payment of Assessments, 860.

Act of April 26, 1906, ch. 1876 ("Curtis Act," or "Disposition of Affairs Act"), 861.

- Sec. 1. Five Civilized Tribes — Final Disposition of Affairs — Enrollment Rules, 861.*
- 2. Minor Children — Illegitimate Children — Payment to Cherokees — Equalization of Creek Allotments Continued — Completion of Rolls — Filing Enrollment Applications Restricted, 862.*
- 3. Approved Roll of Creek Freedmen — Cherokee Freedmen — Choctaw and Chickasaw Freedmen Homestead Allotments, 863.*
- 4. Citizens by Blood — Transfer to Roll of, Restricted, 864.*
- 5. Patents, etc., to Issue in Name of Allottee — All Patents, etc., Recorded Convey Legal Title — Pending Contests, 864.*
- 6. Removal of Principal Chief — Approval of Conveyances on Failure of Chief to Execute — Approval by Principal Chief of Seminoles, 864.*
- 7. Segregation of Specified Choctaw Lands — Exceptions — Appraisal and Sale of Pine Timber, etc., 865.*
- 8. Land-Office Records Transferred to Clerk of District Court — Transcripts — Fees, 865.*
- 9. Payments to Loyal Seminoles Ratified — Recoveries by Individuals Not Barred — Charles F. Winton — Claims of Estate of, 866.*
- 10. Tribal Schools Transferred to Control of Secretary of Interior — School Funds — Use of Remainder of Appropriated Funds — Use of Surplus Fees, etc., 866.*

- Sec. 11. Tribal Revenues to Be Collected by Special Officer — Payment of Claims — Tribal Taxes Abolished — Refund — Accounting, Delivery, etc., of Tribal Property — Failure to Account — Penalty, 867.*
- 12. Choctaw and Chickasaw Town Lots — Sale of Those Reserved for Mining Leases — Proceeds — Forfeiture for Nonpayment — Resale — Reversion of Vacated Streets, etc., 868.*
- 13. Coal and Asphalt Lands Reserved from Sale, 869.*
- 14. Conveyance to Owner of Lands Reserved from Allotment or Sale — Reversion — Railroad Easements Not Affected — Exception — Murrow Indian Orphans' Home — Donation Patents to, Authorized — Conveyance of Fractional Rights — Conveyance of Other Lands — Description, 869.*
- 15. Tribal Buildings, etc., to Be Sold — Proceeds — Purchases by Municipalities, 870.*
- 16. Residue of Unallotted, etc., Lands to be Sold — Proceeds — Preference Rights of Choctaw and Chickasaw Freedmen — Reversion and Sale on Nonpayment — Sale of Unallotted Nonmineral, etc., Lands — Agricultural Lands, 871.*
- 17. Per Capita Distribution of Tribal Funds, 871.*
- 18. Jurisdiction of Tribal Suits — Set-offs, 871.*
- 19. Alienation Restrictions — Lease of Other than Homestead Lands — Prior Conveyances — Taxes, 872.*
- 20. Leases by Full-Blood Allottees — Minors, etc. — Leases to Be Recorded, 873.*
- 21. Lands of Allottees Dying Intestate without Heirs — Mississippi Choctaws — Claims of Heirs, 874.*
- 22. Conveyance of Inherited Lands, 874.*
- 23. Disposal of Property by Will Permitted — Restriction, 876.*
- 24. Choctaw, Chickasaw, and Seminole Lands — Highways on Section Lines — Damages — Expenses — Obstruction of Highway — Penalty — Notice, 877.*
- 25. Power and Light Companies Granted Rights of Way, etc. — Proceedings, etc. — Municipal Control, etc. — Future Control of Granted Rights, 878.*
- 26. Municipalities Granted Additional Powers — Improvement of Streets, etc. — Special Assessments — Maximum — Issue of Scrip or Certificates — Taxation of Railroad Property — Municipal Assessments — Appeal — Costs, 879.*
- 27. Tribal Lands to Be Held in Trust — Allotments Not Affected, 880.*
- 28. Tribal Governments Continued — Restriction — Contracts, 880.*
- 29. Repeal, 881.*

Act of May 27, 1908, ch. 199 ("Restrictions Removal Act"), 881.

- Sec. 1. Five Civilized Tribes — Status of Allotments — Alienation Restrictions Removed — Restrictions Continued — Removal by Secretary of the Interior, 881.*
- 2. Leases of Restricted Lands — Oil, Gas, or Mining Purposes — Lands of Minors, 883.*
- 3. Rolls of Citizens and Freedmen Evidence of Quantum of Indian Blood — Status of Prior Leases by Allottees — Power of Owners of Unrestricted Lands Over Oil, etc., Leases, 884.*

- Sec 4. Unrestricted Lands Subject to Taxation — Exemption from Prior Claims, 887.*
- 5. Alienation, etc., of Restricted Lands Void, 887.*
- 6. Authority of Oklahoma Probate Courts Over Minor Allottees — Local Agent of Interior Department for Estates of Minors — Duties — Appropriation — Restriction on Lands of Minors — Appropriation for Suits — Suits against Vendees, etc., of Town Lots — Conclusion of Investigation — Suits as to Title, etc., of Restricted Lands, 887.*
- 7. Contests of Selections of Allotment — Time Limited, 890.*
- 9. Allottees — Restrictions Removed by Death — Conveyances — Distribution of Estates of Indians of Half-blood or More — In Case of No Issue — Acknowledgment of Wills, 890.*
- 10. Choctaw and Chickasaw Warrants — Payment of Outstanding — Payment to Holders for Value — To Original Payees, 892.*
- 11. Seminole Lands — Payment of Royalties to Lessor, etc. — Interest of Seminole Nation to Cease June 30, 1908, 892.*
- 12. Deposit of Tribal Allotment Records — Appropriation for Copies to Counties of Oklahoma, 892.*
- 14. Town Sites — Sale of Lots in, Established — Coal and Asphalt Retained, 892.*

VII. Rights of Way Through Indian Lands, 893.

Act of March 2, 1899, ch. 374 ("Railroad Right of Way Act") 893.

- Sec. 1. Rights of Way for Railways, etc., Through Indian Reservations, etc. — Stations, 893.*
- 2. Width of Right of Way — Stations, 894.*
- 3. Survey, and Proceedings for Award of Compensation, 894.*
- 4. Effect of Dilatoriness in Construction, etc., 895.*
- 5. Railroad Through Indian Territory — Annual Charge — Rates — Transportation of Mails, 895.*
- 6. Railroad Rights on Public Lands, 895.*
- 7. Regulations, 896.*
- 8. Repeal, 896.*

Act of March 3, 1901, ch. 832, 896.

- Sec. 3. Construction of Telegraph and Telephone Lines Through Indian Lands, 896.*
- 4. Opening Highways Through Indian Lands, 897.*

Act of Feb. 28, 1902, ch. 134, 897.

- Sec. 13. General Right of Way to Railroads, 897.*
- 14. Width — Stations, etc. — Yards, etc. — Water Supply — Changes, 897.*
- 15. Damages — Maps — Appraisement by Referees — Work to Begin on Deposit of Award — Abandonment of Right of Way — Appeal, 898.*
- 16. Annual Rental — Regulation of Freight and Other Charges — Interstate Transportation — Mails, 899.*
- 17. Crossings, etc. — Referees — Condemnation Proceedings — Limitations — Appeal — Deposit of Compensation — Bond for Damages — Forfeiture, 900.*
- 18. Automatic Signals at Crossings — Approval by Interstate Commerce Commissioners — Common Grade Crossing, 901.*

Sec. 19. Notice of Intent to Use Signals at Crossings — Division of Cost, 901.

20. Mortgages, 902.

21. Amendment, 902.

22. General Extension of Privileges — Extension of Time, 902.

23. Repeals — Application of Act, 902.

Act of March 11, 1904, ch. 505, 903.

Sec. 1. Right of Way Through Indian Lands for Pipe Lines, 903.

2. Amendment or Repeal, 904.

Act of March 3, 1909, ch. 263, 904.

Sec. 1. Grant of Lands to Railroads in Indian Reservations for Reservoirs, etc.—Conveyance of Lands — Restriction — Land for Tree Planting — Use of Proceeds, 904.

Act of May 6, 1910, ch. 204, 905.

Acquisition by Railways for Reservoirs, etc., of Lands Allotted to Indians in Severalty, 905.

VIII. Instruction of Indians, 905.

R. S. 2071. President May Employ Instructors for Indians, 905.

R. S. 2072. When Tribes May Direct the Employment of Blacksmiths, etc., 905.

Act of June 23, 1879, ch. 35, 906.

Sec. 7. Detail of Army Officer for Indian Education, 906.

Act of July 31, 1882, ch. 363, 906.

Barracks for Indian Training-schools — Money Appropriated for Education Among Indians May Be Expended There, 906.

Act of July 4, 1884, ch. 180, 906.

Sec. 9. Indian Agents to Submit Census in Annual Reports, 906.

Act of March 2, 1887, ch. 320, 907.

Sec. 1. Annual Report of Expenditure of Education Fund, 907.

Act of March 2, 1889, ch. 412, 907.

Sec. 10. Superintendent of Indian Schools—Appointment—Duties, 907.

Act of July 13, 1892, ch. 164, 908.

Rules to Secure Attendance at Schools, 908.

Act of March 3, 1893, ch. 209, 908.

Sec. 1. Rations, etc., May Be Withheld for Nonattendance at School — Subsistence Withheld to Be Credited to Tribe, 908.

Act of Aug. 15, 1894, ch. 290, 908.

Sec. 1. Equal Education to Those Taking Lands in Severalty, 908.

Act of March 2, 1895, ch. 188, 909.

Sec. 1. Consent of Parent to Send Child Out of State, etc., 909.

Act of June 10, 1896, ch. 398, 909.

Sec. 1. Written Consent of Parent to Take Pupil to Another State, 909.

Act of June 7, 1897, ch. 3, 909.

Sec. 1. No Appropriation Hereafter for Sectarian Schools, 909. Indians to Be Employed as Assistant Matrons, Farmers, etc., 910.

- Act of March 3, 1903, ch. 263, 910.*
Sec. 1. White Children in Indian Schools, 910.
- Act of April 21, 1904, ch. 1402, 910.*
Sec. 1. Discontinuance of Schools, etc., 910.
- Act of June 21, 1906, ch. 3504, 910.*
Sec. 1. Rations to Mission Schools on Indian Reservations, 910.
- Act of March 1, 1907, ch. 2285, 911.*
Sec. 1. Admission of White Children to Indian Schools — Tuition Fees — Deposit of Fees, 911.
- Act of April 30, 1908, ch. 153, 911.*
Sec. 1. Appropriations — Expenditure of — Limitation per Capita, 911.
- Act of March 3, 1911, ch. 210, 912.*
Sec. 1. Report of Expenditures at Schools, etc., 912.
Reports of Expenditures for Agricultural Experiments, 912.
- Act of Aug. 24, 1912, ch. 388, 912.*
Sec. 1. Educational Leaves to Employees of Indian Schools, 912.
- Act of June 30, 1913, ch. 4, 912.*
Sec. 18. Osage Indians — Payments to Be Withheld If Children Not Placed in School, 912.

IX. Traffic in Intoxicating Liquors, 913.

- R. S. 2139.** *Penalty for Selling Intoxicating Liquors in Indian Country — Complaints, Where and How Made, 913.*
- R. S. 2140.** *Power of Superintendents, etc., to Search for Concealed Liquors, 915.*
- R. S. 2141.** *Penalty for Setting Up Distillery in Indian Country, 917.*
- Act of July 4, 1884, ch. 180, 917.*
Sec. 1. Persons in Army Prohibited from Furnishing Liquors, etc., 917.
- Act of March 1, 1895, ch. 145, 917.*
Sec. 8. Punishment for Sale, etc., of Liquors, 917.
- Act of Jan. 30, 1897, ch. 109, 919.*
Sec. 1. Sale, etc., of Intoxicating Liquors Further Prohibited — Commitment on Conviction, 919.
2. Inconsistent Provisions Repealed, 923.
- Act of March 1, 1907, ch. 2285, 923.*
Sec. 1. Suppression of Liquor Traffic — Powers of Officers, 923.
- Act of Aug. 24, 1912, ch. 388, 923.*
Sec. 1. Sacramental Wines in Indian Country — Powers of Officers, 923.

CROSS-REFERENCES

In Alaska, see ALASKA.

Indian Depredations, see CLAIMS.

Offenses by, see PENAL LAWS.

Opening of Reservations to Homestead Entries, see PUBLIC LANDS.

School Lands in Opened Reservations, see PUBLIC LANDS.

I. COMMISSIONER OF INDIAN AFFAIRS

Sec. 462. [Commissioner of Indian Affairs.] There shall be in the Department of the Interior a Commissioner of Indian Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be entitled to a salary of three thousand dollars a year. [R. S.]

Act of July 9, 1832, ch. 174, 4 Stat. L. 564.

Sections 462 to 469 constitute chapter 4 of title XI of the Revised Statutes, "The Commissioner of Indian Affairs."

The salary of the commissioner has been increased from time to time. Five thousand dollars was appropriated for this purpose by the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1031.

An assistant commissioner was authorized by a provision of the Act of July 16, 1914, ch. 141, § 1, *infra*, p. 751.

This section is cited generally in U. S. *v. Brindle*, (1884) 110 U. S. 688, 4 S. Ct. 180, 28 U. S. (L. ed.) 286.

Sec. 463. [Duties of Commissioner.] The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations. [R. S.]

Act of July 9, 1832, ch. 174, 4 Stat. L. 564; Act of July 27, 1868, ch. 259, 15 Stat. L. 228.

The object of the establishment of the office of commissioner of Indian affairs was to create an administrative agency with broad powers adequate to the execution of the policy of the government, as determined by the Acts of Congress, with respect to the Indians under its guardianship. U. S. *v. Birdsall*, (1914) 233 U. S. 223, 34 S. Ct. 512, 58 U. S. (L. ed.) 930.

The commissioner, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, has the management of Indian affairs, and of all matters arising out of Indian relations. U. S. *v. Brindle*, (1884) 110 U. S. 688, 4 S. Ct. 180, 28 U. S. (L. ed.) 286.

Action of the President.—The action of the commissioner of Indian affairs must be presumed to be the action of the President. *Belt v. U. S.*, (1879) 15 Ct. Cl. 92.

Power of Secretary of Interior.—It seems that the Secretary of the Interior has power, under this section, to supervise and control the management of the bureau of Indian affairs. *Knight v. U. S. Land Assn.*, (1891) 142 U. S. 161, 12 S. Ct. 258, 35 U. S. (L. ed.) 974.

The general language of the statutes makes it plain that the authority conferred upon the commissioner of Indian affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary

of the Interior, to manage all Indian affairs and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage. *Rainbow v. Young*, (C. C. A. 8th Cir. 1908) 161 Fed. 835, 88 C. C. A. 653.

The commissioner may exclude collectors from Indian agencies at times when payments are being made to the Indians. This authority extends to the exclusion of all persons whose presence may be detrimental to the peace and welfare of the Indians. *Rainbow v. Young*, (C. C. A. 8th Cir. 1908) 161 Fed. 835, 88 C. C. A. 653.

Power of sub-Indian agent.—A sub-Indian agent has no authority to draw bills of exchange, or drafts upon the Secretary of the Interior so as to charge the United States. *Jackson's Case*, (1865) 1 Ct. Cl. 260, *followed in* *Fremont's, etc., Case*, (1866) 2 Ct. Cl. 461.

But where the sub-agent gives notice in advance of the course that he will pursue and it is approved by the commissioner of Indian affairs, such approval operates as a complete ratification and renders his acts binding as though he had possessed original authority. *Belt's Case*, (1879) 15 Ct. Cl. 92.

Signature to order.—An order directing advertisements for proposals for supplies

may be said to come from the Secretary of the Interior, as the head of the department, when signed by the commissioner of Indian affairs alone. *U. S. v. Odeneal*, (1882) 10 Fed. 616.

Regulations regarding adoption into Indian tribe.—A regulation of the Department of the Interior, that the adoption of a person into an Indian tribe must be approved by the Indian office to be valid, can hardly be said to be beyond the power of that department to adopt, in view of the provision of this section that the "Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations." *U. S. v. Hitchcock*, (1907) 205 U. S. 80, 27 S. Ct. 423, 51 U. S. (L. ed.) 718, *affirming* (1905) 26 App. Cas. (D. C.) 290.

Rules and regulations of the Indian Department.—The courts will take judicial notice of the rules and regulations of the Indian Department. Promulgated by authority of law, they have the force and effect of statutes. *Bridgeman v. U. S.*, (C. C. A. 9th Cir. 1905) 140 Fed. 577, 72 C. C. A. 145.

Establishing court of Indian offenses.—Under the general power conferred by this section and R. S. sec. 465 (*infra*, p. 748), and the treaty of 1855, whereby the Umatilla Indians engaged to submit to rules prescribed by the United States for their government, the President is authorized to establish an Indian court and police force for such tribe and define and prescribe the punishment for Indian offenses. Such power may be exercised through the Secretary of the Interior, who is charged with the supervision of the public business relating to the Indians. *U. S. v. Clapox*, (1888) 35 Fed. 577.

Punishment of Indians.—Though the Indians are the wards of the United States, acting through executive officers

pursuant to regulations promulgated under the authority of the President, pursuant to this section and R. S. sec. 465 (*infra*, p. 748), yet in the absence of such regulations defining what conduct of Indians shall be deemed reprehensible and subject them to correction, it does not rest in executive discretion to administer corrective punishment as to members of a tribe having a treaty with the United States covenanting that bad Indians shall not be punished by the United States except pursuant to laws defining their offenses and prescribing the punishments therefor. *In re By-A-Lil-Le*, (1909) 12 Ariz. 150, 100 Pac. 450.

An attempt of the Secretary of War to establish an Indian reservation would be futile, as such action would by virtue of this section be a plain encroachment of the prerogative of another department of the government. *Northern Pac. R. Co. v. Mitchell*, (E. D. Wash. 1913) 208 Fed. 469.

This section is quoted in *Leecy v. U. S.*, (C. C. A. 8th Cir. 1911) 190 Fed. 289, 111 C. C. A. 254, wherein it was held that the section conferred no authority upon the Secretary of the Interior to withdraw certain lands in question from allotment.

Act of July 9, 1832.—Under the Act of 1832, from which this section was in part drawn, the commissioner was under the direction of the Secretary of War. Regulations made by the President were made through the War Department, and a rule of the Secretary of War was presumed to have received the assent of the President and to be his regulation. (1848) 5 Op. Atty-Gen. 36.

Act of July 27, 1868.—The Act of 1868, from which this section was in part drawn, transferred the case of the Indians from the Treasury Department to that of the Interior. *U. S. v. Boyd*, (1895) 68 Fed. 577.

Regulation of traffic in intoxicating liquors.—See the notes under section 2139, *infra*, p. 913.

Sec. 464. [Accounts for claims and disbursements.] All accounts and vouchers for claims and disbursements connected with Indian affairs, shall be transmitted to the Commissioner for administrative examination, and by him passed to the proper accounting officer of the Department of the Treasury for settlement. [*R. S.*]

Act of July 9, 1832, ch. 174, 4 Stat. L. 564.

The accounts of a special receiver and superintendent appointed to assist the special commissioner in disposing of lands ceded by the Indians to the United States in trust, to survey, manage, and sell the same, relate to and are connected with Indian affairs and must be transmitted to the commissioner of Indian affairs for examination. *U. S. v. Brindle*, (1884) 110 U. S. 688, 4 S. Ct. 180, 28 U. S. (L. ed.) 286.

Claim for damages for breach of contract.—Under a similar provision in the Act of 1832, from which this section was drawn, the Attorney-General held that the commissioner had no jurisdiction of a claim for damages for breach of a contract with the government to emigrate Indians, occasioned by the interference of the officers of the government in such emigration. (1847) 4 Op. Atty-Gen. 626.

Administrative examination.—The ad-

ministrative examination of the claims of Indians for property taken in violation of treaty obligations rests in the first instance with the Interior Department. But the administrative examination by the

Secretary of the Interior in such cases is not conclusive upon the accounting officers. *Byrd v. U. S.*, (1909) 44 Ct. Cl. 498.

Sec. 465. [Regulations relating to Indian affairs.] The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 738.

Regulations to be consistent with existing statutes.—"The authority of the President to make regulations is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress, and must be in execution of, and supplementary to, but not in conflict with, the statutes." *Romero v. U. S.*, (1889) 24 Ct. Cl. 331, holding that regulations made by the President in regard to Indian agents cannot be construed to lengthen a term of office limited by the Constitution nor to give to one whose commission has expired by such limitation the salary of an office declared by the statutes to be in abeyance, because of the expiration of the term of the incumbent thereof.

Force of regulations.—Regulations when made have the force of statutory enactments. *U. S. v. Eaton*, (1892) 144 U. S. 677, 12 S. Ct. 764, 36 U. S. (L. ed.) 591; *Wilkins v. U. S.*, (C. C. A. 3d Cir. 1899) 96 Fed. 837, 37 C. C. A. 588; *U. S. v. Thurston County*, (C. C. A. 8th Cir. 1906) 143 Fed. 287, 74 C. C. A. 425.

And such regulations are obligatory on all the departments. (1848) 5 Op. Atty.-Gen. 36.

Payment of treaty money to Indians.—The payment of money due from the government to Indians, by force of treaty, falls within the reason and object of the power of regulation invested in the President. (1848) 5 Op. Atty.-Gen. 36.

Establishing reservation.—"The very

extensive powers given to the President by R. S. secs. 462-465 in the management of Indian affairs might well be held to include the power to establish a reservation, if there were no other acts in relation to the matter." *U. S. v. Leathers*, (1879) 6 Sawy. 17, 26 Fed. Cas. No. 15,581; (1882) 17 Op. Atty.-Gen. 260.

Rules to effectuate treaty.—A treaty with the Indians is an "act" or law "relating to Indian affairs," and under this section the President has power to prescribe a rule for carrying the same into effect and such power may be exercised through the proper instrumentality—the Secretary of the Interior. *U. S. v. Clapox*, (D. C. Ore. 1888) 35 Fed. 575.

Bond of Indian agents.—R. S. sec. 2057 (*infra*, p. 755) requires Indian agents "to give bonds in such penalties and with such security as the President or Secretary of the Interior may require." Under that section and the present R. S. sec. 465 the President and the Secretary of the Interior are given the authority to determine the character of the bond, both as to its penalty and the nature and condition of its obligation. *U. S. Fidelity, etc., Co. v. U. S.*, (C. C. A. 9th Cir. 1907) 150 Fed. 550, 80 C. C. A. 446.

Establishing court of Indian offenses.—See note to R. S. sec. 463, *supra*, p. 746.

Punishment of Indians.—See note to R. S. sec. 463, *supra*, p. 746.

Regulation of liquor traffic.—See the notes under R. S. sec. 2139, *infra*, p. 913.

R. S. sec. 466. This section was as follows:

"SEC. 466. The Secretary of the Interior shall prepare and cause to be published such regulations as he may deem proper, prescribing the manner of presenting claims arising under laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims as may be presented, subject to the regulations prepared by him; and no payment on account of any such claims shall be made without a specific appropriation therefor by Congress." Act of May 29, 1872, ch. 233, 17 Stat. L. 190.

It was superseded by the Act of March 3, 1891, ch. 583, 26 Stat. L. 851, given under the title CLAIMS, vol. 2, p. 229.

The following cases construed R. S. sec. 466, and similar prior statutes: *Leighton v. U. S.*, (1896) 161 U. S. 291, 16 S. Ct. 495, 40 U. S. (L. ed.) 703; *Corralitos Co. v. U. S.*, (1900) 178 U. S. 280, 20 S. Ct. 941, 44 U. S. (L. ed.) 1069; *Nesbitt v. U. S.*, (1902) 186 U. S. 153, 22 S. Ct. 805,

46 U. S. (L. ed.) 1100; *Leighton v. U. S.*, (1894) 29 Ct. Cl. 288; *Love v. U. S.*, (1894) 29 Ct. Cl. 332; *Stone v. U. S.*, (1894) 29 Ct. Cl. 111; *Hegwer v. U. S.*, (1865) 30 Ct. Cl. 405; *Brown v. U. S.*, (1897) 32 Ct. Cl. 432; *Ayres v. U. S.*, (1899) 35 Ct. Cl. 26.

R. S. sec. 467, relating to the sale of arms, etc., to Indians, is given *infra*, p. 808.
R. S. secs. 468, 469, relating to reports of the commissioner, were repealed by the Act of June 25, 1910, ch. 431, § 19, 36 Stat. L. 860, and are noted *infra*, p. 768.

SEC. 7. [Statutes, etc., to be furnished to agents, etc., by Commissioner.] That it shall be the duty of the Commissioner of Indian Affairs to cause to be compiled and printed for the use of Indian Agents and inspectors the provisions of the statutes regulating the performance of their respective duties, and also to furnish said officers from time to time information of new enactments upon the same subject. [22 Stat. L. 88.]

The above section 7 is from the Indian Appropriation Act of May 17, 1882, ch. 163.

An act to legalize the deed and other records of the Office of Indian Affairs, and to provide and authorize the use of a seal by said office.

[Act of July 26, 1892, ch. 256, 27 Stat. L. 272.]

SEC. 1. [Recording of deeds, etc., legalized.] That the recording of all deeds and papers heretofore made and done in the office of the Commissioner of Indian Affairs be, and is hereby, confirmed, approved, and legalized; and said record heretofore made shall be deemed, taken, and held to be good and valid and shall have all the force and effect and be entitled to the same credit as if it had been made in pursuance of and in conformity to law. But shall have no effect whatever upon the validity or invalidity of the deed or paper so recorded, and shall be no evidence of constructive notice to any persons not actually knowing the contents. [27 Stat. L. 272.]

The deed records legalized by this Act begin in 1825. These deeds show the transfer of lands granted to individual Indians under the several treaties since 1817 whenever a restriction was made that the lands should not be sold without the consent of the President; also the transfer of those lands allotted to individual Indians, the patent for which contained a similar restrictive clause upon the sale of the land. The other records referred to are of the current correspondence of the office, of treaties before ratification, of contracts made with special attorneys (R. S. secs. 2103-2106), and of similar papers. Some of these records run back to 1800 and a few even prior to that date, when the office was under the War Department, but it was not until the year 1824 that a regular record of all the correspondence of the office was inaugurated and kept up. *Compilers' note 2 Supp. R. S. 51.*

SEC. 2. [Records to be kept of all deeds by Indians requiring approval.] That the Commissioner of Indian Affairs is hereby empowered and directed to continue to make and keep a record of every deed executed by any Indian, his heirs, representatives, or assigns, which may require the approval of the President of the United States or of the Secretary of the Interior, whenever such approval shall have been given, and the deed so approved returned to said office. [27 Stat. L. 273.]

SEC. 3. [Seal for Indian Office — copies, how certified — evidence.] That the Commissioner of Indian Affairs shall cause a seal to be made and provided for the said office, with such device as the President of the United

States shall approve, and copies of any public documents, records, books, maps, or papers belonging to or on the files of said office, authenticated by the seal and certified by the Commissioner thereof, or by such officer as may, for the time being, be acting as or for such Commissioner, shall be evidence equally with the originals thereof. [27 Stat. L. 273.]

Copies of department records are made legal evidence by R. S. sec. 882, given under the title EVIDENCE.

A seal is essential to make copies admissible in evidence. Newsom v. Langford, (Tex. Civ. App. 1915) 174 S. W. 1036.

SEC. 4. [Certified copies of records to be furnished — fees.] That the Commissioner of Indian Affairs shall have the custody of said seal, and shall furnish certified copies of any such records, books, maps, or papers belonging to or on the files of said office, to any person applying therefor who shall comply with the requirements of said office, upon the payment by such parties at the rate of ten cents per hundred words, and one dollar for copies of maps or plats, and the additional sum of twenty-five cents for the Commissioner's certificate of verification, with the seal of said office; and one of the employes of said office shall be designated by the Commissioner as the receiving clerk, who shall give bond in the sum of one thousand dollars, and the amounts so received shall, under the direction of the Commissioner, be paid into the Treasury of the United States; but fees shall not be demanded for such authenticated copies as may be required by the officers of any branch of the Government or by any Indian who shall satisfy the Commissioner by satisfactory legal evidence that he or she is not able, by reason of poverty, to pay such fees, nor for such unverified copies as the Commissioner in his discretion may deem proper to furnish. [27 Stat. L. 273.]

[SEC. 1.] [Private Secretary to Commissioner.] * * * For salary of private secretary, now appropriated for as confidential clerk in office of Commissioner of Indian Affairs at the rate of one thousand eight hundred dollars per annum. [34 Stat. L. 36.]

This is from the Urgent Deficiencies Appropriation Act of Feb. 27, 1906, ch. 510. A like appropriation was made by the Act of March 4, 1915, ch. 141, 38 Stat. L. 1031.

[SEC. 1.] [Agent to negotiate with Indians.] * * * That the Commissioner of Indian Affairs is hereby authorized to send a special Indian agent, or other representative of his office, to visit any Indian tribe for the purpose of negotiating and entering into a written agreement with such tribe for the commutation of the perpetual annuities due under treaty stipulations, to be subject to the approval of Congress; and the Commissioner of Indian Affairs shall transmit to Congress said agreements with such recommendations as he may deem proper. [35 Stat. L. 72.]

This is from the Indian Appropriation Act of April 30, 1908, ch. 153.

[SEC. 1.] **[Designation by Commissioner of employee to sign letters.]** That hereafter the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may designate an employee of the Indian Office to sign letters of that office requiring the signature of the commissioner or assistant commissioner, and all signatures of such employee while acting under such designation shall have the same force and effect as if made by said commissioner or assistant commissioner. [35 Stat. L. 783.]

This is from the Indian Appropriation Act of March 3, 1909, ch. 263.

SEC. 17. **[Employee to sign approval of Secretary of Interior to tribal deeds, etc.]** * * * That the Secretary of the Interior be, and he is hereby, authorized to designate an employee or employees of the Department of the Interior to sign, under the direction of the Secretary, in his name and for him, his approval of tribal deeds to allottees, to purchasers of town lots, to purchasers of unallotted lands, to persons, corporations, or organizations for lands reserved to them under the law for their use and benefit, and to any tribal deeds made and executed according to law for any of the Five Civilized Tribes of Indians in Oklahoma. [36 Stat. L. 1069.]

This is from the Indian Appropriation Act of March 3, 1911, ch. 210. Provisions somewhat similar were made by the Act of Feb. 25, 1903, ch. 755, § 1, 32 Stat. L. 891.

[SEC. 1.] **[Assistant Commissioner of Indian Affairs.]** * * * INDIAN OFFICE: * * * ; assistant commissioner, \$3,500; second assistant commissioner who shall also perform the duties of chief clerk, \$2,750. [38 Stat. L. 490.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 16, 1914, ch. 141.

Provisions somewhat similar appear annually.

The Act of March 4, 1915, ch. 141, 38 Stat. L. 1031, provides for an assistant commissioner, a chief clerk, and various other employees.

II. OFFICERS OF INDIAN AFFAIRS—THEIR DUTIES AND COMPENSATION

Sec. 2039. **[Board of Indian commissioners.]** There shall be a board of Indian commissioners, composed of not more than ten persons, appointed by the President solely, from men eminent for intelligence and philanthropy, and who shall serve without pecuniary compensation. [R. S.]

Act of April 10, 1869, ch. 16, 16 Stat. L. 40; Act of July 15, 1870, ch. 296, 16 Stat. L. 360.

Sections 2039 to 2157 of the Revised Statutes constitute title XXVIII, "Indians," Sections 2039 to 2078 of this title constitute chapter 1, "Officers of Indian affairs; their duties and compensation."

Act of April 10, 1869.—The Act of 1869, above noted, appropriated two million dollars to enable the President to maintain peace among the Indian tribes,

to promote their civilization, to relieve their necessities, and to bring them upon reservations. In order to enable the President to execute the powers thus conferred, he was authorized to appoint a

board of commissioners, who might, under his direction, exercise joint control with the Secretary of the Interior over the disbursement of such appropriation. *Ryan v. U. S.*, (1872) 8 Ct. Cl. 265.

R. S. sec. 2040. This section was as follows:

"Sec. 2040. The board of commissioners mentioned in the preceding section shall have power to appoint one of their own number as secretary, who shall be entitled to such reasonable compensation as the board may designate, payable from any moneys appropriated for the expenses of the board."

Act of July 15, 1870, ch. 296, 16 Stat. L. 360.

It was superseded by the Act of Aug. 24, 1912, ch. 388, § 1, *infra*, p. 768, relating to the employment of a secretary.

R. S. sec. 2041. This section was as follows:

"Sec. 2041. The board of commissioners mentioned in section two thousand and thirty-nine shall supervise all expenditures of money appropriated for the benefit of Indians within the limits of the United States; and shall inspect all goods purchased for Indians, in connection with the Commissioner of Indian Affairs, whose duty it shall be to consult the commission in making purchases of such goods." Act of July 15, 1870, ch. 296, 16 Stat. L. 360.

It was superseded by the Act of May 17, 1882, ch. 163, § 1, *infra*, p. 762.

Sec. 2042. [Investigation of contracts.] Any member of the board of Indian commissioners is empowered to investigate all contracts, expenditures, and accounts in connection with the Indian service, and shall have access to all books and papers relating thereto in any Government office; but the examination of vouchers and accounts by the executive committee of said board shall not be a prerequisite of payment. [*R. S.*]

Act of May 29, 1872, ch. 233, 17 Stat. L. 186.

Sec. 2043. [Appointment of Indian inspectors; term of office.] There shall be appointed by the President, by and with the advice and consent of the Senate, a sufficient number of Indian inspectors, not exceeding five in number, to perform the duties required of such inspectors by the provisions of this Title. Each inspector shall hold his office for four years, unless sooner removed by the President. [*R. S.*]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 463.

The number of inspectors was reduced to three by the Act of March 3, 1875, ch. 132, *infra*, p. 761.

Other provisions relating to inspectors were made by the Act of March 3, 1905, ch. 1479, § 1, *infra*, p. 765, and the Act of March 4, 1909, ch. 297, § 1, *infra*, p. 767.

A provision of the Act of June 28, 1898, ch. 517, § 27, 30 Stat. L. 504, authorizing the location of an inspector in the Indian Territory, together with an Act of May 27, 1902, ch. 888, 32 Stat. L. 247, fixing the compensation of said inspector, were superseded by the admission of the Indian Territory as a part of the state of Oklahoma, pursuant to an Act of June 16, 1906, ch. 3335, 34 Stat. L. 267.

Sec. 2044. [Salary and expenses.] Each inspector shall receive an annual salary of three thousand dollars and his necessary traveling expenses, not exceeding ten cents a mile for actual travel while in the discharge of his duty, a statement of which expenses as to each inspector shall accompany the annual report of the Secretary of the Interior. [*R. S.*]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 463.

See the notes to the preceding R. S. sec. 2043.

Sec. 2045. [Powers and duties of inspectors.] Each Indian superintendency and agency shall be visited and examined as often as twice a year by one or more of the inspectors. Such examination shall extend to a full

investigation of all matters pertaining to the business of the superintendency or agency, including an examination of accounts, the manner of expending money, the number of Indians provided for, contracts of all kinds connected with the business, the condition of the Indians, their advancement in civilization, the extent of the reservations, and what use is made of the lands set apart for that purpose, and, generally, all matters pertaining to the Indian service. For the purpose of making such investigations, each inspector shall have power to examine all books, papers, and vouchers, to administer oaths, and to examine on oath all officers and persons employed in the superintendency or agency, and all such other persons as he may deem necessary or proper. The inspectors, or any of them, shall have power to suspend any superintendent or agent or employé, and to designate some person in his place temporarily, subject to the approval of the President, making immediate report of such suspension and designation; and upon the conclusion of each examination a report shall be forwarded to the President without delay. The inspectors, in the discharge of their duties, jointly and individually, shall have power, by proper legal proceedings, which it shall be the duty of the district attorney of the United States for the appropriate district duly to effectuate, to enforce the laws, and to prevent the violation of law in the administration of affairs in the several agencies and superintendencies. So far as practicable, the examinations of the agencies and superintendencies shall be made alternately by different inspectors, so that the same agency or superintendency may not be examined twice in succession by the same inspector or inspectors. [R. S.]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 463.

The provisions of this section requiring visits twice each year were repealed by the Act of March 3, 1875, ch. 132, *infra*, p. 761.

The provisions relating to the superintendencies have become superseded by the failure to provide for such superintendencies, as indicated in the notes to R. S. secs. 2046-2051 noted as superseded *infra*, this page.

Additional inspectors whose appointment is authorized only by the appropriation of money to pay their salaries are subject to the provisions of this section. *Smith v. U. S.*, (1902) 37 Ct. Cl. 119.

Suspension of agent while Senate in session.—The suspension of an agent, under this section, and the designation of a person to fill the place temporarily, subject to the approval of the President, may take place while the Senate is in session. (1877) 15 Op. Atty.-Gen. 405.

Bond given by inspector.—The general functions and duties of Indian inspectors are defined in the above section. These do

not include specifically the disbursement of public money, and those officers are not required by statute to give bond. Yet the Secretary of the Interior may lawfully assign to inspectors other duties relating to Indian affairs, and where the particular duty so assigned involves the receipt or disbursement of public money or the custody of public property, the secretary may take a bond for the protection of the United States against loss, and such bond will be valid and binding upon both principal and sureties, if voluntarily given by the officer. (1882) 17 Op. Atty.-Gen. 391.

R. S. secs. 2046-2051 provided for the appointment, compensation, etc., of Indian superintendents, their terms, duties, and employees.

The provisions of said R. S. secs. 2046, 2047, 2048, 2049, 2050, and 2051 were discontinued by the President under authority vested in him by section 6 of the Act of Feb. 14, 1873, ch. 138, § 6, 17 Stat. L. 463, incorporated in R. S. sec. 2047. Senate Document No. 452 on "Indian Affairs," 57th Congress, 1st session, vol. 1, p. 5, note.

By an Act of Aug. 1, 1914, ch. 221, § 17, *infra*, p. 769, there was authorized a superintendent for the five civilized tribes.

The Act of Feb. 18, 1873, 17 Stat. L. 463, from which R. S. sec. 2047 was drawn, was

construed in *U. S. v. Wirt*, (1874). 8 Sawy. 161, 28 Fed. Cas. No. 16,745.

Sec. 2052. [Indian agents — appointments, salaries.] The President is authorized to appoint from time to time, by and with the advice and consent of the Senate, the following Indian agents: * * * [R. S.]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 437.

A provision of this section following the word "agents" and omitted here provided for the number and compensation of the agents for the various tribes. It has long been superseded by the sundry Appropriation Acts which provide for varying numbers of agents and determine their salaries.

Sec. 2053. [Services of certain agents and superintendents to be dispensed with.] It shall be the duty of the President to dispense with the services of such Indian agents and superintendents as may be practicable; and where it is practicable he shall require the same person to perform the duties of two agencies or superintendencies for one salary. [R. S.]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 437.

As to superintendents see *supra*, p. 753.

Dispensing with services while Senate in session.—The power of the President, under this section, to dispense with the services of any agent, is not suspended during a session of the Senate, and the

duties of such agent may be devolved upon another agent or upon a military officer under R. S. sec. 2062, noted *infra*, p. 757. (1877) 15 Op. Atty-Gen. 405.

R. S. sec. 2054. This section was as follows:

"SEC. 2054. Whenever any one or more of the superintendencies is abolished by law, or discontinued by the President, the Indian agents in such superintendencies shall report directly to the Commissioner of Indian affairs."

Act of July 15, 1870, ch. 296, 16 Stat. L. 360.

It was rendered obsolete by the abolition of superintendencies. See the notes to R. S. secs. 2046-2051, noted *supra*, p. 753.

Sec. 2055. [Indian agents — salary.] Each Indian agent shall be entitled to receive a salary at the rate of fifteen hundred dollars a year except as herein otherwise provided for. [R. S.]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 438.

R. S. sec. 2055, as originally enacted, was amended to read as above by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244, which added the concluding words "except as herein otherwise provided for."

The compensation of Indian agents depends on the various Appropriation Acts.

Salary of Indian agent.—Congress in every subsequent annual Appropriation Act made provision for the pay of Indian agents without regard, apparently, to the general provisions of the Revised Statutes. The course of legislation in these several Appropriation Acts shows that it

was the settled purpose of Congress to regulate the Indian agency service according to the exigencies of each year. *Belknap v. U. S.*, (1889) 24 Ct. Cl. 433, *affirmed* (1893) 150 U. S. 588, 14 S. Ct. 183, 37 U. S. (L. ed.) 1191.

Sec. 2056. [Term of office.] Each Indian agent shall hold his office for the term of four years and until his successor is duly appointed and qualified. [R. S.]

Act of Feb. 27, 1851, ch. 14, 9 Stat. L. 587; Act of April 8, 1864, ch. 48, 13 Stat. L. 40.

R. S. sec. 2056 as originally enacted was amended "so as to read as" above by the Indian Appropriation Act of May 17, 1882, ch. 163, 22 Stat. L. 87, which added the concluding words, "and until his successor is duly appointed and qualified."

Before the amendment of 1882, above noted, Indian agents appointed for four years were never treated or regarded by the Interior Department as holding over

after the expiration of the stated term. *Romero v. U. S.*, (1889) 24 Ct. Cl. 331.

Agent appointed during recess of Senate.—The above section has no application

to an Indian agent appointed during a recess of the Senate, whose term expires with the end of the next session of the

Senate, unless the appointment is confirmed. *Romero v. U. S.*, (1889) 24 Ct. Cl. 331.

Sec. 2057. [Bond of Indian agents.] Each Indian agent, before entering upon the duties of his office, shall give bond in such penalties and with such security as the President or the Secretary of the Interior may require. [R. S.]

Act of Feb. 27, 1851, ch. 14, § 9 Stat. L. 587.

By an Act of March 3, 1875, ch. 132, § 1, 18 Stat. L. 451, it was provided as follows: "Sec. 10. That hereafter the security or securities, upon the bond required by the Act of February twenty-seventh, eighteen hundred and fifty-one, to be given by each Indian agent before entering upon the duties of his office, shall file a sworn statement with the Secretary of the Interior, setting forth the nature and kind of property owned by such security or securities, the value of the same, and where situated; and that no money appropriated by this Act shall be paid to any Indian agent hereafter appointed until the security or securities shall have filed such statement."

The Act of Feb. 27, 1851, to which this section referred was incorporated into R. S. sec. 2057 given in the text.

The entire section of which the foregoing section 10 was a part was amended by an Act of March 3, 1909, ch. 263, 35 Stat. L. 784, *infra*, p. 761, to read as there given, and the provisions of the original section 10 here noted were omitted.

By an Act of April 30, 1908, ch. 153, § 1, 35 Stat. L. 75, a provision was made as follows: "That hereafter the expense of procuring the official bond of any agent, superintendent, or other disbursing officer of the Indian Service shall be paid by the United States."

However the Act of Aug. 5, 1909, ch. 5, 36 Stat. L. 125, provided that "hereafter the United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States."

Former statute fixed penalty and conditions.—The Act of June 30, 1834, ch. 162, 4 Stat. L. 735, fixed the penalty and conditions of the bonds of agents, and a bond containing conditions other than those prescribed was void. *U. S. v. Humason*, (1879) 6 Sawy. 199, 26 Fed. Cas. No. 15,421.

But a bond might be required in a larger penalty than the statute provided for, under section 8 of the same Act, now R. S. sec. 2075, *infra*, p. 759. *U. S. v. Humason*, (1879) 5 Sawy. 537, 26 Fed. Cas. No. 15,420.

Conditions of bond.—That the bond required from and given by an Indian agent contains provisions not required by any statutory provision does not affect its validity, where its conditions are not in violation of law, and it is entered into voluntarily by both principal and surety. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 150 Fed. 550, 80 C. C. A. 446.

Criminal prosecution as bar to civil action.—The conviction and imprisonment of an Indian agent for malfeasance in office is not a bar to a subsequent suit by the United States, on his bond to recover the amount of public money misappropriated or unaccounted for by him. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 150 Fed. 550, 80 C. C. A. 446.

Action on bond.—In an action on an Indian agent's bond, a transcript of the books and proceedings of the Treasury

Department is admissible, though it contains some items of credit or debit concerning which it is not competent evidence. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390.

It is not, however, evidence of the receipt by the agent of moneys that did not come to his hands through the ordinary channels of the department. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390.

Where, in an action on the bond of an Indian agent, the transcript of the books and proceedings in the Treasury Department contained a debit and credit statement of the account and a showing of the items in dispute, it was held not objectionable because it also contained explanatory memoranda showing the grounds of the rulings of the accounting officers concerning the items rejected, and, in some instances, the evidence on which they relied. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390.

In an action on a bond of a United States Indian agent, a transcript from the books and proceedings of the Treasury Department is not conclusive of the claims of the government; the court being authorized to allow disallowed items on facts either appearing on the face of the transcript or established by extraneous evidence. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390.

Sec. 2058. [Duties of Indian agents.] Each Indian agent shall, within his agency, manage and superintend the intercourse with the Indians, agreeably to law; and execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the President, the Secretary of the Interior, the Commissioner of Indian Affairs, or the superintendent of Indian affairs. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 736; Act of June 5, 1850, ch. 16, 9 Stat. L. 736; Act of Feb. 27, 1851, ch. 14, 9 Stat. L. 587.

Superintendencies have been abolished. See the notes to R. S. secs. 2046-2051 noted *supra*, p. 753.

Nature of duties.—"Many of the services required of an agent are of a higher order than the mere custody of property . . . and in some cases they are delicate and confidential." *Romero v. U. S.*, (1889) 24 Ct. Cl. 331.

In *Farrell v. U. S.*, (1901) 110 Fed. 942, it was said that the regulations above referred to in R. S. sec. 2058, "require the agents to use their utmost vigilance in enforcing the penalties of the law against all persons who engage in the traffic in intoxicating liquors with the Indians, and to instruct and encourage those to whom allotments have been made to cultivate their farms."

Agent must execute order of commissioner.—An order of the commissioner of Indian affairs, directing an agent to have certain services performed, must be executed by such agent under the above section, and the sureties upon the agent's bond cannot be held liable for the amount paid by him for the performance of such services. *U. S. v. Stowe*, (1884) 19 Fed. 807.

Disbursement of funds.—This section

clearly authorizes the President to devolve the duty of disbursing the funds of the several agencies upon the agents thereof, it being discretionary with the President to require the superintendent of Indian affairs to make such disbursement under R. S. sec. 2089, *infra*, p. 773. (1875) 15 Op. Atty.-Gen. 66.

Where, because the members of one of two bands of Indians had committed certain depredations, the federal authorities withheld from them the greater portion of the annuity to which they would otherwise have been entitled, and the Indian agent was instructed to disburse to each member of the offending band \$1.93, and to each of the other bands \$11.20, it was held that such agent had no authority to divide all of the money equally between the members of both bands, because of their threatening attitude, with the consent of the members of the unoffending band, and that his act in so doing rendered him and his sureties liable as for a diversion of the funds. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, 76 C. C. A. 390.

Sec. 2059. [Discontinuance and transfer of agencies.] The President shall, whenever he may judge it expedient, discontinue any Indian agency, or transfer the same, from the place or tribe designated by law, to such other place or tribe as the public service may require. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 735.

The consolidation and abolition of agencies was authorized by the Act of July 4, 1884, ch. 180, § 6, *infra*, p. 762.

Action of President while Senate in session.—The power of the President, under this section, to discontinue or transfer any Indian agency, is not suspended during a session of the Senate, and the transfer may be to the vicinity of a mili-

tary post, should it be contemplated to require a military officer to perform the duties of agent, under R. S. sec. 2062, noted *infra*, p. 757. (1877) 15 Op. Atty.-Gen. 405.

Sec. 2060. [Residence of Indian agents.] Every Indian agent shall reside and keep his agency within or near the territory of the tribe for which he may be agent, and at such place as the President may designate, and shall not depart from the limits of his agency without permission. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 735.

Sec. 2061. [Limitation on visits to Washington by agents for Indians in California.] All Indian agents appointed for California shall reside at their respective agencies, and shall in no case be permitted to visit the city of Washington except when ordered to do so by the Commissioner of Indian Affairs. The Commissioner shall report all cases of the violation of this section to the President, with the request that the agents offending be at once removed from office. [R. S.]

Act of April 8, 1864, ch. 48, 13 Stat. L. 41.

R. S. sec. 2062. This section was as follows:

"Sec. 2062. The President may require any military officer of the United States to execute the duties of an Indian agent; and when such duties are required of any military officer, he shall perform the same, without any other compensation than his actual traveling expenses."

Act of June 30, 1834, ch. 162, 4 Stat. L. 735-737.

It was superseded by the Act of July 1, 1898, ch. 545, § 1, *infra*, p. 764.

Officer detached for special service.—In *Minis v. U. S.*, (1841) 15 Pet. 423, 10 U. S. (L. ed.) 791, it was held that the Act of 1834, above cited, did not contemplate within its provisions the appointment of general Indian agents merely, but extended to a military officer who was detached for special services as an Indian agent.

Officer on active list designated as agent—This section must be understood as constituting an exception to R. S. sec. 1222 (title WAR DEPARTMENT AND MILITARY ESTABLISHMENT), declaring that no army officer on the active list shall hold any civil office, and it is clear that the President has the power to devolve upon an army officer on the active list the duties of an Indian agent, subject to the qualification of R. S. sec. 1224 (see WAR DEPARTMENT AND MILITARY ESTABLISHMENT), which provides that army officers shall not be employed as disbursing agents of the In-

dian department, where such employment requires them to be separated from their regiments or companies, or otherwise interferes with the performance of their military duties proper. (1875) 14 Op. Atty-Gen. 573.

Requirements while Senate in session.—The President may, during a session of the Senate, exercise the power conferred by this section. (1877) 15 Op. Atty-Gen. 405.

Traveling expenses.—A similar provision was found in sections 4 and 13 of the Act of June 30, 1834, above cited, in considering which the Attorney-General decided that in all cases where duties properly assignable to Indian agents were executed by military officers, under the order of the President, they were entitled to their actual traveling expenses, in spite of the provisions of the Act of 1835 limiting the compensation of officers of the army. (1835) 2 Op. Atty-Gen. 701.

Sec. 2063. [Compensation for extra services performed by agents and sub-agents.] No compensation beyond their actual expenses for extra services shall be allowed any Indian agent or sub-agent for services when doing duty under the order of the Government, detached from their agency and the boundary of the tribe to which they are agents or sub-agents. [R. S.]

Act of May 31, 1832, ch. 109, 4 Stat. L. 520.

Sec. 2064. [Acknowledgment of deeds, etc., by agents.] Indian agents are authorized to take acknowledgments of deeds, and other instruments of writing, and to administer oaths in investigations committed to them in Indian country, pursuant to such rules and regulations as may be prescribed for that purpose, by the Secretary of the Interior; and acknowledgments so taken shall have the same effect as if taken before a justice of the peace. [R. S.]

Act of March 3, 1855, ch. 204, 10 Stat. L. 701.

Sec. 2065. [Appointment of Indian sub-agents.] A competent number of sub-Indian agents shall be appointed by the President, with a salary of one thousand dollars a year each, to be employed, and to reside wherever the President may direct, and who shall give bonds, with one or more sureties, in the penal sum of one thousand dollars, for the faithful execution of their duties. But no sub-agent shall be appointed who shall reside within the limits of any agency where there is an agent appointed. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 736.

Sec. 2066. [Limits of superintendencies, agencies, and sub-agencies.] The limits of each superintendency, agency, and sub-agency shall be established by the Secretary of the Interior, either by tribes or geographical boundaries. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 736; Act of March 3, 1847, ch. 66, 9 Stat. L. 203.

Superintendencies have been abolished by the President. See note to R. S. secs. 2046-2051 noted *supra*, p. 753.

Sec. 2067. [Special agents and commissioners.] All special agents and commissioners not appointed by the President shall be appointed by the Secretary of the Interior. [R. S.]

Act of March 3, 1863, ch. 99, 12 Stat. L. 792.

Sec. 2068. [Interpreters to the agencies.] An interpreter shall be allowed to each agency. Where there are different tribes in the same agency, speaking different languages, one interpreter may be allowed, at the discretion of the Secretary of the Interior, for each of such tribes. Interpreters shall be nominated, by the proper agents, to the Department of the Interior for approval, and may be suspended by the agent from pay and duty, and the circumstances reported to the Department of the Interior for final action. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

By a provision of an Act of April 4, 1910, ch. 140, § 2, 36 Stat. L. 272, "no person employed by the United States and paid for any other service shall be paid for interpreting."

Sec. 2069. [Preference to Indians for interpreters.] In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

R. S. sec. 2070. This section was as follows:

"Sec. 2070. The salaries of interpreters lawfully employed in the service of the United States, in Oregon, Utah, and New Mexico, shall be five hundred dollars a year each, and of all so employed elsewhere, four hundred dollars a year each." Act of Feb. 27, 1851, ch. 14, 9 Stat. L. 587; Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 437.

It was repealed by an Act of May 17, 1882, ch. 163, 22 Stat. L. 70.

The number and compensation of the interpreters depends on the various annual Appropriation Acts.

See the note to R. S. sec. 2068, *supra*, this page.

The following cases construed section 2070: *Mitchell v. U. S.*, (1883) 18 Ct. Cl. 287; *U. S. v. Mitchell*, (1883) 109 U. S. 146, 3 S. Ct. 151, 27 U. S. (L. ed.) 887; *U. S. v. Langston*, (1886) 118 U. S. 389, 6 S. Ct. 1185, 30 U. S. (L. ed.) 164; *Collins v. State*, (1892) 3 S. D. 18, 51 N. W. 776.

R. S. secs. 2071 and 2072 are given *infra*, p. 905.

Sec. 2073. [Discontinuance of the offices of agents, interpreters, etc.] The Secretary of the Interior shall, under the direction of the President, cause to be discontinued the services of such agents, sub-agents, interpreters, and mechanics, as may from time to time become unnecessary, in consequence of the emigration of the Indians, or other causes. [R. S.]

Act of July 9, 1832, ch. 174, 4 Stat. L. 564.

R. S. sec. 2073, as originally enacted, was amended to read as above by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244, which inserted the word "agents" after the word "such," and substituted the word "emigration" for the word "immigration."

Sec. 2074. [No person to hold two offices—leave of absence.] No person shall hold more than one office at the same time under this Title, nor shall any agent, sub-agent, interpreter, or person employed under this Title, receive his salary while absent from his agency or employment, without leave of the superintendent, or Secretary of the Interior; but such absence shall at no time exceed sixty days. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

"This title," to which the above section refers, is R. S. title XXVIII, "Indians," which comprises sections 2039-2157, inclusive.

Superintendencies have been abolished. See the notes to R. S. secs. 2046-2051 noted *supra*, p. 753.

Indian agent as deputy marshal.—The above section does not prohibit a person from acting as Indian agent and a deputy marshal at the same time, as service of such deputy is not inconsistent with the

duties to be performed by Indian agents under R. S. secs. 2068 and 2064, *supra*, pp. 756, 757. (1892) 20 Op. Atty.-Gen. 494.

Sec. 2075. [Additional security.] The President may, from time to time, require additional security, and in larger amounts, from all persons charged or trusted, under the laws of the United States, with the disbursement or application of money, goods, or effects of any kind, on account of Indian affairs. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

As to bonds of Indian agents, see R. S. sec. 2057, *supra*, p. 755.

"Additional security" may be either a new or additional bond with the same or other sureties in the same or a greater amount. *U. S. v. Humason*, (1879) 5 Sawy. 537, 26 Fed. Cas. No. 15,420.

An Indian agent is a person "charged

or trusted" with the disbursement of public moneys within the language of the above section and may be required to give additional security. *U. S. v. Humason*, (1879) 5 Sawy. 537, 26 Fed. Cas. No. 15,420.

Sec. 2076. [Compensation prescribed to be in full.] The several compensations prescribed by this Title shall be in full of all emoluments or allowances whatsoever. But where necessary, a reasonable allowance or provision may be made for offices and office contingencies. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

As to "this Title" to which the section refers, see note to R. S. sec. 2074, *supra*, this page.

As to the compensation of interpreters, see the note to R. S. sec. 2068, *supra*, p. 758.

Compensation of interpreters.—In *U. S. v. Mitchell*, (1883) 109 U. S. 146, 3 S. Ct. 151, 27 U. S. (L. ed.) 887, it was held that, in the case of interpreters, Congress had evinced the purpose of superseding this section and R. S. sec. 2074, *supra*, p. 759, by passing subsequent Acts appropri-

ating a smaller sum than the one fixed as the salary of an interpreter and placing a further fund at the disposal of the Secretary of the Interior from which, at his discretion, additional emoluments and allowances might be given to the interpreters.

Sec. 2077. [Allowance for traveling expenses.] Where persons are required, in the performance of their duties, under this Title, to travel from one place to another, their actual expenses, or a reasonable sum in lieu thereof, may be allowed them, except that no allowance shall be made to any person for travel or expenses in coming to the seat of Government to settle his accounts, unless thereto required by the Secretary of the Interior. [*R. S.*]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

Appropriations for traveling and incidental expenses of Indian agents are made yearly. The current appropriations were made by the Act of Aug. 1, 1914, ch. 222, 38 Stat. L. 586.

Board while actually in transit.—Under this section and R. S. sec. 2078 following a special agent employed in inspecting various Indian agencies may be allowed his board while actually in transit from

one station to another, but not his living expenses while inspecting any particular station. *U. S. v. Smith*, (1888) 35 Fed. 490.

Sec. 2078. [Persons employed in Indian affairs not to trade with the Indians.] No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office. [*R. S.*]

Act of June 30, 1834, ch. 162, 4 Stat. L. 738.

See the following paragraph of the text.

Strictly construed.—This section being penal should be strictly construed. *U. S. v. Douglas*, (C. C. A. 8th Cir. 1911) 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

"Trade" as used in this section should be given its usual and ordinary meaning and includes the purchase, by a woman

industrial teacher employed by the government on an Indian reservation, of cattle furnished by the United States and issued to Indians. *U. S. v. Douglas*, (C. C. A. 8th Cir. 1911) 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

SEC. 10. [Employees, etc., of United States not to be interested in Indian contracts, etc.] That no agent or employee of the United States Government, or of any of the Departments thereof, while in the service of the Government, shall have any interest, directly or indirectly, contingent or absolute, near or remote, in any contract made, or under negotiation, with the Government, or with the Indians, for the purchase or transportation or delivery of goods or supplies for the Indians, or for the removal of the Indians; nor shall any such agent or employee collude with any person who may attempt to obtain any such contract for the purpose of enabling such person to obtain the same. The violation of any of the provisions of this section shall be a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, and by

removal from office; and, in addition thereto, the court shall, in its discretion, have the power to punish by imprisonment of not more than six months. [18 Stat. L. 177.]

This is from the Indian Appropriation Act of June 22, 1874, ch. 389.
See the preceding R. S. sec. 2078.

[SEC. 1.] [Number of inspectors.] * * * That after the commencement of the next fiscal year there shall be but three inspectors; [18 Stat. L. 422.]

This and the following text paragraph and section 10 following are from the Indian Appropriation Act of March 3, 1875, ch. 132.

Notwithstanding this provision the annual Appropriation Acts provide for varying numbers of inspectors. The current appropriation made by the Act of Aug. 1, 1914, ch. 222, 38 Stat. L. 586, was for six Indian service inspectors, exclusive of a chief inspector.

[Visit to and examination of agencies.] The provision of law requiring that each agency shall be visited and examined by one or more of the inspectors at least twice in each year is hereby repealed. [18 Stat. L. 422.]

See the note to the preceding paragraph of this section.
This provision repealed in part R. S. sec. 2045, *supra*, p. 752.

SEC. 10. [Book of expenditures — contents — false entries.] Each Indian agent shall keep a book of itemized expenditures of every kind, with a record of all contracts, together with the receipts of moneys from all sources, and the books thus kept shall always be open to inspection; and the said books shall remain in the office at the respective reservations, not to be removed from said reservation by said agent, but shall be safely kept and handed over to his successor and he shall report annually to the Commissioner of Indian Affairs all material on hand and not required for his use: *Provided*, That should any agent knowingly make any false entry in said books, or shall knowingly fail to keep a perfect entry in said books as herein prescribed, he shall be deemed guilty of a misdemeanor and, on conviction before any United States court having jurisdiction of such offense, shall be fined in a sum not less than five hundred nor more than one thousand dollars, at the discretion of the court, and shall be rendered incompetent to hold said office of Indian agent after conviction under said Act. [18 Stat. L. 457, as amended by 35 Stat. L. 784.]

See the note to the first paragraph of section 1 of this Act.

This section was amended to read as above given by an Act of March 3, 1909, ch. 263, 35 Stat. L. 784. As originally enacted it contained a provision relating to bonds set out in the note to R. S. sec. 2057, *supra*, p. 755, and a further provision as follows: " . . . Each Indian agent shall keep a book of itemized expenditures of every kind, with a record of all contracts, together with the receipts of money from all sources; and the books thus kept shall always be open to inspection; and the said books shall remain in the office at the respective reservations, not to be removed from said reservation by said agent, but shall be safely kept and handed over to his successor; and true transcripts of all entries of every character in said books shall be forwarded quarterly by each agent to the Commissioner of Indian Affairs: *Provided*, That should any agent knowingly make any false entry in said books, or in the transcripts directed to be forwarded to the Commissioner of Indian Affairs, or shall knowingly fail to keep a perfect entry in said books as herein prescribed, he shall be deemed guilty of a misdemeanor, and, on conviction before any United States court having jurisdiction of such offense, shall be fined in a sum not less than five hundred nor more than one

thousand dollars, at the discretion of the court, and shall be rendered incompetent to hold said office of Indian agent after conviction under this Act." [18 Stat. L. 451.]

Said Act of March 3, 1875, ch. 132, contained also as a part of section 5 thereof, the following provision: "Indian agents shall be required to state, under oath, upon rendering their quarterly accounts, that the employees claimed for were actually and bona fide employed at such agency, and at the compensation as claimed, and that such service was necessary; and that such agent is not to receive, and has not received, directly or indirectly, any part of the compensation claimed for any other employee: *Provided*, That when there is no officer authorized to administer oaths within convenient distance of such agent, the Secretary of the Interior may direct such returns to be made upon certificate of the agent;" [18 Stat. L. 449.]

SEC. 4. [Form of estimates for Indian appropriations.] That hereafter the estimates for appropriations for the Indian service shall be presented in such form as to show the amounts required for each of the agencies in the several States or Territories, and for said States and Territories respectively. [19 Stat. L. 200.]

This and the following paragraph are from the Indian Appropriation Act of May 17, 1882, ch. 163. The form of annual reports was prescribed by the Act of June 30, 1913, ch. 4, § 26, *infra*, p. 768. And see the notes thereto.

[SEC. 1.] [Powers and duties of Indian commissioners.] * * *

And hereafter the commission shall only have power to visit and inspect agencies and other branches of the Indian service, and to inspect goods purchased for said service, and the Commissioner of Indian Affairs shall consult with the commission in the purchase of supplies. The commission shall report their doings to the Secretary of the Interior. [22 Stat. L. 70.]

This and the following paragraph are from the Indian Appropriation Act of May 17, 1882, ch. 163.

The provisions of this paragraph superseded those of R. S. 2041, noted *supra*, p. 752. See R. S. sec. 2107, *infra*, p. 779.

[Per diem pay to certain clerks, etc., detailed for special duty in Indian service.] * * * When it becomes necessary to detail clerks and other employees of the Indian service outside of Washington to assist in the opening of bids, making contracts, and shipping goods, they may be allowed a per diem of not exceeding four dollars per day for hotel and other expenses, which per diem shall be in lieu of all expenses now authorized by law, exclusive of railway transportation and sleeping car fare. [22 Stat. L. 86.]

See the note to the preceding paragraph of the text.

As to traveling expenses see R. S. sec. 2077, *supra*, p. 760, and the note thereto.

SEC. 6. [Consolidation and abolition of agencies — preference to Indian employees.] That the President may, in his discretion, consolidate two or more agencies into one; and where Indians are located on reservations created by executive order, he may, with the consent of the tribes to be affected thereby, expressed in the usual manner, consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary; and

preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies. [23 Stat. L. 97.]

This is from the Indian Appropriation Act of July 4, 1884, ch. 180.
Similar provisions were made by like Appropriation Acts for previous years.

[SEC. 1.] [Cherokee, North Carolina, Training School superintendent to act as agent — agent abolished.] * * * The superintendent of the Indian Training School at Cherokee, North Carolina, shall, in addition to his duties as superintendent, perform the duties heretofore required of the agent at said Cherokee Agency, and receive in addition to his salary as superintendent two hundred dollars per annum, and shall give bond as other Indian agents, and that the office of agent be, and the same is hereby abolished at that place. [27 Stat. L. 614.]

This and the following paragraph are from the Indian Appropriation Act of March 3, 1893, ch. 209.

[Repeal of law fixing compensation of agents.] * * * All provisions of law fixing compensation for Indian agents in excess of that herein provided for are hereby repealed. [27 Stat. L. 614.]

See the note to the preceding paragraph of the text.

Similar provisions were made by the Act of July 4, 1884, ch. 180, 23 Stat. L. 77. And somewhat similar provisions were made by the Act of Aug. 15, 1894, ch. 290, 28 Stat. L. 286.

This section would appear to affect R. S. sec. 2055, *supra*, p. 754.

SEC. 10. [Indian employees preferred.] That in the Indian service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and Indian service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision. [28 Stat. L. 313.]

This section is from the Indian Appropriation Act of Aug. 15, 1894, ch. 290.

[SEC. 1.] [Limit to expenditures for employees at agencies, etc.] That hereafter not more than fifteen thousand dollars shall be paid in any one year for salaries or compensation of employees regularly employed at any one agency, for its conduct and management, and the number and kind of employees at each agency shall be prescribed by the Secretary of the Interior and none other shall be employed: *Provided*, That where two or more Indian agencies have been or may hereafter be consolidated, the expenditure of such consolidated agencies for regular employees shall not exceed twenty thousand dollars: *Provided further*, That salaries or compensation of agents, Indians, school employees of every description, and persons temporarily employed, in case of emergency, to prevent loss of life

and property, in the erection of buildings, the work of irrigation, and making other permanent improvements, shall not be construed as coming within the limitations fixed by the foregoing paragraphs. [30 Stat. L. 90, as amended by 37 Stat. L. 521.]

This section is from the Indian Appropriation Act of June 7, 1897, ch. 3.

It was amended by increasing the amount to be paid to employees at any one agency, from \$10,000 to \$15,000, and by increasing the amount to be expended at consolidated agencies from \$15,000 to \$20,000, so as to make the section to read as given in the text, by an Act of Aug. 24, 1912, ch. 388, 37 Stat. L. 521.

A previous provision limiting the amount to be expended for salaries of employees at any one agency was made by an Act of March 3, 1875, ch. 132, § 5, 18 Stat. L. 449, which was superseded by the text. The operation of the last cited Act was restrained, however, by a provision of the Act of May 11, 1880, ch. 85, 21 Stat. L. 131 "that teachers and Indians employed at agencies in any capacity should not be constituted as part of agency employees" named in said section 5.

Employment of physicians.—The text paragraph authorized the Secretary of the Interior to employ physicians at agencies to treat Indians in need of medical services. *U. S. v. Patrick*, (C. C. A. 8th Cir. 1896) 73 Fed. 800, 36 U. S. App. 645, 20 C. C. A. 11.

Where a physician was employed by an Indian agent from time to time to treat

sick Indians, and the vouchers for the physician's services were uniformly approved by the Secretary of the Interior for many years, it was held that the physician should be regarded as having been thus employed by the Secretary of the Interior. *U. S. v. Patrick*, (C. C. A. 8th Cir. 1896) 73 Fed. 800, 36 U. S. App. 645, 20 C. C. A. 11.

[SEC. 1.] [Army officers detailed as Indian agents.] * * * That hereafter the President may detail officers of the United States Army to act as Indian agents at such agencies as in the opinion of the President may require the presence of an army officer, and while acting as Indian agents such officers shall be under the orders and direction of the Secretary of the Interior: [30 Stat. L. 573.]

This and the following paragraph are from the Indian Appropriation Act of July 1, 1898, ch. 545.

The provisions of the text superseded similar provisions made by the Act of July 13, 1892, ch. 164, 27 Stat. L. 120, and R. S. sec. 2062 noted *supra*, p. 757.

[Indian agents to account for funds.] * * * That hereafter Indian agents shall account for all funds coming into their hands as custodians from any source whatever, and to be responsible therefor under their official bonds. [30 Stat. L. 595.]

See the note to the preceding paragraph of this section.

[SEC. 1.] [Special agents, etc., may administer oaths, etc.] * * * That hereafter each special agent, supervisor of schools, or other official charged with the investigation of Indian agencies and schools in the pursuit of his official duties shall have power to administer oaths and to examine on oath all officers and persons employed in the Indian Service, and all such other persons as may be deemed necessary and proper. [30 Stat. L. 927.]

This is from the Indian Appropriation Act of March 1, 1899, ch. 324.

The same provision without the word "hereafter" occurs in the Indian Appropriation Act of July 1, 1898, ch. 545, 30 Stat. L. 574. By the addition of the word "hereafter" it has now become permanent. *Compilers' note*, 2 *Supp. R. S.* 953.

[SEC. 1.] **[Special bond for disbursing officers of large per capita payments.]** * * * That hereafter when it becomes necessary to make large per capita payments to Indians, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, is hereby authorized to require any disbursing officer of the Indian Department to file a special bond in such amount as may be necessary to make such payment in one installment, the expenses incurred in procuring such special bond to be paid by the United States from this appropriation. [33 Stat. L. 191.]

This is from the Indian Appropriation Act of April 21, 1904, ch. 1402.
See R. S. sec. 2057, *supra*, p. 755, and the notes thereto.

[SEC. 1.] **[Indian inspectors — engineers.]** * * * For pay of eight Indian inspectors, two of whom shall be engineers, one to be designated as chief, competent in the location, construction, and maintenance of irrigation works, at two thousand five hundred dollars per annum each, except the chief engineer, who shall receive three thousand five hundred dollars, * * * *Provided*, That the requirement of two engineers skilled in irrigation shall become immediately operative. [33 Stat. L. 1049.]

This is from the Indian Appropriation Act of March 3, 1905, ch. 1479.
See the notes to R. S. sec. 2043, *supra*, p. 752.

[SEC. 1.] **[Transfer of funds — detail of employees.]** * * * That hereafter when not required for the purpose for which appropriated, the funds provided for the pay of specified employees at any Indian agency may be used by the Secretary of the Interior for the pay of other employees at such agency, but no deficiency shall be thereby created; and, when necessary, specified employees may be detailed for other service when not required for the duty for which they were engaged. [34 Stat. L. 1016.]

This and the following three paragraphs of this section are from the Indian Appropriation Act of March 1, 1907, ch. 2285.

[Matrons to teach housekeeping.] * * * To enable the Secretary of the Interior to employ suitable persons as matrons to teach Indian girls in housekeeping and other household duties, at a rate not to exceed sixty dollars per month, and for furnishing necessary equipments, and renting quarters where necessary, twenty-five thousand dollars: *Provided*, That the amount paid said matrons shall not come within the limit for employees fixed by the Act of June seventh, eighteenth hundred and ninety-seven. [34 Stat. L. 1019.]

See the note to the preceding paragraph of the text.
The Act of June 7, 1897, ch. 3, § 1, is given as amended, *supra*, p. 763.

[Appropriations for salaries.] * * * The appropriations herein or hereafter made for the salaries of Indian agents shall not take effect nor become available in any case for or during the time in which any active

officer of the Army of the United States shall be engaged in the performance of the duties of Indian agent at any of the agencies hereafter named; [34 Stat. L. 1020.]

See the note to the first paragraph of this section.

[Duties of agents imposed on superintendent of Indian schools — bond — pay.] * * * and the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may devolve the duties of any Indian agency or part thereof upon the superintendent of the Indian school located at such agency or part thereof whenever in his judgment such superintendent can properly perform the duties of such agency. And the superintendent upon whom such duties devolve shall give bonds as other Indian agents.

That the pay of any superintendent who performs agency duties in addition to those of his superintendency may be increased by the Commissioner of Indian Affairs, in his discretion, to an extent not exceeding three hundred dollars per annum. [34 Stat. L. 1020.]

See the note to the first paragraph of this section.

Provisions similar to those of the text have appeared in Indian Appropriation Acts for many years.

SEC. 1. [Disbursing officers' bonds — acceptance of new bond — effect on sureties on prior bond.] * * * Hereafter when the Secretary of the Interior deems a new bond necessary he may, in his discretion, require any disbursing officer under the jurisdiction of the Commissioner of Indian Affairs to execute a new bond, with approved sureties, in such amount as he may deem necessary, and when accepted and approved by the Secretary of the Interior the new bond shall be valid and the surety or sureties of the prior bond shall be released from liability for all acts or defaults of the principal which may be done or committed from and after the day on which the new bond was approved. [35 Stat. L. 71.]

This and the following section 2 are from the Indian Appropriation Act of April 30, 1908, ch. 153.

SEC. 2. [Farmers and stockmen.] * * * To enable the Commissioner of Indian Affairs to employ practical farmers and practical stockmen, subject only to such examination as to qualifications as the Secretary of the Interior may prescribe, in addition to the agency farmers now employed, at wages not exceeding seventy-five dollars each per month, to superintend and direct farming and stock raising among such Indians as are making effort for self-support, one hundred and twenty-five thousand dollars: *Provided*, That the amounts paid such farmers and stockmen shall not come within the limit for employees fixed by the Act of June seventh, eighteen hundred and ninety-seven: *Provided further*, That the Commissioner of Indian Affairs may employ additional farmers at any Indian school at not exceeding sixty dollars per month, subject only to such examination as to

qualifications as the Secretary of the Interior may prescribe, said farmers to be in addition to the school farmers now employed. [35 Stat. L. 75.]

See the note to the preceding section 1 of the text.

Similar provisions have appeared in prior Appropriation Acts.

The Act of June 7, 1897, ch. 3, § 1, is given as amended, *supra*, p. 763.

[Indian inspectors — not required to be engineers.] * * * Six Indian inspectors, not required to be engineers, now employed and appropriated for in the Indian Department, at two thousand five hundred dollars each, and said Indian inspectors shall hereafter be termed inspectors, and shall be included in the classified service. [35 Stat. L. 887.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1909, ch. 297.

See the notes to R. S. sec. 2043, *supra*, p. 752.

SEC. 27. [Annual statements to be made of fiscal affairs of Indians.] Annually, on the first Monday in December, the Secretary of the Interior shall transmit to the Speaker of the House of Representatives a statement of the fiscal affairs of all Indian tribes for whose benefit expenditures from either public or tribal funds shall have been made by any officer, clerk, or employee in the Interior Department during the preceding fiscal year; and such statement shall show (1) the total amount of all moneys, from whatever source derived, standing to the credit of each tribe of Indians, in trust or otherwise, at the close of such fiscal year; (2) an analysis of such credits, by funds, showing how and when they were created, whether by treaty stipulation, agreement, or otherwise; (3) the total amount of disbursements from public or trust funds made on account of each tribe of Indians for such fiscal year; and (4) an analysis of such disbursements showing the amounts disbursed (a) for per capita payments in money to Indians, (b) for salaries or compensation of officers and employees, (c) for compensation of counsel and attorney's fees, and (d) for support and civilization. [36 Stat. L. 1077.]

This is from the Indian Appropriation Act of March 3, 1911, ch. 210.

[SEC. 1.] [Indian office — estimates for all personal services to be submitted — restriction.] * * * For the fiscal year nineteen hundred and fourteen and annually thereafter estimates in detail shall be submitted for all personal services required in the Indian Office, and after the end of the fiscal year nineteen hundred and thirteen it shall not be lawful to employ in said office any personal services other than those specifically appropriated for in the legislative, executive, and judicial appropriation Acts, except temporary details of field employees for service connected solely with their respective employments. [37 Stat. L. 396.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

[SEC. 1.] [**Secretary to Board of Indian commissioners — pay.**] * * * That hereafter the Board of Indian Commissioners is authorized to employ a secretary, not a member of said board, and pay his salary out of the appropriation herein made or which shall hereafter be made for said board. [37 Stat. L. 521.]

This is from the Indian Appropriation Act of Aug. 24, 1912, ch. 388.
These provisions supersede those of R. S. sec. 2040, noted *supra*, p. 752.

[SEC. 1.] [**Oaths of employees in Indian service.**] * * * That superintendents and acting superintendents in charge of Indian reservations, schools, irrigation and allotment projects are hereby authorized and empowered to administer the oath of office required of employees placed under their jurisdiction. [38 Stat. L. 80.]

This and the following section 26 are from the Indian Appropriation Act of June 30, 1913, ch. 4.

As to superintendents, see the notes to R. S. secs. 2046-2051, noted *supra*, p. 753.

SEC. 26. [**Bureau of Indian Affairs — system of bookkeeping — annual report — allotment of appropriation before expenditures — estimates.**] On or before the first day of July, nineteen hundred and fourteen, the Secretary of the Interior shall cause a system of bookkeeping to be installed in the Bureau of Indian Affairs, which will afford a ready analysis of expenditures by appropriations and allotments and by units of the service, showing for each class of work or activity carried on, the expenditures for the operation of the service, for repairs and preservation of property, for new and additional property, salaries and wages of employees, and for other expenditures. Provision shall be made by the Secretary of the Interior for further analysis of each of the foregoing classes of expenditures, if, in his judgment, he shall deem it advisable. Annually, after July first, nineteen hundred and fourteen, a detailed statement of expenditures, as hereinbefore described, shall be incorporated in the annual report of the Commissioner of Indian Affairs and transmitted by the Secretary of the Interior to Congress on or before the first Monday in December. Before any appropriation for the Indian Service is obligated or expended, the Secretary of the Interior shall make allotments thereof in conformity with the intent and purpose of this Act, and such allotments shall not be altered or modified except with his approval. After July first, nineteen hundred and fourteen, the estimates for appropriations for the Indian Service submitted by the Secretary of the Interior, shall be accompanied by a detailed statement, classified in the manner prescribed in the first paragraph of this section, showing the purposes for which the appropriations are required. [38 Stat. L. 103.]

See the note to the preceding section 1 of this Act.

R. S. secs. 468 and 469 were as follows:

"SEC. 468. The Commissioner of Indian Affairs shall annually report, separately, to Congress, a tabular statement showing distinctly the separate objects of expenditure under his supervision, and how much disbursed for each object, describing the articles and the quantity of each, and giving the name of each person to whom any part was paid, and how much was paid to him, and for what objects, so far as they relate to the disbursement of the funds appropriated for the incidental, contingent, or miscellaneous expenses of the Indian service, during the fiscal year next preceding each report."

Act of March 2, 1867, ch. 173, 14 Stat. L. 515.

"Sec. 469. The Commissioner of Indian Affairs shall embody in his annual report the reports of all agents or commissioners issuing food, clothing, or supplies of any kind to Indians, stating the number of Indians present and actually receiving the same."

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 463.

Both sections were repealed by the Act of June 25, 1910, ch. 431, § 19, 36 Stat. L. 860.

Prior to the repeal of these sections the Act of Aug. 15, 1876, ch. 289, § 3, 19 Stat. L. 199, relating to reports of bids and proposals for services, supplies, etc., was repealed by the Act of June 21, 1906, ch. 3504, 34 Stat. L. 328, which also repealed several provisions relating to the reports of names of employees in the Indian service, and provided that the commissioner should embody in his annual report a "detailed statement of the awards of contracts made for any services, supplies, and annuity goods for the Indian service." This latter provision must be regarded as repealed, however, by the subsequent repeal of R. S. sec. 468 and 469 and the Act of March 3, 1875, ch. 132, § 8, 18 Stat. L. 450, by the Act of June 25, 1910, ch. 431, §§ 19 and 20 previously cited.

Said Act of June 25, 1910, ch. 431, § 20, 36 Stat. L. 861, likewise repealed a provision of the Act of March 3, 1901, § 8, 31 Stat. L. 1085 (which had been repeated in subsequent Acts) requiring that "the Commissioner of Indian Affairs shall report annually to Congress, specifically showing the number of employees at each agency, industrial and boarding school, which are supported in whole or in part out of the appropriations in this Act, giving name, when employed, in what capacity employed, male or female, whether white or Indian, amount of compensation paid, and out of what item or fund of the appropriation paid, and whether, in the opinion of such Commissioner, any of such employees are unnecessary."

This would seem to operate as a repeal of an earlier provision of the Act of June 10, 1896, ch. 398, § 7, 29 Stat. L. 349, requiring the commissioner of Indian affairs to report annually to Congress "the number of employees in the Indian Bureau in Washington, when employed, in what capacity employed, male or female, full name, amount of compensation paid and out of what fund paid, and under what law employed."

The form in which estimates were required was prescribed by the Act of Aug. 15, 1876, ch. 289, § 4, *supra*, p. 762.

[SEC. 1.] [Heat and light for employees' quarters.] * * * That the Secretary of the Interior is hereby authorized to allow employees in the Indian Service, who are furnished quarters, necessary heat and light for such quarters without charge, such heat and light to be paid for out of the fund chargeable with the cost of heating and lighting other buildings at the same place: *Provided further*, That the amount so expended for agency purposes shall not be included in the maximum amounts for compensation of employees prescribed by section one, Act of August twenty-fourth, nineteen hundred and twelve: [38 Stat. L. 584.]

This and the following section 17 are from the Indian Appropriation Act of Aug. 1, 1914, ch. 221.

Provisions similar to those of this paragraph were made by Appropriation Acts for previous years.

The Act of Aug. 24, 1912, ch. 388, § 1, mentioned in the text amended the Act of June 7, 1897, ch. 3, § 1, and is incorporated therein, *supra*, p. 763.

SEC. 17. [Five Civilized Tribes — superintendent to be appointed.] * * * That, effective September first, nineteen hundred and fourteen, the offices of the Commissioner of the Five Civilized Tribes and superintendent of Union Agency, in Oklahoma, be, and the same are hereby, abolished and in lieu thereof there shall be appointed by the President, by and with the advice and consent of the Senate, a superintendent for the Five Civilized Tribes, with his office located in the State of Oklahoma, at a salary

of \$5,000 per annum, and said superintendent shall exercise the authority and perform the duties now exercised by the Commissioner to the Five Civilized Tribes and the superintendent of the Union Agency, with authority to reorganize the department and to eliminate all unnecessary clerks, subject to the approval of the Secretary of the Interior. [38 Stat. L. 598.]

See the note to the preceding section 1 of this Act.

III. PERFORMANCE OF ENGAGEMENTS BETWEEN UNITED STATES AND INDIANS

Sec. 2079. [No future treaties with Indian tribes.] No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired. [R. S.]

Act of March 3, 1871, ch. 120, 16 Stat. L. 566.

Sections 2079 to 2110 of the Revised Statutes constitute ch. 2, "Performance of engagements between the United States and Indians," of title XXVIII, "Indians."

Treaty-making system of government abolished.—"After an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them [the Indians] by Acts of Congress." U. S. v. Kagama, (1886) 118 U. S. 375, 6 S. Ct. 1109, 30 U. S. (L. ed.) 228. See also Lone Wolf v. Hitchcock, (1903) 187 U. S. 553, 23 S. Ct. 216, 47 U. S. (L. ed.) 299; Cherokee Nation v. Hitchcock, (1902) 187 U. S. 294, 23 S. Ct. 115, 47 U. S. (L. ed.) 183; Choctaw Nation v. U. S., (1886) 119 U. S. 1, 7 S. Ct. 75, 30 U. S. (L. ed.) 306; Elk v. Wilkins, (1884) 112 U. S. 94, 5 S. Ct. 41, 28 U. S. (L. ed.) 643; Cherokee Nation v. Southern Kan. R. Co., (1890) 135 U. S. 641, 10 S. Ct. 965, 34 U. S. (L. ed.) 295; Stephens v. Cherokee Nation, (1899) 174 U. S. 445, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041; *Ex p. Crow Dog*, (1883) 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030; U. S. v. Osborn, (1880) 2 Fed. 58; *In re Sah Quah*, (1886) 31 Fed. 327; Trusecott v. Hurlbut Land, etc., Co., (1896) 73 Fed. 62; Jaeger v. U. S., (1892) 27 Ct. Cl. 278; Lowe v. U. S., (1902) 37 Ct. Cl. 413.

Contract by treaty prohibited.—It is clear that this section prohibits the making of any contract with the Indians by treaty. *Starr v. Long Jim*, (1913) 227 U. S. 613, 33 S. Ct. 358, 57 U. S. (L. ed.) 670.

Treaties have the force of law.—By this section, Congress has recognized the obligation of all treaties with the Indian

tribes lawfully made and ratified prior to March 3, 1871, and by numerous legislative provisions, and by many Acts of appropriation, Congress has recognized all such treaties as having the force of law. U. S. v. Berry, (1880) 4 Fed. 779.

Until the Act of 1871, above cited, the power of the government to make treaties with the Indian tribes residing within the limits of a state was never questioned. U. S. v. Forty-three Gallons of Whisky, 25 Fed. Cas. No. 15,136.

Relation of Indian tribes to United States.—The Act of March 3, 1871, did not change the relation of the Indian tribes to the United States, but only changed the method of enacting laws for their government. *Ex p. Morgan*, (1883) 20 Fed. 306. Since that Act the Indian tribes have ceased to be treaty-making powers and have simply become wards of the nation. *Brown v. U. S.*, (1897) 32 Ct. Cl. 432.

Indians entitled to rights of belligerents.—Congress has authority to govern the Indians by statute, instead of by treaty, but, having recognized them in their tribal relations until the Act of 1871, and by that Act declared that no obligation of any treaty made prior thereto should be thereby impaired, they are entitled, at least until otherwise provided by law, to the rights and privileges of belligerents, and the use of the word "amity" in the statutes is, in effect, a recognition of such rights. *Leighton v. U. S.*, (1894) 29 Ct. Cl. 304.

Sec. 2080. [Abrogation of treaties.] Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe, if in his opinion the same can be done consistently with good faith and legal and national obligations. [R. S.]

Act of July 5, 1862, ch. 135, 12 Stat. L. 528.

Power of Congress to abrogate Indian treaties.—"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Lone Wolf v. Hitchcock*, (1903) 187 U. S. 553, 23 S. Ct. 216, 47 U. S. (L. ed.) 299.

Presumption of amity from existence of treaty.—Where the political departments of the government have not abrogated or annulled a treaty with an Indian tribe,

but have continued to recognize its binding force by making appropriations to carry the same into effect and for the payment of annuities stipulated therein to be paid, and such annuities have not been withheld from such tribe by reason of hostilities on its part against the United States or their citizens, as provided by R. S. sec. 2100 (*infra*, p. 775), the presumption is that such tribe was recognized by the United States as in amity therewith during such period, and in the absence of any affirmative proof to the contrary, such presumption will be held as conclusive. *Leighton v. U. S.*, (1894) 29 Ct. Cl. 325.

Sec. 2081. [Payment of certain annuities in coin.] The Secretary of the Treasury is authorized to pay in coin such of the annuities as by the terms of any treaty of the United States with any Indian tribe are required to be paid in coin. [R. S.]

Act of March 3, 1865, ch. 127, 13 Stat. L. 561.

Sec. 2082. [Payment of annuities in goods.] The President may, at the request of any Indian tribe, to which any annuity is payable in money, cause the same to be paid in goods, purchased as provided in the next section. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

Sec. 2083. [Purchase of goods for the Indians.] All merchandise required by any Indian treaty for the Indians, payable after making of such treaty, shall be purchased under the direction of the Secretary of the Interior, upon proposals to be received, to be based on notices previously to be given; and all merchandise required at the making of any Indian treaty shall be purchased under the order of the Commissioner of Indian Affairs by such person as he shall appoint. All other purchases on account of the Indians, and all payments to them of money or goods, shall be made by such person as the President shall designate for that purpose. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

See the Act of March 3, 1875, ch. 132, § 9, *infra*, p. 782, and the Act of April 30, 1908, ch. 153, § 1, *infra*, p. 789.

Contracts to be based on appropriations.—Sections 13 and 7 of the Act of June 30, 1834, now embodied in the above section and in R. S. sec. 2058, *supra*, p. 756, have been held not to authorize any officer of the government to bind the United States by any contract for the subsistence of Indians not based on appropriations made by Congress. The fact that Congress, by special acts, has made provision for the

payment of claims arising out of contracts made contrary to this rule, furnishes no ground for the assumption that the government has recognized its legal liability for the amount of such claims or of claims of like character. *U. S. v. McDougall*, (1887) 121 U. S. 89, 7 S. Ct. 850, 30 U. S. (L. ed.) 861, *disapproving* *Belt v. U. S.*, (1879) 15 Ct. Cl. 92.

Sec. 2084. [Manner of purchase.] No goods shall be purchased by the Office of Indian Affairs, or its agents, for any tribe, except upon the written requisition of the superintendent in charge of the tribe, and only upon public bids in the mode prescribed by the preceding section. [R. S.]

Act of July 5, 1862, ch. 135, 12 Stat. L. 529.

As to the abolition of superintendencies see the notes to R. S. secs. 2046-2051 noted *supra*, p. 753.

Further provisions with respect to the purchase of supplies were made by the Act of April 30, 1908, ch. 153, § 1, *infra*, p. 789.

Sec. 2085. [Claims for supplies for Indians.] No claims for supplies for Indians, purchased without authority of law, shall be paid out of any appropriation for expenses of the Office of Indian Affairs, or for Indians. [R. S.]

Act of July 15, 1870, ch. 296, 16 Stat. L. 360.

Sec. 2086. [Modes of paying annuities and distributing goods.] The payment of all moneys and the distribution of all goods stipulated to be furnished to any Indians, or tribe of Indians, shall be made in one of the following ways, as the President or the Secretary of the Interior may direct:

First. To the chiefs of a tribe, for the tribe.

Second. In cases where the imperious interest of the tribe or the individuals intended to be benefited, or any treaty stipulation, requires the intervention of an agency, then to such person as the tribe shall appoint to receive such moneys or goods; or if several persons be appointed, then upon the joint order or receipt of such persons.

Third. To the heads of the families and to the individuals entitled to participate in the moneys or goods.

Fourth. By consent of the tribe, such moneys or goods may be applied directly, under such regulations, not inconsistent with treaty stipulations, as may be prescribed by the Secretary of the Interior, to such purposes as will best promote the happiness and prosperity of the members of the tribe, and will encourage able-bodied Indians in the habits of industry and peace. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737; Act of March 3, 1847, ch. 66, 9 Stat. L. 203; Act of Aug. 30, 1852, ch. 103, 10 Stat. L. 56; Act of July 15, 1870, ch. 296, 16 Stat. L. 360.

Further provisions relating to payments were made by the Act of June 10, 1896, ch. 398, § 1, *infra*, p. 787, and the Act of March 3, 1911, ch. 210, § 28, *infra*, p. 792.

Indians absent from their reservation without permission from the United States had no individual rights to the annuities promised to their tribes by treaty, and paid at the tribal agency conformably to the Act of Aug. 30, 1852, 10 Stat. L. 41, ch. 103, from which this section was taken in part, and which forbade payment to be made to any attorney or agent, and required it to be made directly to the In-

dians themselves or to the tribe per capita, "unless the imperious interest of the Indian or Indians or some treaty stipulation shall require the payment to be made otherwise, under the direction of the President." *Sac, etc., Indians v. Sac, etc., Indians*, (1911) 220 U. S. 481, 31 S. Ct. 473, 55 U. S. (L. ed.) 552, *affirming* 45 Ct. Cl. 287.

Sec. 2087. [Withholding of annuities on account of intoxicating liquors.] No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the

officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians, nor until the chiefs and head-men of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country. [*R. S.*]

Act of March 3, 1847, ch. 66, § 9 Stat. L. 203.

As to the regulation of the sale of intoxicating liquors generally see subdivision IX, of this title, *infra*, p. 913.

Sec. 2088. [Persons to be present at delivery of annuities.] The superintendent, agent, or sub-agent, together with such military officer as the President may direct, shall be present, and certify to the delivery of all goods and money required to be paid or delivered to the Indians. [*R. S.*]

Act of June 30, 1834, ch. 162, § 4 Stat. L. 737.

As to the abolition of superintendencies see the notes to *R. S.* secs. 2046-2051, noted *supra*, p. 753.

Sec. 2089. [Mode of disbursements.] At the discretion of the President all disbursements of moneys, whether for annuities or otherwise, to fulfill treaty stipulations with individual Indians or Indian tribes, shall be made in person by the superintendents of Indian affairs, where superintendencies exist, to all Indians or tribes within the limits of their respective superintendencies, in the presence of the local agents and interpreters, who shall witness the same, under such regulations as the Secretary of the Interior may direct. [*R. S.*]

Act of March 3, 1857, ch. 90, § 11 Stat. L. 169.

Disbursements by Indian agents.—It was held to be entirely discretionary with the President to require the superintendent to make the disbursement referred to

in the above section, and that he might devolve such duty upon the Indian agents. (1875) 15 Op. Atty.-Gen. 66.

Sec. 2090. [Mode of distribution of goods.] Whenever goods and merchandise are delivered to the chiefs of a tribe, for the tribe, such goods and merchandise shall be turned over by the agent or superintendent of such tribe to the chiefs in bulk, and in the original package, as nearly as practicable, and in the presence of the head-men of the tribe, if practicable, to be distributed to the tribe by the chiefs in such manner as the chiefs may deem best, in the presence of the agent or superintendent. [*R. S.*]

Act of April 10, 1869, ch. 16, § 16 Stat. L. 39.

See the Act of July 1, 1898, ch. 545, § 7, *infra*, p. 787.

R. S. sec. 2091. This section was as follows:

"**Sec. 2091.** All persons whatsoever, charged or trusted with the disbursement or application of money, goods, or effects of any kind for the benefit of the Indians, shall settle their accounts, annually, at the Department of the Interior on the first day of October; and copies of the same shall be laid before Congress at the commencement of the ensuing session, by the proper accounting officers; together with a list of the names of all persons to whom money, goods, or effects have been delivered within the preceding year, for the benefit of the Indians, specifying the amount and object for which they were intended, and showing who are delinquents, if any, in forwarding their accounts according to the provisions of this section; and, also, with a list of the names of all persons appointed or employed under this title, with the dates of their appointment or employment, and the salary and pay of each."

Act of June 30, 1834, ch. 162, § 4 Stat. L. 737.

The section was repealed by an Act of June 25, 1910, ch. 431, § 10; 36 Stat. L. 860.
By the Act of Aug. 30, 1890, ch. 837, § 4, 26 Stat. L. 413, given under PUBLIC MONIES, all disbursing officers were required to render accounts quarterly.

Sec. 2092. [Restriction on advances to superintendents, agents, officers, etc.] No superintendent of Indian affairs, or Indian agent, or other disbursing officer in such service, shall have advanced to him, on Indian or public account, any money to be disbursed in future, until such superintendent, agent, or officer in such service has settled his accounts of the preceding year, and has satisfactorily shown that all balances in favor of the Government, which may appear to be in his hands are ready to be paid over on the order of the Secretary of the Interior. [R. S.]

Act of June 27, 1846, ch. 34, 9 Stat. L. 20.

As to the abolition of superintendencies see R. S. secs. 2046-2051, noted *supra*, p. 753.

Sec. 2903. [Disposal of proceeds of sales of Indian lands.] All moneys received from the sales of lands that have been, or may be hereafter, ceded to the United States by Indian tribes, by treaties providing for the investment or payment to the Indians, parties thereto, of the proceeds of the lands ceded by them, respectively, after deducting the expenses of survey and sale, any sums stipulated to be advanced, and the expenses of fulfilling any engagements contained therein, shall be paid into the Treasury in the same manner that moneys received from the sales of public lands are paid into the Treasury. [R. S.]

Act of Jan. 9, 1837, ch. 1, 5 Stat. L. 135.

See the Act of July 4, 1884, ch. 180, § 10, *infra*, p. 786.

Creek Indian orphan fund.—A treaty with the Creek tribe of Indians, ceding all their lands east of the Mississippi to the United States, provided that twenty sections should be selected under the direction of the President for the orphan children of the Creeks, and divided, and retained or sold for their benefit, as the President might direct. The proceeds of

the sale of these selected lands were properly paid into the Treasury under the first section of the Act of Jan. 9, 1837, above cited, and were also liable to be drawn out for investment or payment, whenever the President should so direct, under the second section of the same law. (1837) 3 Op. Atty-Gen. 238.

Sec. 2094. [Appropriation of moneys to carry out Indian treaties.] All sums that are or may be required to be paid, and all moneys that are or may be required to be invested by the treaties mentioned in the preceding section, are appropriated in conformity to them, and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President. [R. S.]

Act of Jan. 9, 1837, ch. 1, 5 Stat. L. 135.

Sec. 2095. [Investments of stock required by treaties.] All investments of stock, that are or may be required by treaties with the Indians, shall be made under the direction of the President; and special accounts of the funds under such treaties shall be kept at the Treasury, and statements thereof be annually laid before Congress. [R. S.]

Act of Jan. 9, 1837, ch. 1, 5 Stat. L. 135.

Sec. 2096. [Investment of proceeds of lands.] The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe.

and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than five per centum per annum. [R. S.]

Act of Jan. 9, 1837, ch. 1, 5 Stat. L. 135.

See the Act of June 10, 1876, ch. 122, *infra*, p. 783, and the Act of April 1, 1880, ch. 41, *infra*, p. 784.

Sec. 2097. [Misapplication of funds belonging to the Indians prohibited.] No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law. [R. S.]

Act of July 26, 1866, ch. 266, 14 Stat. L. 280.

Intention of statute.—This and the succeeding section show that the policy of the United States is to adhere sacredly to their treaty obligations with the Indian tribes, and to protect by legislation such tribes from the misapplication of their funds arising out of treaty stipulations. *Leighton v. U. S.*, (1894) 29 Ct. Cl. 288.

Court has no power to divert funds.—When Congress, by a special act, distributes part of a fund, appropriated for the

benefit of an Indian tribe, among certain individuals named, and directs the balance to be paid to said tribe through an agent appointed by it under R. S. sec. 2086, *supra*, p. 772, the court is powerless and without jurisdiction to divert said fund from the persons in said act designated, or from the agent appointed to receive the same. *Hanks v. Hendricks*, (1900) 3 Indian Ter. 415, 68 S. W. 689.

Sec. 2098. [Indian depredations, how paid.] No part of the moneys which may be appropriated in any general act or deficiency bill making appropriations for the current and contingent expenses incurred in Indian affairs, to pay annuities due to or to be used and expended for the care and benefit of any tribe or tribes of Indians, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members thereof. No claims for Indian depredations shall be paid until Congress shall make special appropriation therefor. [R. S.]

Act of July 15, 1870, ch. 296, 16 Stat. L. 360.

For provisions relating to Indian depredation claims see the title CLAIMS.

Intention of statute.—See note under the preceding R. S. sec. 2097.

Cited without specific application in (1895) 21 Op. Atty.-Gen. 131.

R. S. sec. 2099. This section was as follows:

"Sec. 2099. No moneys which may be appropriated for the purposes of education among the Indian tribes shall be expended for any such object elsewhere than in Indian country. But this provision shall not apply to appropriations the expenditure of which is authorized by treaty stipulations, to be made under the direction either of the President or of the Indian tribes, respectively."

Act of July 29, 1848, ch. 118, 9 Stat. L. 264.

It was superseded by the proviso in the Act of July 31, 1882, ch. 363, *infra*, p. 906.

Sec. 2100. [Annuities of Indians hostile to United States.] No moneys or annuities stipulated by any treaty with an Indian tribe for which appropriations are made shall be expended for, or paid, or delivered to any tribe

which, since the next preceding payment under such treaty, has engaged in hostilities against the United States, or against its citizens peacefully or lawfully sojourning or traveling within its jurisdiction at the time of such hostilities; nor in such case shall such stipulated payments or deliveries be resumed until new appropriations shall have been made therefor by Congress. And the Commissioner of Indian Affairs shall report to Congress, at each session, any case of hostilities, by any tribe with which the United States has treaty stipulations, which has occurred since his next preceding report. [R. S.]

Act of March 2, 1867, ch. 173, 14 Stat. L. 515.

See the Act of March 3, 1875, ch. 132, § 1, *infra*, p. 780.

Sec. 2101. [Goods withheld from chiefs who have violated treaty stipulations.] No delivery of goods or merchandise shall be made to the chiefs of any tribe, by authority of any treaty, if such chiefs have violated the stipulations contained in such treaty upon their part. [R. S.]

Act of April 10, 1869, ch. 16, 16 Stat. L. 39.

R. S. sec. 2102. This section was as follows:

"Sec. 2102. The Secretary of the Interior shall withhold from any tribe of Indians who may hold American captives, any moneys due them from the United States, until such captives have been surrendered to the lawful authorities of the United States."

Res. No. 62, of May 15, 1870, 16 Stat. L. 377.

It was superseded by a similar provision made by the Act of March 3, 1875, ch. 132, § 1, *infra*, p. 780.

Sec. 2103. [Contracts with the Indians.] No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

Sixth. The judge before whom such contract or agreement is executed shall certify officially the time when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid. [R. S.]

Act of March 3, 1871, ch. 120, 16 Stat. L. 570; Act of May 21, 1872, ch. 177, 17 Stat. L. 136.

Provisions concerning certain private agreements which were made prior to the Act of May 21, 1872, ch. 120, which was incorporated in the foregoing section, were made by the Act of April 29, 1874, ch. 135, 18 Stat. L. 36.

Literal compliance required.—The provisions of this section are explicit and leave no margin of discretion to the Secretary of the Interior. The law must be literally complied with, and nothing can be taken by intentment, nor can the secretary dispense with any of its requirements. (1886) 18 Op. Atty-Gen. 497.

No obligation imposed upon government.—This section, and the two following sections, while intended to protect the Indians from improvident and unconscionable contracts, by no means create a legal obligation on the part of the United States to see that the Indians perform their part of a contract. *In re Sanborn*, (1893) 148 U. S. 222, 13 S. Ct. 577, 37 U. S. (L. ed.) 429.

What contracts included.—*Transactions with government.*—The restrictions and regulations placed upon the making of transactions with Indians by this section and R. S. secs. 2104 to 2106 following, are designed for the protection of such Indians in their dealings with other persons, and appear to have no application to transactions with the government. (1885) 18 Op. Atty-Gen. 181.

Purchases or grants from Indians.—The provisions of this section do not include contracts of the character described in section 2116, *infra*, p. 794. (1885) 18 Op. Atty-Gen. 235.

Leases of land.—This section has no application to leases of land by the Indians to persons for a moneyed consideration. *Cherokee Strip Live Stock Ass'n v. Cass Land, etc., Co.*, (1897) 138 Mo. 394, 40 S. W. 107.

Assignment of claim for loss by fire.—An assignment by an Indian of his claim against a person who negligently caused the Indian's property to be destroyed by fire is not within the purview of this section. *Missouri Pacific R. Co. v. Cullers*, (1891) 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542.

Executed contract.—The mere circumstance that a contract has been executed at the time of its presentation for approval does not except it from the operation of this section. (1884) 18 Op. Atty-Gen. 5.

A contract of guaranty made by a tribe of Indians which therein guaranteed the payment of supplies furnished members of the tribe must be in accordance with this section. *Green v. Menominee Tribe*, (1914) 233 U. S. 558, 34 S. Ct. 706, 68 U. S. (L. ed.) 1093, *affirming* (1912) 47 Ct. Cl. 281.

Contract for services.—A contract with an Indian not a citizen of the United States, for the payment of money in consideration of services to be rendered to the said Indian relative to lands of his tribe which he proposes to enter as allotments, falls within the provisions of this section, and where not executed and approved as required by the said section is void. *Smith v. Martin*, (1911) 28 Okla. 836, 115 Pac. 866.

Contracts within R. S. sec. 2116.—Contracts of the character described in R. S. sec. 2116, *infra*, p. 794, are not included within the provisions of this section. (1885) 18 Op. Atty-Gen. 235.

Approval—Contract approved in part.—A contract that provides for the performance of several distinct acts may be approved as to one or more than one of them, with the effect of validating the contract for the part approved, and no more. *Rollins v. U. S.*, (1888) 23 Ct. Cl. 106; (1876) 15 Op. Atty.-Gen. 585.

Contract to be approved as made.—Where a contract provides that the fee for services shall not exceed a certain rate per centum, but the commissioner and secretary in their approval fixed the rate at a certain per centum, the contract is not approved as made. (1876) 15 Op. Atty.-Gen. 585.

Defective contract.—A contract entered into by Indians which is defective and invalid cannot be cured by subsequent ratification thereof by a committee of the Indians not appearing to have authority to ratify, and the Secretary of the Interior is not authorized by such ratification to approve the contract. (1886) 18 Op. Atty.-Gen. 497.

Rehearing as to approval.—Quære, whether there can be a rehearing as to an approval once indorsed upon the contract and acted upon; but if a reopening of the case is possible, it can only be accomplished by an indorsement of that fact upon the contract affected. (1884) 18 Op. Atty.-Gen. 5.

Rate per centum must be fixed.—A contract which contains a statement that the fee for services shall not exceed a certain rate per centum does not comply with the above section. (1876) 15 Op. Atty.-Gen. 585.

Failure to present a claim to the Secretary of the Interior and commissioner of Indian affairs for services rendered prior to 1872, in behalf of an Indian tribe, as required by section 1 of the above Act, was held to be fatal to the enforcement thereof. *Hanks v. Hendricks*, (1900) 3 Indian Ter. 415, 58 S. W. 669.

Act of May 21, 1872.—The Act of 1872, above noted, relieved the President from the consideration of Indian contracts for the payment of money and vested that duty elsewhere. (1884) 18 Op. Atty.-Gen. 11.

Act of March 1, 1889, relating to Creek Indians.—This and the following section 2104 were, by necessary implication, repealed by the Act of March 1, 1889, ch. 317, § 4, 25 Stat. L. 759, as to the case embraced therein. This Act provided for the payment, out of the appropriations made therein, of a certain amount to the national treasurer of the Muskogee or Creek nation, or to such persons as should be duly authorized to receive the same, at such time and in such sums as should be directed and required by the national council of the said nation. By the express terms of the statute, the money was to be paid in obedience to the direction of the national council, and this was the only condition required to exist before payment. None of the things were required which are necessary under this section to make valid a contract upon which money belonging to an Indian tribe is to be paid. *U. S. v. Crawford*, (1891) 47 Fed. 561.

Sec. 2104. [Payments under contracts restricted.] No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract. [R. S.]

Act of May 21, 1872, ch. 177, 17 Stat. L. 136.

Services rendered before approval of contract.—In making proof of services rendered under a contract pursuant to this section, the claimant is not confined to

acts performed subsequently to the date of the approval thereof, but may show acts done any time after the date of the contract. (1876) 15 Op. Atty.-Gen. 585.

Sec. 2105. [Penalty for receiving moneys from Indians under prohibited contracts.] The person so receiving such money contrary to the

provisions of the two preceding sections, and his aiders and abettors, shall, in addition to the forfeiture of such sum, be punishable by imprisonment for not less than six months, and by a fine of not less than one thousand dollars. And it shall be the duty of all district attorneys to prosecute such cases when applied to to do so, and their failure and refusal shall be ground for their removal from office. Any Indian agent, or other person in the employment of the United States, who shall, in violation of the provisions of the preceding section, advise, sanction, or in any way aid in the making of such contracts or agreements, or in making such payments as are here prohibited, shall, in addition to the punishment herein imposed on the person making such contract, or receiving such money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same. [R. S.]

Act of March 3, 1871, ch. 120, 16 Stat. L. 570.

Sec. 2106. [Assignments of contracts restricted.] No assignment of any contracts embraced by section twenty-one hundred and three, or of any part of one shall be valid, unless the names of the assignees and their residences and occupations be entered in writing upon the contract, and the consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment be also indorsed thereon. [R. S.]

Act of May 21, 1872, ch. 177, 17 Stat. L. 136.

Sec. 2107. [Restriction on payments to contractors, etc., until accounts and vouchers submitted, etc.] No payments shall be made by any officer of the United States to contractors for goods or supplies of any sort furnished to the Indians, or for the transportation thereof, or for any buildings or machinery erected or placed on their reservations, under or by virtue of any contract entered into with the Department of the Interior, or any branch thereof, on the receipts or certificates of the Indian agents or superintendents for such supplies, goods, transportation, buildings, or machinery beyond fifty per cent. of the amount due, until the accounts and vouchers shall have been submitted to the executive committee of the board of Indian commissioners appointed by the President for examination, revisal, and approval; and such board of commissioners shall, without unnecessary delay, forward the accounts and vouchers so submitted to them to the Secretary of the Interior, with the reasons for their approval or disapproval of the same, in whole or in part, attached thereto; and the Secretary shall have power to sustain, set aside, or modify the action of the board, and cause payment to be made or withheld, as he may determine. [R. S.]

Act of March 3, 1871, ch. 120, 16 Stat. L. 568.

While there is no express repeal of this section the restriction of the authority of the board of Indian commissioners by the Act of May 17, 1882, ch. 163, set forth *supra*, p. 762, apparently renders it ineffective. Senate Document No. 452, "Indian Affairs," 57th Congress, 1st session, p. 12, note.

Attorney's agreement with other attorney for part of contingent fee.—An agreement by attorneys having a contract for a contingent fee with Indians, approved by the Secretary of the Interior and commissioner of Indian affairs, as required by

R. S. sec. 2103, *supra*, p. 776, to pay other attorneys, who had assisted in its procurement, a part of the fee, and creating an equitable lien therefor upon the fee when received, was held not to be an assignment of the contract within the meaning of this

section, prohibiting assignments of such contracts except under certain conditions. *Gordon v. Gwydir*, (1910) 34 App. Cas. (D. C.) 508.

Claims for damages do not come within the scope of this section. *Power v. U. S.*, (1883) 18 Ct. Cl. 263.

Sec. 2108. [Moneys due incompetent or orphan Indians.] The Secretary of the Interior is directed to cause settlements to be made with all persons appointed by Indian councils to receive moneys due to incompetent or orphan Indians, and to require all moneys found due to such incompetent or orphan Indians to be returned to the Treasury; and all moneys so returned shall bear interest at the rate of six per centum per annum, until paid by order of the Secretary of the Interior to those entitled to the same. No money shall be paid to any person appointed by any Indian council to receive moneys due to incompetent or orphan Indians, but the same shall remain in the Treasury of the United States until ordered to be paid by the Secretary to those entitled to receive the same, and shall bear six per centum interest until so paid. [R. S.]

Act of July 5, 1862, ch. 135, 12 Stat. L. 529.

Sec. 2109. [Number of Indians present and receiving food, etc., to be reported.] Whenever the issue of food, clothing, or supplies of any kind to Indians is provided for, it shall be the duty of the agent or commissioner issuing the same, at such issue thereof, whether it be both of food and clothing, or either of them, or of any kind of supplies, to report to the Commissioner of Indian Affairs the number of Indians present and actually receiving the same. [R. S.]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 463, 464.

See further as to keeping rolls of the Indians entitled to supplies the Act of March 3, 1875, ch. 132, § 4, set forth *infra*, p. 781.

Sec. 2110. [Rations for Indians.] The President is authorized to cause such rations as he deems proper, and as can be spared from the Army provisions without injury to the service, to be issued, under such regulations as he shall think fit to establish, to Indians who may visit the military posts or agencies of the United States on the frontiers, or in their respective nations; and a special account of these issues shall be kept and rendered. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 738.

[SEC. 1.] **[No payments to Indians holding any captives other than Indians.]** * * * That the Secretary of the Interior be authorized to withhold, from any tribe of Indians who may hold any captives other than Indians, any moneys due them from the United States until said captives shall be surrendered to the lawful authorities of the United States. [18 Stat. L. 424.]

This and the following sections 2-6, 7, 9, are from the Indian Appropriation Act of March 3, 1875, ch. 132.

The provisions of this paragraph superseded those of R. S. sec. 2102, noted *supra*, p. 776.

SEC. 2. [Appropriations for Indian service not to be paid to Indians at war with United States.] That none of the appropriations herein made, or of any appropriations made for the Indian service, shall be paid to any band of Indians or any portion of any band while at war with the United States or with the white citizens of any of the States or Territories. [18 Stat. L. 449.]

See the notes to the preceding section 1 of this Act.

SEC. 3. [Indians to be required to labor on reservations to amount of supplies and annuities distributed.] That for the purpose of inducing Indians to labor and become self-supporting, it is provided that hereafter, in distributing the supplies and annuities to the Indians for whom the same are appropriated, the agent distributing the same shall require all able-bodied male Indians between the ages of eighteen and forty-five to perform service upon the reservation, for the benefit of themselves or of the tribe, at a reasonable rate, to be fixed by the agent in charge, and to an amount equal in value to the supplies to be delivered; and the allowances provided for such Indians shall be distributed to them only upon condition of the performance of such labor, under such rules and regulations as the agent may prescribe: *Provided*, That the Secretary of the Interior may, by written order, except any particular tribe, or portion of tribe, from the operation of this provision where he deems it proper and expedient. [18 Stat. L. 449.]

See the note to section 1 of this Act, *supra*, p. 780.

SEC. 4. [Agents to make rolls of Indians entitled to supplies — how to distribute supplies.] That hereafter, for the purpose of properly distributing the supplies appropriated for the Indian service, it is hereby made the duty of each agent in charge of Indians and having supplies to distribute, to make out, at the commencement of each fiscal year, rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance. [18 Stat. L. 449.]

See the notes to section 1 of this Act, *supra*, p. 780.

SEC. 6. [Appropriations for Indian supplies to be so distributed as to prevent deficiencies.] That hereafter, it shall be the duty of the Secretary of the Interior, and the officers charged by law with the distribution of supplies to the Indians, under appropriations made by law, to distribute them and pay them out to the Indians entitled to them, in such proper proportions as that the amount of appropriation made for the current year shall not be expended before the end of such current year, so as to prevent deficiencies; and no expenditure shall be made or liability incurred on the part of the Government on account of the Indian service for any fiscal year (unless in compliance with existing law) beyond the amount of money previously appropriated for said service during such year. [18 Stat. L. 450.]

See the notes to section 1 of this Act, *supra*, p. 780.

See generally ESTIMATES, APPROPRIATIONS, AND REPORTS.

SEC. 7. [Copies of contracts to be furnished before payment.] * * * copies of all contracts made by the Commissioner of Indian Affairs, or any other officer of the Government, for the Indian service, shall be furnished to the Second Auditor of the Treasury before any payment shall be made thereon. [18 Stat. L. 450.]

See the note to section 1 of this Act, *supra*, p. 780.

By the Act of July 31, 1894, ch. 174, §§ 3 and 7, 28 Stat. L. 205, 206, the second auditor was designated auditor for the War Department, and the auditor for the Interior Department was charged with the examination of all accounts relating to Indians. See TREASURY DEPARTMENT.

SEC. 9. [Bids for supplies, etc., for Indian service—certified check, draft, or bond to accompany bids.] "That hereafter all bidders under any advertisement published by the Commissioner of Indian Affairs for proposals for goods, supplies, transportation, and so forth, for and on account of the Indian Service, whenever the value of the goods, supplies, and so forth, to be furnished, or the transportation to be performed, shall exceed the sum of \$5,000, shall accompany their bids with a certified check, draft, or cashier's check, payable to the order of the Commissioner of Indian Affairs, upon some United States depository or some one of such solvent national banks as the Secretary of the Interior may designate, or by an acceptable bond in favor of the United States, which check, draft, or bond shall be for five per centum of the amount of the goods, supplies, transportation, and so forth, as aforesaid; and in case any such bidder, on being awarded a contract, shall fail to execute the same with good and sufficient sureties according to the terms on which such bid was made and accepted, such bidder, or the sureties on his bond, shall forfeit the amount so deposited or guaranteed to the United States, and the same shall forthwith be paid into the Treasury of the United States; but if such contract shall be duly executed, as aforesaid, such draft, check, or bond so deposited shall be returned to the bidder. [18 Stat. L. 450, as amended by 39 Stat. L. 129.]

See the note to section 1 of this Act, *supra*, p. 780. This section was amended to read as above given by a provision of the Indian Appropriation Act of May 18, 1916, ch. 125, § 1. As originally enacted it was as follows:

"Sec. 9. That hereafter all bidders under any advertisement published by the Commissioner of Indian Affairs for proposals for goods, supplies, transportation, and so forth, for and on account of the Indian service, whenever the value of the goods, supplies, and so forth, to be furnished, or the transportation to be performed, shall exceed the sum of five thousand dollars, shall accompany their bids with a certified check, or draft payable to the order of the Commissioner of Indian Affairs, upon some United States depository or some one of such solvent national banks as the Secretary of the Interior may designate, which check or draft shall be five per centum on the amount of the goods, supplies, transportation, and so forth, as aforesaid; and in case any such bidder, on being awarded a contract, shall fail to execute the same with good and sufficient sureties according to the terms on which such bid was made and accepted, such bidder shall forfeit the amount so deposited to the United States, and the same shall forthwith be paid into the Treasury of the United States; but if such contract shall be duly executed, as aforesaid, such draft or check so deposited shall be returned to the bidder." [18 Stat. L. 450.]

See Pamph. Supp. No. 8, Fed. Stat. Ann. 7, 1918 Supp. Fed. Stat. Ann.

A provision similar to the above, except in the use of the words "or solvent national bank" in place of the words "or some one of such solvent national banks as the Secretary of the Interior may designate," as used here, was contained in the Act of June 22, 1874, ch. 389, § 6, 18 Stat. L. 176.

An act transferring the custody of certain Indian trust-funds.

[Act of June 10, 1876, ch. 122, 19 Stat. L. 58.]

[Custodian of Indian trust securities — interest, certificates of deposit — purchases — sales, etc.] That all stocks, bonds, or other securities or evidences of indebtedness now held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act, be transferred to the Treasurer of the United States, who shall become the custodian thereof; and it shall be the duty of said Treasurer to collect all interest falling due on said bonds, stocks, &c., and deposit the same in the Treasury of the United States, and to issue certificates of deposit therefor, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds herein authorized, and shall make all purchases and sales of bonds and stocks authorized by treaty-stipulations or by acts of Congress when requested so to do by the Secretary of the Interior: *Provided*, That nothing in this act shall in any manner impair or affect the supervisory and appellate powers and duties in regard to Indian affairs which may now be vested in the Secretary of the Interior as trustee for various Indian tribes, except as to the custody of said bonds and the collection of interest thereon as hereinbefore mentioned. [19 Stat. L. 58.]

See the Act of April 1, 1880, ch. 41, *infra*, p. 784.

Sale of past-due bonds.—Where state bonds, held by the United States Treasurer in trust for certain of the Indian tribes, are past due and payment thereof has been refused by the treasurer of the state, the Secretary of the Interior, in the performance of his duties as trustee, has power to authorize the acceptance of

a proposition made by a third person to purchase such bonds at their face value with accrued interest, provided the market value does not exceed the face value with accrued interest, and provided the acceptance will best subserve the interests of the trust. (1887) 18 Op. Atty.-Gen. 581.

SEC. 3. [Bids or proposals — preservation — filing abstract.] That in all lettings of contracts in connection with the Indian service, the proposals or bids received shall be filed and preserved; * * * and an abstract of all bids or proposals received for the supplies or services embraced in any contract shall be attached to, and filed with, the said contract when the same is filed in the office of the Second Comptroller of the Treasury. [19 Stat. L. 199.]

This is from the Indian Appropriation Act of Aug. 15, 1876, ch. 289.

A further provision of this section, omitted from the text, relating to detailed reports of bids, contracts, etc., was repealed by the Act of June 21, 1906, ch. 3504, 34 Stat. L. 328.

The office of second comptroller was abolished and the duty of examining all accounts relating to the Indian service was imposed on the auditor for the Interior Department by the Act of July 31, 1894, ch. 174, §§ 4, 7, 28 Stat. L. 206. See TREASURY DEPARTMENT.

[SEC. 1.] [Transportation of supplies by wagon, Indian labor.] * * *
And whenever practicable wagon transportation may be performed by

Indian labor; and whenever it is so performed the Commissioner of Indian Affairs is hereby authorized to hire a storehouse at any railroad whenever necessary, and to employ a storekeeper therefor, and to furnish in advance the Indians who will do the transportation with wagons and harness, all the expenses incurred under this provision, to be paid out of this appropriation: *Provided*, That hereafter contracts involving an expenditure of more than two thousand dollars shall be advertised and let to the lowest responsible bidder. [19 Stat. L. 291.]

This is from the Indian Appropriation Act of March 3, 1877, ch. 101.

This Act of March 3, 1877, ch. 101, does not supersede or repeal the Act of March 3, 1875, 18 Stat. L. 453, or R. S. sec. 5260 (title RAILROADS), which to a certain extent prohibit payment to land-grant railroads for services to the government. "The necessary or probable use of a land-grant road may in one case con-

stitute it de facto the lowest statutory bidder; in another may suggest the breaking up of the transportation into stages and separate contracts; and in a third may be so uncertain or so unsubstantial an element as in prudence properly to be disregarded." (1884) 18 Op. Atty-Gen. 41.

An act to authorize the Secretary of the Interior to deposit certain funds in the United States Treasury in lieu of investment.

[Act of April 1, 1880, ch. 41, 21 Stat. L. 70.]

[Deposit of Indian trust funds in Treasury — interest and permanent appropriation.] That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress. [21 Stat. L. 70.]

See the Act of June 10, 1876, ch. 122, *supra*, p. 783.

Agreement to deposit money at interest.—An agreement made with certain Indians by duly appointed commissioners, whereby a portion of the purchase money of Indian lands was retained in trust and was to be placed in the Treasury and interest paid thereon, was held to be in line with the provision in the text and the policy then adopted, and is valid and binding. (1893) 20 Op. Atty-Gen. 517.

Interest payable only when provided for in treaty.—See *Blackfeather v. U. S.*, (1893) 28 Ct. Cl. 447.

Sale of bonds called for redemption.—The Secretary of the Interior has the right to sell United States bonds held by him in trust for certain Indian tribes and called for redemption, in order that the fund may receive the benefit of the premium. (1881) 17 Op. Atty-Gen. 104.

[SEC. 1.] [Secretary of Interior may purchase articles made at Indian training schools.] * * * That the Secretary of the Interior be, and he

is hereby, authorized, whenever it can be done advantageously, to purchase for use in the Indian service, from Indian manual and training schools, in the manner customary among individuals such articles as may be manufactured at such schools, and which are used in the Indian service. Accounts of such transactions shall be kept in the Indian Bureau and in the training schools, and reports thereof made from time to time. [21 Stat. L. 131.]

This is from the Indian Appropriation Act of May 11, 1880, ch. 85.

[SEC. 1.] [Proceeds of timber, etc., from Indian reservations to be covered in, etc.] * * * The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session. [22 Stat. L. 590.]

This is from the Deficiencies Appropriation Act of March 3, 1883, ch. 141.

The Indian Appropriation Act of March 2, 1887, ch. 320, 24 Stat. L. 463, contained the following provisions: "That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress."

SEC. 8. [Officers and others presenting false vouchers to forfeit all claims, etc.] That any disbursing or other officer of the United States, or other person who shall knowingly present, or cause to be presented, any voucher, account, or claim to any officer of the United States, for approval or payment, or for the purpose of securing a credit in any account with the United States, relating to any matter pertaining to the Indian service, which shall contain any material misrepresentation of fact in regard to the amount due or paid, the name or character of the article furnished or received, or of the service rendered, or to the date of purchase, delivery, or performance of service, or in any other particular, shall not be entitled to payment or credit for any part of said voucher, account, or claim; and if any such credit shall be given or received, or payment made, the United States may recharge the same to the officer or person receiving the credit or payment, and recover the amount from either or from both, in the same manner as other debts due the United States are collected:

Provided, That where an account contains more than one voucher the foregoing shall apply only to such vouchers as contain the misrepresentation:

And provided further, That the officers and persons by and between whom the business is transacted shall, in all civil actions in settlement of accounts, be presumed to know the facts in relation to the matter set forth in the voucher, account, or claim:

And provided further, That the foregoing shall be in addition to the penalties now prescribed by law, and in no way affect proceedings under existing law for like offenses. That where practicable this section shall be printed on the blank forms of vouchers provided for general use. [23 Stat. L. 97.]

This and the following section 10 are from the Indian Appropriation Act of July 4, 1884, ch. 180.

Provisions similar to those of the text were made by the Act of March 1, 1883, ch. 61, § 8, 22 Stat. L. 451.

Action on bond of Indian agent.—This section, which provides that the presentation by an Indian agent of vouchers, accounts, and claims, containing material misrepresentations of fact in regard to the amounts due and paid shall not constitute an accounting, and making it the duty of the accounting officers of the government to reject such vouchers, does not impose a penalty, nor render an action to recover the indebtedness resulting from the rejection of such accounts one for the recovery of a penalty, but merely prescribes a statutory rule of accounting, which becomes a part of the contract of a surety for an Indian agent, to which his obligation is subject, and it is no defense to such an action on the agent's bond that vouchers so rejected contained correct and true items of expenditure; the agent having the right on their rejection to furnish true vouchers for all items for which he was entitled to credit. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 150 Fed. 550, 80 C. C. A. 446.

False voucher confined to one item.—Where an Indian agent's account contained a receipt roll which was not an original paper at all but merely an abstract of several subvouchers which accompanied it, and where the voucher on which one false item rested was confined to that item and had no relation to any other matter in the account to which it belonged, the penalty of section 8 of the Act of July 4, 1884, ch. 180, reached no further than to take away the agent's right to credit for any part of that item. 20 Op. Atty.-Gen. 561.

And where a false item occurred in a printed form entitled "pay roll of regular employees," and was signed by twelve persons, each stating opposite to his name the kind of work done by him, the receipts so taken were held to be so many separate and distinct vouchers within the meaning of the proviso of the above section. 20 Op. Atty.-Gen. 561.

SEC. 10. [Expense of land service not chargeable to Indian lands.] That no part of the expenses of the public lands service shall be deducted from the proceeds of Indian lands sold through the General Land Office, except as authorized by the treaty or agreement providing for the disposition of the lands. [23 Stat. L. 98.]

See the note to the preceding section 1 of this Act.

SEC. 4. [Advertisement and contract before appropriations.] * * * That hereafter the Commissioner of Indian Affairs is authorized to advertise in the spring of each year for bids, and enter into contracts, subject to the approval of the Secretary of the Interior, for goods and supplies for the Indian service required for the ensuing fiscal year, notwithstanding the fact that the appropriations for such fiscal year have not been made, and the contracts so made shall be on the basis of the appropriations for the preceding fiscal year and shall contain a clause that no deliveries shall be made under the same and no liability attach to the United States in consequence of such execution if Congress fails to make an appropriation for such contract for the fiscal year for which those supplies are required. [28 Stat. L. 312.]

This is from the Indian Appropriation Act of Aug. 15, 1894, ch. 290. Similar provisions appeared in prior Indian Appropriation Acts.

[SEC. 1.] [Officer of government to make payments, etc.] * * *
That any sums of money hereafter to be paid per capita to individual Indians shall be paid to said Indians by an officer of the Government designated by the Secretary of the Interior. [29 Stat. L. 336.]

This is from the Indian Appropriation Act of June 10, 1896, ch. 398.

By the Act of March 2, 1895, ch. 188, § 11, 28 Stat. L. 188, the Secretary of the Interior was authorized to detail an officer from his department or appoint a special agent to superintend and inspect payments of disbursements to Indians. This was repealed by an Act of April 21, 1904, ch. 1402, § 9, 33 Stat. L. 218.

The Act of June 28, 1898, ch. 517, contained the following provision:

"SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation." [30 Stat. L. 502.]

Payment of annuity to third person.—The Act of 1847, part of which constitutes R. S. sec. 2086, *supra*, p. 772, declared null and void all executory contracts for the payment of money or goods made and entered into by any Indian. The Attorney-General held that this provision did not apply to such a contract when entered into by the Indians as a tribe; but that by general principle, the President might in-

quire into the consideration of an order on him by an Indian tribe to pay over their annuity to a third person in discharge of an alleged debt, and proceed in the premises as, in his sound discretion, might best comport with the "imperious interest" of his pupils and wards, the Indians concerned. (1853) 6 Op. Atty.-Gen. 49; (1854) 6 Op. Atty.-Gen. 462.

SEC. 7. [Commutation of rations to civilized Indians.] That hereafter when, in the judgment of the Secretary of the Interior, any Indian tribe, or part thereof, who are receiving rations and clothing and other supplies under this Act, are sufficiently advanced in civilization to purchase such rations and clothing and other supplies judiciously, they may commute the same and pay the value thereof in money per capita to such tribe or part thereof, the manner of such payment to be prescribed by the Secretary of the Interior. [30 Stat. L. 596.]

This section is from the Indian Appropriation Act of July 1, 1898, ch. 545.

[SEC. 1.] [Indian supplies, etc., how transported.] That from and after the passage of this Act, Indian goods and supplies shall be transported under contract as provided in the Act of March third, eighteen hundred and seventy-seven, or in open market by common carriers, as the Secretary of the Interior in his discretion shall determine. [30 Stat. L. 676.]

This is from the Deficiencies Appropriation Act of July 7, 1898, ch. 571.

For the Act of March 3, 1877, ch. 101, § 1, see *supra*, p. 783.

The Indian Appropriation Act of March 3, 1893, ch. 209, contained the following provisions: "Transportation of Indian supplies: . . . *Provided*, that Indians shall be employed in the transportation of supplies and in other work connected with the Indian service wherever practicable." [27 Stat. L. 632.]

SEC. 8. [Indians eighteen years old may receipt for annuity money.] That hereafter all Indians, when they shall arrive at the age of eighteen

years, shall have the right to receive and receipt for all annuity money that may be due or become due to them, if not otherwise incapacitated under the regulations of the Indian Office. [30 Stat. L. 947.]

This is from the Indian Appropriation Act of March 1, 1899, ch. 324.
See R. S. sec. 2089, *supra*, p. 773.

[SEC. 1.] **[Appropriations for subsistence—use of surplus—report—stock cattle—treaty funds excluded.]** * * * That hereafter the Secretary of the Interior, under the direction of the President, may use any surplus that may remain in any of the said appropriations for the purchase of subsistence for the several Indian tribes, to an amount not exceeding twenty-five thousand dollars in the aggregate, to supply any subsistence deficiency that may occur: *Provided*, That any diversions which shall be made under authority of this section shall be reported in detail, and the reason therefor, to Congress, at the session of Congress next succeeding such diversion: *Provided further*, That the Secretary of the Interior, under direction of the President, may use any sums appropriated in this Act for subsistence, and not absolutely necessary for that purpose, for the purchase of stock cattle for the benefit of the tribe for which such appropriation is made, and shall report to Congress, at its next session thereafter, an account of his action under this provision: *Provided further*, That funds appropriated to fulfill treaty obligations shall not be used. [34 Stat. L. 1016.]

The provisions of this and the following two paragraphs of the text are from the Indian Appropriation Act of March 1, 1907, ch. 2285.

[Diversion to other use of appropriations for employees and supplies—report.] * * * And that the several appropriations made for millers, blacksmiths, engineers, carpenters, physicians, and other persons, and for various articles provided for by treaty stipulation for the several Indian tribes, may be diverted to other uses for the benefit of said tribes, respectively, within the discretion of the President, and with the consent of said tribes, expressed in the usual manner; and that he cause report to be made to Congress, at its next session thereafter, of his action under this provision: [34 Stat. L. 1016.]

See the note to the preceding paragraph of this section.

[Appropriations for supplies—when available—time of distribution.] * * * That so much of the appropriations of any annual Indian appropriation Act as may be required to pay for goods and supplies, for expenses incident to their purchase, and for transportation of the same, for the fiscal year for which such appropriations are made, shall be immediately available, upon the approval of such Act, but no such goods or supplies shall be distributed or delivered to any of said Indians prior to the beginning of such fiscal year. [34 Stat. L. 1016.]

See the note to the first paragraph of this section.

An Act Providing for the allotment and distribution of Indian tribal funds.

[*Act of March 2, 1907, ch. 2523, 34 Stat. L. 1221.*]

[SEC. 1.] **[Indian tribal funds—allotment, etc., of, to individual Indians.]** That the Secretary of the Interior is hereby authorized, in his discretion, from time to time; to designate any individual Indian belonging to any tribe or tribes whom he may deem to be capable of managing his or her affairs, and he may cause to be apportioned and allotted to any such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which said Indian is a member, and the amount so apportioned and allotted shall be placed to the credit of such Indian upon the books of the Treasury, and the same shall thereupon be subject to the order of such Indian: *Provided*, That no apportionment or allotment shall be made to any Indian until such Indian has first made an application therefor: *Provided further*, That the Secretaries of the Interior and of the Treasury are hereby directed to withhold from such apportionment and allotment a sufficient sum of the said Indian funds as may be necessary or required to pay any existing claims against said Indians that may be pending for settlement by judicial determination in the Court of Claims or in the Executive Departments of the Government, at time of such apportionment and allotment. [*34 Stat. L. 1221.*]

SEC. 2. **[Payment to helpless, etc., Indians.]** That the pro rata share of any Indian who is mentally or physically incapable of managing his or her own affairs may be withdrawn from the Treasury in the discretion of the Secretary of the Interior and expended for the benefit of such Indian under such rules, regulations, and conditions as the said Secretary may prescribe: *Provided*, That said funds of any Indian shall not be withdrawn from the Treasury until needed by the Indian and upon his application and when approved by the Secretary of the Interior. [*34 Stat. L. 1221, as amended by 39 Stat. L. 128.*]

This section was amended to read as above given by the Indian Appropriation Act of May 18, 1916, ch. 125, § 1. As originally enacted it was as follows:

"SEC. 2. That the Secretary of the Interior is hereby authorized to pay any Indian who is blind, crippled, decrepit, or helpless from old age, disease, or accident, his or her share, or any portion thereof, of the tribal trust funds in the United States Treasury belonging to the tribe of which such Indian is a member, and of any other money which may hereafter be placed in the Treasury for the credit of such tribe and susceptible of division among its members, under such rules, regulations, and conditions as he may prescribe." See Pamph. Supp. No. 7, Fed. Stat. Ann. 7, 1918 Supp. Fed. Stat. Ann.

[SEC. 1.] **[Purchase of supplies for Indian service to be advertised—exception—irrigation—Indian labor.]** * * * That no purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record

of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided*, That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further*, That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the direction of the Secretary of the Interior. [35 Stat. L. 71.]

The provisions of this and the three following paragraphs are from the Indian Appropriation Act of April 30, 1908, ch. 153.

Provisions similar to those of this paragraph were made by like Appropriation Acts for previous years.

[Deposit in bank of Indian moneys — bond.] That hereafter any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such national bank or banks as he may select: *Provided*, That the bank or banks so selected by him shall first execute to said disbursing agent a bond, with approved surety, in such an amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior. [35 Stat. L. 72.]

See the note to the preceding paragraph of this section.

As to the abolition of superintendencies see the note to R. S. secs. 2046–2051, noted *supra*, p. 753.

[Warehouses for goods for Indian Service.] * * * That hereafter warehouses for the receipt, storage, and shipment of goods for the Indian Service shall be maintained at the following places: New York, Chicago, Omaha, Saint Louis, and San Francisco. [35 Stat. L. 73.]

See the note to the first paragraph of this section, *supra*, this page.

The Indian Appropriation Act of Aug. 1, 1914, ch. 222, 38 Stat. L. 585, limited the number of permanent warehouses to three. The Indian Appropriation Act of May 18, 1916, ch. 125, § 1, 39 Stat. L. 126, limited the appropriation there made to the maintenance of not exceeding two permanent warehouses.

[Supplies — transportation by land grant railroads — compensation.] * * * That hereafter payment for transportation of Indian goods and supplies shall include all Indian transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts), but in no case shall more than fifty per centum of full amount of service be paid to said land-grant roads: *Provided*, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: *Provided further*, That hereafter in expending money appropriated for this purpose a railroad company which has not received aid in bonds of the United States, and which obtained a grant of public lands

to aid in the construction of its railroad on condition that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other Government services, and also subject to such regulations as Congress may impose, restricting the charge for such Government transportation, having claims against the United States for transportation of Indian goods and supplies over such aided railroads, shall be paid out of the moneys appropriated for such purpose only on the basis of such rate for the transportation of such Indian goods and supplies as the Secretary of the Interior shall deem just and reasonable under the provisions set forth herein, such rate not to exceed fifty per centum of the compensation for such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service. [35 *Stat. L.* 73.]

See the note to the first paragraph of this section, *supra*, p. 790.

[SEC. 1.] [Indian tribes — annual statement of reimbursable accounts.]

* * * Hereafter the Secretary of the Interior shall cause to be stated annual accounts between the United States and each tribe of Indians arising under appropriations heretofore, herein, or hereafter to be made, which by law are required to be reimbursed to the United States, crediting in said accounts the sums so reimbursed, if any; and the Secretary of the Interior shall pay, out of any fund or funds belonging to such tribe or tribes of Indians applicable thereto and held by the United States in trust or otherwise, all balances of accounts due to the United States and not already reimbursed to the Treasury, and deposit such sums in the Treasury as miscellaneous receipts; and such accounts shall be received and examined by the proper auditor of the Treasury Department and the balances arising thereon certified to the Secretary of the Treasury. [36 *Stat. L.* 270.]

This is from the Indian Appropriation Act of April 4, 1910, ch. 140.

SEC. 23. [Indian supplies — purchases under regular contracts.] That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed. [36 *Stat. L.* 861.]

This is from the Act of June 25, 1910, ch. 431. See the notes to section 1 of said Act, *infra*, p. 853.

For R. S. sec. 3709 mentioned in the text see the title PUBLIC CONTRACTS.

The Indian Appropriation Act of May 18, 1916, ch. 125, § 1, 39 *Stat. L.* 126, contained the following provision: "That section thirty-seven hundred and nine, Revised Statutes, in so far as that section requires that advertisement be made, shall apply only to those purchases and contracts for supplies or services, except personal services, for the

Indian field service which exceed in amount the sum of \$50 each, and section twenty-three of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and sixty-one), is hereby amended accordingly." See Pamph. Supp. No. 7, Fed. Stat. Ann. 6, 1918 Supp. Fed. Stat. Ann.

SEC. 28. [Judgments to Indians — payments — accounting.] Hereafter payments to Indians made from moneys appropriated by Congress in satisfaction of the judgment of any court shall be made under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs, and all such payments shall be accounted for to the Treasury in conformity with law. [36 Stat. L. 1077.]

This is from the Indian Appropriation Act of March 3, 1911, ch. 210.

[SEC. 1.] [Payment for wagon transportation of supplies.] * * * That all wagon transportation from the point where delivery is made by the last common carrier to the agency, school, or elsewhere, and between points on the reservation or elsewhere, shall hereafter be paid from the funds appropriated or otherwise available for the support of the school, agency, or other project for which the supplies to be transported are purchased. [38 Stat. L. 79.]

This and the following section 18 are from the Indian Appropriation Act of June 30, 1913, ch. 4.

SEC. 18. [Contracts as to tribal funds, etc., subject to official approval.] * * * No contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given. [38 Stat. L. 97.]

See the notes to the preceding section 1 of this Act

Joint Resolution Making appropriations for current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and sixteen.

[Res. of March 4, 1915, No. 16, 38 Stat. L. 1228.]

[Appropriations for current expenses continued.] That all appropriations for the current and contingent expenses of the Bureau of Indian Affairs and for fulfilling treaty stipulations with various Indian tribes, which shall remain unprovided for on June thirtieth, nineteen hundred and fifteen, are continued and made available for and during the fiscal year nineteen hundred and sixteen to the same extent, in detail, and under the same conditions, restrictions, and limitations for the fiscal year nineteen hundred and sixteen as the same were provided for on account of the

fiscal year nineteen hundred and fifteen in the Indian appropriation Act for that fiscal year. For all of such purposes a sufficient sum is appropriated, out of any money in the Treasury not otherwise appropriated, or out of funds to the credit of Indians as the same were respectively provided in the Indian appropriation Act for the fiscal year nineteen hundred and fifteen: *Provided*, That the appropriations from the Treasury of the United States or from Indian funds shall not exceed in the aggregate the amounts of such appropriations for the fiscal year nineteen hundred and fifteen: *Provided further*, That this joint resolution shall not be construed as providing for or authorizing the duplication of any special payment or for the execution of any purpose provided for in said appropriation Act that was intended to be paid only once or done solely on account of the fiscal year nineteen hundred and fifteen: *Provided further*, That appropriations continued hereunder shall be available for the maintenance, repair, and operation of motor-propelled and horse-drawn passenger carrying vehicles in the same manner as appropriations were available for those purposes during the fiscal year nineteen hundred and fifteen. [38 Stat. L. 1228.]

IV. GOVERNMENT AND PROTECTION OF INDIANS

Sec. 2111. [Sending seditious messages — penalty.] Every person who sends any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or law of the United States, or to disturb the peace and tranquillity of the United States, is liable to a penalty of two thousand dollars. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 731.

R. S. secs. 2111 to 2126 constitute ch. 3, "Government and Protection of Indians," of title XXVIII, "Indians."

Sec. 2112. [Carrying seditious messages — penalty.] Every person who carries or delivers any talk, message, speech, or letter, intended to produce a contravention or infraction of any treaty or law of the United States, or to disturb the peace or tranquillity of the United States, knowing the contents thereof, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, is liable to a penalty of one thousand dollars. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 731.

Sec. 2113. [Correspondence with foreign nations to excite Indians to war — penalty.] Every person who carries on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or who alienates, or attempts to alienate, the confidence of any Indian or Indians from the Government of the United States, is liable to a penalty of one thousand dollars. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 731.

Unlawful interference.— It seems that any efforts, without just cause, to interfere in the conduct of an agency or an Indian school, and thereby cause ill feeling on the part of the Indians toward the

government, might bring the actors within the condemnation of the latter part of the above section. *In re Lelah-Puc-Ka-Chee*, (1899) 98 Fed. 429.

Sec. 2114. [General superintendence by the President over tribes removed west of the Mississippi.] The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May twenty-eighth, eighteen hundred and thirty, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi;" and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever. [R. S.]

Act of May 28, 1830, ch. 148, 4 Stat. L. 412.

The Act of May 11, 1880, ch. 85, § 4, 21 Stat. L. 131, provided: "That all officers and agents of the Army and Indian Bureaus are prohibited, except in a case specially directed by the President, from granting permission in writing or otherwise to any Indian or Indians on any reservation to go into the State of Texas under any pretext whatever; and any officer or agent of the Army or Indian Bureau who shall violate this provision shall be dismissed from the public service. And the Secretary of the Interior is hereby directed and required to take at once such other reasonable measures as may be necessary in connection with said prohibition to prevent said Indians from entering said State." This was repealed by a provision of the Indian Appropriation Act of May 18, 1916, ch. 125, § 1, 39 Stat. L. 128. See Pamph. Supp. No. 7, Fed. Stat. Ann. 6, 1918 Supp. Fed. Stat. Ann.

Cherokee nation.— In *Cherokee Nation v. Southern Kansas R. Co.*, (1888) 33 Fed. 900, it was held that the Cherokee nation was removed from its home east of the Mississippi river by authority of the Act of May 28, 1830, above noted, and re-

mained under the control of an Indian agent and subject to all the provisions of the law regulating the intercourse of the government and people of the United States with the Indian tribes.

Sec. 2115. [Survey of Indian reservations.] Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the General Land-Office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed. [R. S.]

Act of April 8, 1864, ch. 48, 13 Stat. L. 41.

Prior to the Act of 1864, above noted, the survey of Indian lands came within the jurisdiction of the commissioner of Indian affairs. *McKee v. U. S.*, (1865) 1 Ct. Cl. 336.

Survey of certain lands belonging to the Creek tribe.— See *U. S. v. Mackey*, (E. D. Okla. 1913) 214 Fed. 137.

Sec. 2116. [Purchases or grants from Indians.] No purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars. The agent of any State who may be

present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 730.

Nature of title of tribe immaterial.—The operation of this statutory provision does not depend upon the nature or extent of the title to the land which the tribal nation may hold. (1885) 18 Op. Atty.-Gen. 235.

The words of the statute are broad enough to include a tribe holding land by patent from the United States, and the purpose of the statute manifestly requires it to receive that construction. (1857) 9 Op. Atty.-Gen. 24.

Alienation by individual Indians.—“This section declares that no conveyance from an Indian tribe shall be of any validity in law or in equity unless authorized by treaty. As the tribe cannot sell, neither can the individual members, for they have neither an undivided interest in the tribal land nor vendible interest in any particular tract.” *Franklin v. Lynch*, (1914) 233 U. S. 269, 34 S. Ct. 505, 58 U. S. (L. ed.) 954.

But where reservation has been made by a treaty with the United States, it has been held that Congress did not intend, by the above section, that there should be any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty. *Jones v. Meehan*, (1899) 175 U. S. 1, 20 S. Ct. 1, 44 U. S. (L. ed.) 49.

A contrary opinion was rendered by the Attorney-General prior to the foregoing decision. (1886) 18 Op. Atty.-Gen. 487.

Invalidity of lease.—A lease of Indian lands to a white man without the consent of the Indian agent and the commissioner

of Indian affairs, and without authorization by Act of Congress or treaty regulation, is void. *Cherokee Strip Live Stock Ass'n v. Cass Land, etc.*, (1897) 138 Mo. 394, 40 S. W. 107; *Coe v. Low*, (1904) 36 Wash. 10, 77 Pac. 1077.

A lease of land for grazing purposes is as clearly within the statute as a lease for any other or for general purposes, and the duration of the term is immaterial. The consent of a tribe may exempt one who enters with cattle upon a reservation from the penalty imposed by R. S. sec. 2117 (given below), but it cannot validate the lease or confer upon such person any legal right whatsoever to remain upon the land, (1885) 18 Op. Atty.-Gen. 235.

No action can be maintained upon a lease for grazing purposes made in violation of this section. *Mayes v. Cherokee Strip Live Stock Ass'n*, (1897) 58 Kan. 712, 51 Pac. 215.

Negotiations for lease not an offense.—The penal part of this section does not reach to the mere inducing or negotiating of a lease of Indian lands for grazing purposes, as the wording of such part of the statute makes the penalty applicable only to treating for the “title or purchase” of any lands. *U. S. v. Hunter*, (1884) 21 Fed. 615.

Contracts with Indians under R. S. sec. 2103.—Contracts of the character described in this section are not included within the provisions of section 2103, *supra*, p. 776. (1885) 18 Op. Atty.-Gen. 235.

Sec. 2117. [Driving stock to feed on Indian lands.] Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 730.

Sheep are embraced within the meaning of this section. (1884) 18 Op. Atty.-Gen. 91; *U. S. v. Mattock*, (1872) 2 Sawy. 148, 26 Fed. Cas. No. 15,744.

Driving cattle for delivery to Indians.—This section is not violated by driving cattle into the Indian country for delivery to one of its citizens under his contract to purchase them. *Morris v. Cohn*, (1891) 55 Ark. 401, 17 S. W. 342, 18 S. W. 384.

Elements of offense.—The words of

this section imply the active agency of some person in getting cattle on a reservation, but it is not necessary that stock should be actually driven upon the land. The offense is committed if they are driven or conveyed so near to Indian lands that, from the nature and habits of the animals, they will probably get upon them. (1880) 16 Op. Atty.-Gen. 568.

Consent of tribe required.—A statute of a particular Indian tribe, giving to its

citizens consent to inclose pastures and to use the same exclusively for keeping and grazing livestock, does not give such citizens the right to lease such pastures for grazing stock to other persons without the consent of the tribe. *Forsythe v. U. S.*, (1901) 3 Indian Ter. 599, 64 S. W. 548.

Who may bring suit.—Any member of the tribe may file in the name of the

United States a suit against the party violating this statute and recover for the United States the penalty therein prescribed. *Forsythe v. U. S.*, (1901) 3 Indian Ter. 599, 64 S. W. 548.

The United States attorney need not appear in an action brought under this section. *Forsythe v. U. S.*, (1901) 3 Indian Ter. 599, 64 S. W. 548.

Sec. 2118. [Settling on, or surveying lands belonging to Indians by treaty.] Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take such measures and employ such military force as [he?] may judge necessary to remove any such person from the lands. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 730.

Holder of title subject to Indian occupancy.—One who holds a title in lands subject to the right of occupancy of an Indian tribe has no right, merely by virtue of that title, to enter upon and take possession of the premises; and by entering upon the land without the permission of the tribe and of the government, he becomes an intruder and may be proceeded against summarily under the above section. Nor does a writ of possession obtained by such person, by default in the territorial court, change his character as an intruder. (1875) 14 Op. Atty-Gen. 568.

The Pueblo Indians of New Mexico are not such a tribe as is contemplated by this section. These Indians hold their lands by rights superior to that of the United States, and this statute is intended to affect only those Indians holding land the ultimate title to which remains in the government. *U. S. v. Joseph*, (1876) 94 U. S. 614, 24 U. S. (L. ed.) 295.

Settlement on Indian lands not an indictable offense.—A settlement upon Indian lands is not an indictable offense

and cannot be prosecuted by criminal proceedings. It is an offense created by statute, with a definite penalty attached, for the performance of which R. S. sec. 2124, *infra*, p. 798, prescribes the mode. *U. S. v. Payne*, (1884) 22 Fed. 426.

To what lands applicable.—The similar provision of the Act of 1834, above cited, has been held not to apply to lands outside a government reservation, in which the only title the Indians had was that of such occupancy as they had to unoccupied public lands in general. *Caldwell v. Robinson*, (1894) 59 Fed. 653.

Nor does the Act apply to lands that were not a part of the United States at the time of its adoption. *Robinson v. Caldwell*, (1895) 67 Fed. 391.

Injuries to personal or property rights.—By this section and R. S. secs. 2119 and 2124 the executive branch of the government is bound to protect Indians residing on a reservation in the possession and occupancy of their land; but this affords no remedy to the Indian for an injury to his personal or property rights, and for such remedy he must go to some court of competent jurisdiction. *Smith v. Mosgrove*, (1908) 61 Ore. 495, 94 Pac. 970.

Sec. 2119. [Protection of Indians desiring civilized life.] Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not inconsistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him. [R. S.]

Act of June 14, 1862, ch. 101, 12 Stat. L. 427.

For general provisions relating to the allotment of land to Indians in severalty see subdivision VI of this title, *infra*, p. 819.

Powers and duties of agent under this section.—By provisions of this section and R. S. secs. 2114, 2118 (*supra*, pp. 794, 796), and 2149 (*infra*, p. 814), the Executive Department is charged with the duty of removing all intruders from an Indian reservation and protecting the Indians in the use and occupancy thereof, notwithstanding that portions of such reservation have been allotted in severalty to a part of the tribe, or that the allottees have thereby become citizens of the United States. By

the rules and regulations of the Department of the Interior, as well as by the express provisions of this section, the Indian agent is the officer charged with the performance of this duty, and he may employ such force as may be necessary to accomplish the purpose; and all persons who endeavor to prevent, by force, such agent from performing this duty imposed upon him, thereby place themselves in the position of wrongdoers. *U. S. v. Mullin*, (1895) 71 Fed. 682.

Sec. 2120. [Indians trespassing upon lands of civilized Indians.] Whenever any person of Indian blood belonging to a band or tribe which receives or is entitled to receive annuities from the United States, and who has not adopted the habits and customs of civilized life, and received his lands in severalty by allotment, as mentioned in the preceding section, commits any trespass upon the lands or premises of any Indian who has so received his lands by allotment, the superintendent and agent of such band or tribe shall ascertain the damages resulting from such trespass, and the sum so ascertained shall be withheld from the payment next thereafter to be made, either to the band or tribe to which the party committing such trespass shall belong, as in the discretion of the superintendent he shall deem proper; and the sum so withheld shall, if the Secretary of the Interior approves, be paid over by the agent or superintendent to the party injured. [*R. S.*]

Act of June 14, 1862, ch. 101, 12 Stat. L. 427.

Sec. 2121. [Suspension of chief for trespass.] Whenever such trespasser as is mentioned in the preceding section is the chief or head-man of a band or tribe, the superintendent of Indian affairs in his district shall also suspend the trespasser from his office for three months, and shall during that time deprive him of all the benefits and emoluments connected therewith; but the chief or head-man may be sooner restored to his former standing if the superintendent shall so direct. [*R. S.*]

Act of June 14, 1862, ch. 101, 12 Stat. L. 427.

As to the abolition of superintendencies see the notes to R. S. secs. 2046-2051, noted *supra*, p. 753.

Sec. 2122. [Sale of buildings belonging to the United States.] The Secretary of the Interior is authorized to cause all such buildings belonging to the United States, as have been, or hereafter shall be, erected for the use of their agents, teachers, farmers, mechanics, and other persons employed amongst the Indians, to be sold whenever the lands on which the same are erected have become the property of the United States, and are no longer necessary for such purposes. [*R. S.*]

Act of March 3, 1843, ch. 78, 5 Stat. L. 611.

Sec. 2123. [Sale of lands with buildings.] The Secretary of the Interior is authorized to cause to be sold, at his discretion, with each of such buildings as are mentioned in the preceding section, a quantity of land not exceeding one section; and on the payment of the consideration agreed for into the Treasury of the United States by the purchaser, the

Secretary shall make, execute, and deliver to the purchaser a title in fee-simple for such lands and tenements. [R. S.]

Act of March 3, 1843, ch. 78, 5 Stat. L. 611.

Sec. 2124. [Penalties, how recovered.] All penalties which shall accrue under this Title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one-half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 733.

"This title," to which the above section refers, is R. S. title XXVIII, "Indians," which comprises sections 2039-2157, inclusive.

Intention of statute.—This section is not intended to limit the United States to the single remedy of debt in enforcing

penalties, but is designed merely to establish the rights and remedy of an informer. U. S. v. Stocking, (1898) 87 Fed. 857.

Sec. 2125. [Proceedings against goods.] When goods or other property shall be seized for any violation of this Title, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 734.

See the note to the preceding R. S. sec. 2124.

Property not to be retained by military force seizing same.—The special provision of R. S. sec. 3086 (see title CUSTOMS DUTIES, vol. 2, p. 1173), by which the property seized is left in the custody of the collector or principal officer of the customs for violation of the revenue service, is not to be considered as embraced in the proceedings contemplated in this

section, so as to permit the military forces employed in making seizures to retain the custody of the property to abide adjudication; but as soon as is reasonably practicable after report is made to the United States district attorney, the property should be placed in the custody of the proper civil officer. (1887) 18 Op. Atty-Gen. 544.

Sec. 2126. [Burden of proof.] In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 733.

Implication of statute.—This section carries with it the implication that the doors of the courts are open to an Indian

as well as to any other person. Felix v. Patrick, (1888) 36 Fed. 457.

An act in relation to marriage between white men and Indian women.

[Act of Aug. 9, 1888, ch. 818, 25 Stat. L. 392.]

[SEC. 1.] **[White men marrying Indian women not to acquire tribal rights.]** That no white man, not otherwise a member of any tribe of

Indians, who may hereafter marry, an Indian woman, member of any Indian tribe in the United States, or any of its Territories except the five civilized tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled. [25 Stat. L. 392.]

SEC. 2. [Indian women marrying citizens become citizens.] That every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: *Provided*, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein. [25 Stat. L. 392.]

SEC. 3. [Evidence of marriage of white men with Indian women.] That whenever the marriage of any white man with any Indian woman, a member of any such tribe of Indians, is required or offered to be proved in any judicial proceeding, evidence of the admission of such fact by the party against whom the proceeding is had, or evidence of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent. [25 Stat. L. 392.]

An act in relation to dead and fallen timber on Indian lands.

[Act of Feb. 16, 1889, ch. 172, 25 Stat. L. 673.]

[Indians on reservations may be allowed to cut, remove, etc., dead timber.] That the President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this act then in that case such authority shall not be granted. [25 Stat. L. 673.]

See the provisions of the second following paragraph of the text.

The unauthorized cutting of timber upon Indian reservations is notoriously unlawful. *U. S. v. Cook*, (1873) 19 Wall. 591, 22 U. S. (L. ed.) 210; *Northern Pac. R. Co. v. Lewis*, (1896) 162 U. S. 366, 16 S. Ct. 831, 40 U. S. (L. ed.) 1002. It was made a criminal offense by the Act of June 4, 1888, ch. 340, 25 Stat. L. 166, which amended R. S. sec. 5388, which was embodied in Penal Laws, sec. 50, and repealed by sec. 341 thereof. See **PENAL LAWS**.

Construction.—Construing the provisions of the foregoing Act in relation to dead and fallen timber on Indian lands,

the United States Supreme Court said: "It will be observed that by this statute no general authority is given to Indians to cut timber upon their reservations. The Act contemplates that the authority shall be temporary only, 'from year to year,' and it is further limited to 'dead timber standing or fallen,' and that it shall be disposed of solely for the benefit of the Indian or Indians to whom the authority is given. Pursuant to this Act certain regulations were prepared by the Secretary of the Interior, approved by the President, and extended to the Indians of the Chippewa reservation in the state

of Minnesota. These regulations provided that each Indian who engaged in the work should provide his own logging outfit and supplies; that no Indian should be allowed to log who has children of school age, but not attending school, unless in the opinion of his agent some good reason existed in special cases which were sufficient to exempt particular persons from this requirement; otherwise, every Indian on the reservation, not well employed, should be permitted and encouraged to engage in the work; that all cutting should be done under the superintendence and direction of a competent white man, who should go into the woods with the Indians, 'to the end that no green or growing timber may be cut, and that no live trees are damaged in any manner, so as to cause them to die; . . . and to inspect the sealing of the logs;' that with the exception of a superintendent and of foremen and blacksmiths, all white labor was to be excluded from the reservation; that the logs cut should be sold at public sale to the highest bidder, either by auction or by calling for sealed proposals, at the discretion of the Secretary of the Interior, after at least two weeks' notice by publication in the newspapers, and no sale of the logs should be valid until approved by the commissioner of Indian affairs; and that ten per cent. of the gross proceeds derived from such sale of the logs should go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless might be supported. The timber in this case was cut under five different contracts made between individual Indians and the defendants, all of which were limited to dead and down timber, to be cut during the season of 1891 and 1892. The first provided for 250,000 feet; the second for 500,000 feet; the third for 500,000 feet; the fourth for 1,000,000 feet, and the fifth for 500,000 feet. The whole amounted to 2,750,000 feet. These contracts were approved by the commissioner of Indian affairs, and, although in some of their provisions they differed from the general

regulations above stated, which provided for a public sale of logs at auction or under sealed proposals, they must be regarded as superseding those regulations in that particular, and as constituting new regulations approved by the President and commissioner of Indian affairs. The object of the statute, as interpreted by these regulations, was evidently to permit deserving Indians, who had no other sufficient means of support, to cut for a single season a limited quantity of dead and down timber under the superintendence of a properly qualified white man, and to use the proceeds for their support in exact proportion to the scale of logs banked by each, provided that ten per cent. of the gross proceeds should go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless might be supported. The rights of the government to the unimpaired value of the land and to the standing timber were carefully guarded by the proviso that no green or growing timber should be cut, and no live trees damaged so as to cause them to die, that they might be marketed under the provisions of the Act. Nothing can be plainer than that there was no intention on the part of Congress or the President to authorize promiscuous logging operations, or the felling of live standing timber, or that a few Indians should be permitted to monopolize the proceeds, but that they should be divided among the individuals of the tribe in proportion to the scale of the logs banked by each." *Pine River Logging, etc., Co. v. U. S.*, (1902) 186 U. S. 279, 22 S. Ct. 920, 46 U. S. (L. ed.) 1164, *affirming* (C. C. A. 8th Cir. 1900) 105 Fed. 1004, 44 C. C. A. 686, in which case it was held that where by consent of a government agent superintending the work a quantity of timber in excess of that specified in the contracts above mentioned was cut, the government was not estopped from asserting its right to recover against the defendants in an action in the nature of trover for the timber cut in excess of the quantity specified.

SEC. 38. [Tribal marriages valid, issue legitimate.] * * * That all marriages heretofore contracted under the laws or tribal customs of any Indian nation now located in the Indian Territory are hereby declared valid, and the issue of such marriages shall be deemed legitimate and entitled to all inheritances of property or other rights, the same as in the case of the issue of other forms of lawful marriage: [26 Stat. L. 98.]

This was a part of section 38 of an Act of May 2, 1890, ch. 182, providing a temporary government for the territory of Oklahoma and enlarging the jurisdiction of the United States in the Indian Territory.

[SEC. 1.] **[Dead timber may be cut, etc., by Minnesota and Chippewa Indians.]** The Secretary of the Interior may in his discretion, from year to year, under such regulations as he may prescribe, authorize the Indians residing on any Indian reservation in the State of Minnesota, whether the same has been allotted in severalty or is still unallotted, to fell, cut, remove, sell or otherwise dispose of the dead timber, standing or fallen, on such reservation or any part thereof, for the sole benefit of such Indians; and he may also in like manner authorize the Chippewa Indians of Minnesota who have any interest or right in the proceeds derived from the sales of ceded Indian lands or the timber growing thereon, whereof the fee is still in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber, standing or fallen, on such ceded land. But whenever there is reason to believe that such dead timber in either case has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this Act, then in that case such authority shall not be granted. [30 Stat. L. 90.]

This and the following paragraph are from the Indian Appropriation Act of June 7, 1897, ch. 3. For a similar provision general in character, see the second preceding paragraph of the text and the notes thereto construing it.

Selection of trees by government agent.—Where the United States, through its agents, selected logging superintendents, who were intrusted with the supervision of the cutting of timber on an Indian reservation, and the duty of determining the particular trees which came within the definition of "dead and down timber," which duty required the exercise of judgment and discretion, and such judgment and discretion were honestly exercised, it

was held that the government was bound thereby, and could not charge one to whom it contracted to sell the logs after they should be cut and banked with liability beyond the contract price, on the ground that some of the logs which were cut and banked, and which the purchaser took possession of under his contract, were cut from living green trees. U. S. v. Bonneas, (1903) 125 Fed. 485, 60 C. C. A. 321.

[Children of white man and Indian woman to have rights of mother.] That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right. [30 Stat. L. 90.]

See the note to the preceding paragraph of this section.

SEC. 6. [Property not required for use — sale or removal.] That whenever there is on hand at any of the Indian reservations government property not required for the use and benefit of the Indians on such reservations, the Secretary of the Interior is authorized to cause any such property to be transferred to any other Indian reservation where it may be used advantageously, or to cause it to be sold and the proceeds thereof deposited and covered into the Treasury in conformity with section thirty-six hundred and eighteen of the Revised Statutes of the United States. [30 Stat. L. 596, as amended by 36 Stat. L. 861.]

This was from the Indian Appropriation Act of July 1, 1898, ch. 545. It was amended to read as given in the text by an Act of June 25, 1910, ch. 431, § 22. See the

note to section 1 of said Act *infra*, p. 853. Prior to its amendment this section was as follows:

"SEC. 6. That hereafter at any of the Indian reservations where there is now on hand Government property not required for the use and benefit of the Indians at said reservation, the Secretary of the Interior is hereby authorized to move such property to other Indian reservations where it may be required, or to sell it and apply the proceeds of same in the purchase of such articles as may be needed for the use of the Indians for whom such said property was purchased; and he shall make report of his action hereunder to the next session of Congress thereafter." [30 Stat. L. 596.]

See the following paragraph of the text.

[SEC. 1.] [Property not required for use — removal.] * * * That hereafter where there is Government property on hand at any of the Indian reservations or schools not required for the use or benefit of the Indians of said reservations or schools, the Secretary of the Interior is hereby authorized to move such property to other Indian reservations or schools where it may be required. [34 Stat. L. 1016.]

This and the following paragraph are from the Indian Appropriation Act of March 1, 1907, ch. 2285.

See the preceding paragraph of the text.

[Access to records of Five Civilized Tribes.] That the Secretary of the Interior, or his accredited representative, shall at all times have access to any books and records of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether in possession of any of the officers of either of said tribes or any officer or custodian thereof, of the future State of Oklahoma. [34 Stat. L. 1027.]

See the note to the preceding paragraph of this section.

[SEC. 1.] [Encouraging farming industry among Indians — repayment — reuse of fund — report.] * * * There is hereby appropriated the sum of thirty thousand dollars, or so much thereof as may be necessary, to be immediately available, for the purpose of encouraging industry among Indians, and to aid them to engage in the culture of fruits, grains, and other crops. The said sum may be used for the purchase of animals, machinery, tools, implements, and other agricultural equipment: *Provided*, That the sum hereby appropriated shall be expended subject to the conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, on or before June thirtieth, nineteen hundred and eighteen, and all repayments to this fund made on or before June thirtieth, nineteen hundred and seventeen are hereby appropriated for the same purpose as the original fund, and the entire fund, including such repayments, shall remain available until June thirtieth, nineteen hundred and seventeen, and all repayments to the fund hereby created which shall be made subsequent to June thirtieth, nineteen hundred and seventeen, shall be covered into the Treasury and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law: *Provided further*, That the Secretary of the Interior shall submit to Congress

annually on the first Monday in December a detailed report of the use of this fund: [36 Stat. L. 1061.]

This is from the Indian Appropriation Act of March 3, 1911, ch. 210.

Provisions somewhat similar were made by the following paragraph of the text, and by the fourth paragraph of the Act of Aug. 1, 1914, ch. 222, § 1, *infra*, p. 805.

[SEC. 1.] [Encouraging farming industry among Indians — repayment — report.] * * * For the purpose of encouraging industry among the Indians and to aid them in the culture of fruits, grains, and other crops, \$100,000, or so much thereof as may be necessary, to be immediately available, which sum may be used for the purchase of animals, machinery, tools, implements, and other equipment necessary to enable Indians to become self-supporting: *Provided*, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five, and all repayments to this fund made on or before June thirtieth, nineteen hundred and twenty-four, are hereby reappropriated for the same purpose as the original fund, and the entire fund, including such repayments, shall remain available until June thirtieth, nineteen hundred and twenty-four, and all repayments to the fund hereby created which shall be made subsequent to June thirtieth, nineteen hundred and twenty-four, shall be covered into the Treasury and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law: *Provided further*, That the Secretary of the Interior shall submit to Congress annually on the first Monday in December a detailed report of the use of this fund. [38 Stat. L. 80.]

This is from the Indian Appropriation Act of June 30, 1913, ch. 4.

Provisions somewhat similar were made by the preceding paragraph of the text, and by the fourth paragraph of the Act of Aug. 1, 1914, ch. 222, *infra*, p. 805.

[SEC. 1.] [Irrigation and drainage of Indian lands — costs — engineers — report.] For the construction, repair, and maintenance of ditches, reservoirs, and dams, purchase and use of irrigation tools and appliances, water rights, ditches, lands necessary for canals, pipe lines, and reservoirs for Indian reservations and allotments, and for drainage and protection of irrigable lands from damage by floods, or loss of water rights, including expenses of necessary surveys and investigations to determine the feasibility and estimated cost of new projects and power and reservoir sites on Indian reservations in accordance with the provisions of section thirteen of the Act of June twenty-fifth, nineteen hundred and ten, \$335,000, to remain available until expended: *Provided*, That no part of this appropriation shall be expended on any irrigation system or reclamation project for which specific appropriation is made in this Act or for which public funds are or may be available under any other Act of Congress; for pay of one chief inspector of irrigation, who shall be a skilled irrigation engineer, \$4,000; one assistant inspector of irrigation, who shall be a skilled irrigation engineer, \$2,500; for traveling and incidental expenses of two

inspectors of irrigation, including sleeping-car fare and a per diem of \$3 in lieu of subsistence when actually employed on duty in the field and away from designated headquarters, \$4,200; in all, \$345,700: *Provided also*, That not to exceed seven superintendents of irrigation, six of whom shall be skilled irrigation engineers and one competent to pass upon water rights, and one field-cost accountant, may be employed: *Provided further*, That the proceeds of sales of material utilized for temporary work and structures shall be covered into the appropriation made therefor and be available for the purpose of the appropriation; and for lands irrigable under any such system or project the Secretary of the Interior may fix maintenance charges which shall be paid as he may direct, such payments to be available for use in maintaining the project or system for which collected: *Provided further*, That all moneys expended heretofore or hereafter under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe: *Provided further*, That the Secretary of the Interior is hereby authorized and directed to apportion the cost of any irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, and annually thereafter the Secretary of the Interior shall transmit to Congress a cost account in detail of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year, including a résumé of previous expenditures, which shall show the number of Indians on the reservation where the land is irrigated, irrigable area under ditch, irrigable area under project (approximate), irrigable area cultivated by Indians, irrigable area cultivated by lessees, amount expended on construction to June thirtieth of the preceding fiscal year, amount necessary to complete, and cost per acre when completed (estimated); value of land when irrigated, and such other detailed information as may be requisite for a thorough understanding of the conditions on each system or project: [38 Stat. L. 582.]

The provisions of the text and of the following three paragraphs are from the Indian Appropriation Act of Aug. 1, 1914, ch. 222.

The Act of June 25, 1910, ch. 431, § 13, mentioned in the text is given *infra*, p. 857.

[Hospitals — isolation and quarantine of diseased Indians.] * * *

That hereafter the Secretary of the Interior shall submit to Congress annually a detailed report as to all moneys expended in the erection of hospitals as provided for herein: *Provided further*, That whenever the Secretary of the Interior shall find any Indian afflicted with tuberculosis, trachoma, or other contagious or infectious diseases, he may, if in his judgment the health of the afflicted Indian or that of other persons require it, isolate, or quarantine such afflicted Indian in a hospital or other place for treatment. The Secretary of the Interior may employ such means as may be necessary in the isolation, or quarantine of such Indian, and it shall be the duty of

such Indian so afflicted to obey any order or regulation made by the Secretary of the Interior in carrying out this provision. [38 Stat. L. 584.]

See the note to the preceding paragraph of this section.

[Incarceration of Indians — report.] * * * That hereafter whenever an Indian shall be incarcerated in an agency jail, or any other place of confinement, on an Indian reservation or at an Indian school, a report or record of the offense or case shall be immediately submitted to the superintendent of the reservation or such official or officials as he may designate, and such report shall be made a part of the records of the agency office. [38 Stat. L. 586.]

See the note to the first paragraph of this section, *supra*, p. 804.

[Encouragement of farming industry among Indians — appropriation — report.] * * * For the purpose of encouraging industry and self-support among the Indians and to aid them in the culture of fruits, grains, and other crops, \$600,000, or so much thereof as may be necessary, to be immediately available, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary to enable Indians to become self-supporting: *Provided*, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five: *Provided further*, That hereafter the Secretary of the Interior shall submit to Congress annually on the first Monday in December a detailed report of all moneys appropriated for the purpose of encouraging industry among Indians: *And provided also*, That not to exceed \$75,000 of the amount herein appropriated shall be expended on any one reservation or for the benefit of any one tribe of Indians. [38 Stat. L. 586.]

See the note to the first paragraph of this section, *supra*, p. 804.

Provisions somewhat similar to those of the text were made by the Act of March 3, 1911, ch. 210, § 1, *supra*, p. 802; and the Act of June 30, 1913, ch. 4, § 1, *supra*, p. 803.

V. GOVERNMENT OF INDIAN COUNTRY

Sec. 2127. [Sale of cattle, etc., of the Indians by agents.] The agent of each tribe of Indians, lawfully residing in the Indian country, is authorized to sell for the benefit of such Indians any cattle, horses, or other live stock belonging to the Indians, and not required for their use and subsistence, under such regulations as shall be established by the Secretary of the Interior. But no such sale shall be made so as to interfere with the execution of any order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops. [R. S.]

Act of March 3, 1865, ch. 127, 13 Stat. L. 563.

R. S. secs. 2127-2157 constitute ch. 4, "Government of Indian country," of title XXVIII, "Indians."

Further provisions relating to the sale of cattle of Indians were made by the Act of July 4, 1884, ch. 180, § 1, *infra*, p. 820.

Extent of governmental power.—"The power of the national government over the Indian tribes and the territory occupied by them, within the constitutional limits of municipal legislation, is plenary. To what extent this power will be exercised rests in the sound discretion of Congress, limited only by those considerations of policy and humanity that have always marked the action of the government in its treatment of these people." *U. S. v. Tobacco Factory*, (1870) 28 Fed. Cas. No. 16,528.

"Indian country."—Section 1 of the Act of June 30, 1834, ch. 161, 4 Stat. L. 729, was repealed by the Revised Statutes, and consequently the description of the Indian country found in that section is no longer a part of the law of the land. *U. S. v. Bridleman*, (1881) 7 Fed. 894; *Forty-three Gallons Cognac Brandy*, (1882) 11 Fed. 47. But the section may still be referred to for the purpose of determining what was meant by the term "Indian country" when found in the sections of the Revised Statutes which are re-enactments of other sections of the Act of 1834. *U. S. v. Le Bris*, (1887) 121 U. S. 278, 7 S. Ct. 894, 30 U. S. (L. ed.) 946.

"Indian country," as used in the Revised Statutes, applies to all country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, except that within the

boundaries of states, and it embraces all territory within the boundaries of states, actually occupied by Indians and excluded by statute or treaty from state jurisdiction. *Ex p. Crow Dog*, (1883) 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030; *Benson v. U. S.*, (1890) 44 Fed. 178. (1911) 29 Op. Atty-Gen. 239.

The term must now be considered to apply to those portions of the public lands allotted to the use and occupation of the Indians and known as reservations. *Forty-three Gallons Cognac Brandy*, (1882) 11 Fed. 47; *U. S. v. Martin*, (1883) 14 Fed. 817; *U. S. v. Leathers*, (1897) 6 Sawy. 17, 26 Fed. Cas. No. 15,581. See also (1873) 14 Op. Atty-Gen. 290.

See also note to R. S. sec. 2145, *infra*, p. 810.

Alaska is not "Indian country." *Kie v. U. S.*, (1886) 27 Fed. 351; (1878) 16 Op. Atty-Gen. 141. See also notes to the following R. S. secs. 2132, 2139, 2146, 2150, *infra*.

Nevada is not "Indian country," but if admitted to be such, the provisions of the Revised Statutes relating to Indian country are not applicable to the tribes in Nevada outside of the Indian reservations. *U. S. v. Leathers*, (1879) 6 Sawy. 17, 26 Fed. Cas. No. 15,581.

Oklahoma, when opened to settlement by proclamation, ceased to be Indian country. (1889) 19 Op. Atty-Gen. 306.

Indian Territory.—See note to R. S. sec. 2141, *infra*, p. 917.

R. S. secs. 2128-2131. These sections were as follows:

"SEC. 2128. [*Trading with Indians.*] Any loyal person, a citizen of the United States, of good moral character, shall be permitted to trade with any Indian tribe upon giving bond to the United States in the penal sum of not less than five nor more than ten thousand dollars, with at least two good sureties, to be approved by the superintendent of the district within which such person proposes to trade, or by the United States district judge or district attorney for the district in which the obligor resides, renewable each year, conditioned that such person will faithfully observe all laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same."

Act of July 26, 1866, ch. 266, 14 Stat. L. 280.

Bond by one of two partners.—Where only one of two partners had given a bond under this section and had secured a license under R. S. sec. 2129 (given below), but the unlicensed partner had

secured a permit to live upon an Indian reservation, the sale of goods to the Indians by the partnership was held not to be contrary to law. *Dunn v. Carter*, (1883) 30 Kan. 294, 1 Pac. 66.

"SEC. 2129. [*License to trade.*] No person shall be permitted to trade with any of the Indians in the Indian country without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river."

Act of June 30, 1834, ch. 161, 4 Stat. L. 729.

An exception to the provisions of this section was evidently made by the first proviso to R. S. sec. 2133 as amended *infra*, p. 807.

"Trader."—A trader or seller of merchandise upon eliminated land was held not to be a trader within the Indian country, requiring a license under this section *et seq.* *Rider v. La Clair*, (1914) 77 Wash. 488, 138 Pac. 3.

Contract extending benefits of license to others.—A contract entered into by licensed Indian traders with certain other persons whereby such traders agreed to pay such other persons one-half of the net profits of goods sold to the Indians, and whereby

the latter persons were to furnish goods for sale upon their own account and credit and deliver them to such traders, and one of the latter persons was to have control of the actual selling of the goods of the Indians, was held to be an attempt to vio-

late the statute by introducing into the Indian country, under color of the traders' license, parties who had not been approved and licensed by the government officials. *Gould v. Kendall*, (1884) 15 Neb. 549, 19 N. W. 483.

"SEC. 2130. [*Refusal of license.*] Any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country, or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the superintendent to the Commissioner of Indian Affairs."

Act of June 30, 1834, ch. 161, 4 Stat. L. 729.

"SEC. 2131. [*Revocation of license.*] The superintendent of the district shall have power to revoke and cancel any license to trade within the Indian country whenever the person licensed has, in his opinion, transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or whenever, in his opinion, it is improper to permit such person to remain in the Indian country. No trade with the tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and subagents, and to be inserted in the license. The persons granting or revoking such licenses shall forthwith report the same to the Commissioner of Indian Affairs, for his approval or disapproval."

Act of June 30, 1834, ch. 161, 4 Stat. L. 729.

These sections were superseded by the Act of Aug. 15, 1876, ch. 289, § 5, *infra*, p. 817, in connection with the Act of March 3, 1901, ch. 832, § 1, as amended, *infra*, p. 818.

Sec. 2132. [*Prohibition of trade by the President.*] The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. [*R. S.*]

Act of June 30, 1834, ch. 161, 4 Stat. L. 729.

Alaska cannot be considered as a country belonging to an Indian tribe, and no authority is given to the President, by virtue of the above section, to prohibit

the introduction of goods, or of any particular articles, into the same. (1878) 16 Op. Atty-Gen. 141.

Sec. 2133. [*Penalty for trading without a license.*] Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of five hundred dollars: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the five civilized tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said five civilized tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. [*R. S.*]

R. S. sec. 2133, as originally enacted, was "amended so that it shall read" as above by the Act of July 31, 1882, ch. 360, 22 Stat. L. 179.

Prior to its amendment R. S. sec. 2133 read as follows: "Any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover be liable to a penalty of five hundred dollars." Act of June 30, 1834, ch. 161, 4 Stat. L. 729.

An abandoned reservation is not "Indian country," within the meaning of the above section. *U. S. v. Forty-eight Pounds Rising Star Tea, etc.*, (1888) 35 Fed. 403, *affirmed* (1889) 38 Fed. 400.

Pueblo Indians.—This section, as amended, does not apply to the Pueblo Indians of New Mexico. (1891) 20 Op. Atty.-Gen. 215.

Sec. 2134. [Penalty upon foreigners entering Indian country without passports.] Every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent, or sub-agent of Indian affairs, or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after the expiration of such passport, shall be liable to a penalty of one thousand dollars. Every such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 730.

The word "foreigner" is used in this section in its ordinary signification, embracing those who are born out of the United States, who are not naturalized,

and who owe allegiance to any other government than that of the United States. (1887) 18 Op. Atty.-Gen. 555.

Sec. 2135. [Prohibited purchases and sales.] Every person, other than an Indian, who, within the Indian country, purchases or receives of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any article of clothing, except skins or furs, shall be liable to a penalty of fifty dollars. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 730.

Sec. 467. [Sale of arms, etc., to Indians prohibited.] The Secretary of the Interior shall adopt such rules as may be necessary to prohibit the sale of arms or ammunition within any district or country occupied by uncivilized or hostile Indians, and shall enforce the same. [R. S.]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 457.

Sec. 2136. [Trading or selling arms, etc., in any district occupied by uncivilized or hostile Indians.] If any trader, his agent, or any person acting for or under him, shall sell any arms or ammunition at his trading-post or other place within any district or country occupied by uncivilized or hostile Indians, contrary to the rules and regulations of the Secretary of the Interior, such trader shall forfeit his right to trade with the Indians, and the Secretary shall exclude such trader, and the agent, or other person so offending, from the district or country so occupied. [R. S.]

Act of Feb. 14, 1873, ch. 138, 17 Stat. L. 459.

Res. No. 20, passed Aug. 5, 1876, 19 Stat. L. 216, entitled "Joint resolution prohibiting supply of special metallic cartridges to hostile Indians," provided as follows:

"Whereas, it is ascertained that the hostile Indians of the northwest are largely equipped with arms which require special metallic cartridges, and that such special

ammunition is in large part supplied to such hostile Indians directly or indirectly through traders and others in the Indian country: Therefore, *Resolved*, That the President of the United States is hereby authorized and requested to take such measures as in his judgment may be necessary to prevent such special metallic ammunition being conveyed to such hostile Indians, and is further authorized to declare the same contraband of war in such district of country as he may designate during the continuance of hostilities."

Sec. 2137. [Prohibition of hunting on Indian lands.] Every person, other than an Indian, who, within the limits of any tribe with whom the United States has existing treaties, hunts, or traps, or takes and destroys any peltries or game, except for subsistence in the Indian country, shall forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and all peltries so taken; and shall be liable in addition to a penalty of five hundred dollars. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 730.

Fisheries in Indian country.—Hunting and trapping are not the only things which it is unlawful to do in the Indian country. The establishment of fisheries upon an Indian reservation is contrary to law. *U. S. v. Sturgeon*, (1879) 6 Sawy. 29, 27 Fed. Cas. No. 16,413.

Property seized by the military under

the provisions of this section should, as soon as reasonably practicable after report of the seizure shall have been made to the United States district attorney, be placed in the custody of the proper civil officer. (1887) 18 Op. Atty-Gen. 555. See also note to R. S. sec. 2150, *infra*, p. 814.

Sec. 2138. [Penalty for removing cattle from Indian country.] Every person who drives or removes, except by authority of an order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops, any cattle, horses, or other stock from the Indian country for the purposes of trade or commerce, shall be punishable by imprisonment for not more than three years, or by a fine of not more than five thousand dollars; or both. [R. S.]

Act of March 3, 1865, ch. 127, 13 Stat. L. 563.

R. S. secs. 2139, 2140, 2141, relating to intoxicating liquors are given, with other Acts relating to the same subject, *infra*, p. 913 *et seq.*

Sec. 2142. [Assault.] Every white person who shall make an assault upon an Indian, or other person, and every Indian who shall make an assault upon a white person, within the Indian country, with a gun, rifle, sword, pistol, knife, or any other deadly weapon, with intent to kill or maim the person so assaulted, shall be punishable by imprisonment, at hard labor, for not more than five years, nor less than one year. [R. S.]

Act of March 27, 1854, ch. 26, 10 Stat. L. 270.

See section 328 of the Penal Laws given in PENAL LAWS.

Assault with intent to kill.—To make an assault with intent to kill, this section, it was held, did not require that the act would be murder if death had ensued. If it would be only manslaughter in case of death, it would be assault with an

intent to kill if death did not ensue. *Ex p. Brown*, (1889) 40 Fed. 81.

Malice.—In a prosecution under this section for assault with intent to kill, it was held not to be necessary to show malice. *Jennings v. U. S.*, (1899) 2 Indian Ter. 670, 53 S. W. 456.

Sec. 2143. [Arson.] Every white person who shall set fire, or attempt to set fire, to any house, out-house, cabin, stable, or other building, in the Indian country, to whomsoever belonging; and every Indian who shall set fire to any house, out-house, cabin, stable, or other building, in the Indian

country, in whole or in part belonging to or in lawful possession of a white person, and whether the same be consumed or not, shall be punishable by imprisonment at hard labor for not more than twenty one years, nor less than two years. [R. S.]

Act of March 27, 1854, ch. 26, 10 Stat. L. 270.

See section 328 of the Penal Laws given in PENAL LAWS.

Sec. 2144. [The laws defining, etc., forgery and depredations on mails, extended to Indian country.] The general laws of the United States defining and prescribing punishments for forgery and for depredations upon the mails, shall extend to the Indian country. [R. S.]

Act of March 3, 1855, ch. 204, 10 Stat. L. 700.

See the title PENAL LAWS.

Sec. 2145. [General laws as to punishment of crimes extended to Indian country.] Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 733; Act of March 27, 1854, ch. 26, 10 Stat. L. 270.

"This title," to which the section refers, is R. S. title XXVIII, "Indians," which comprises sections 2039-2157, inclusive.

Not repealed.—The Act of March 3, 1855, ch. 341 (which was embodied in Penal Laws, sec. 328, see PENAL LAWS), did not operate to repeal this section. The Act of 1885 provided for the punishment of crimes committed by Indians only. So far from impliedly repealing this section, it manifestly repeals in part the limitation that was imposed by R. S. sec. 2146 upon the effect of this section. *Donnelly v. U. S.*, (1913) 223 U. S. 243, 33 S. Ct. 449, 57 U. S. (L. ed.) 820, Ann. Cas. 1913E 710. See also *In re Wilson*, (1891) 140 U. S. 575, 11 S. Ct. 870, 35 U. S. (L. ed.) 513.

Indian country.—Indian country means all country within the United States, and not within the jurisdiction of any state, to which the Indian title has not been extinguished. An Indian reservation is a part of the Indian country within the meaning of this section. (1911) 29 Op. Atty.-Gen. 239.

"Indian country" embraces lands allotted in severalty to the Indians. *U. S. v. Pelican*, (1914) 232 U. S. 442, 34 S. Ct. 396, 58 U. S. (L. ed.) 676.

The Colville Reservation, set apart by executive order on July 2, 1872 (Exec. Ord. Ind. Reserv. (ed. 1912) 194, 195; 1 Kappler, 915, 916) and repeatedly recognized by Acts of Congress, is a legally constituted reservation, and as such it is included in the "Indian country" to which this section of the Revised Statutes refers, and it is none the less embraced within that description because it

was segregated from the public domain. The fact that the reservation is within the state of Washington is immaterial. *U. S. v. Pelican*, (1914) 232 U. S. 442, 34 S. Ct. 396, 58 U. S. (L. ed.) 676.

See also note to R. S. sec. 2127, *supra*, p. 805.

The words "sole and exclusive jurisdiction" as employed in this section do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that the section may apply to it; the words are used in order to describe the laws of the United States which by this section are extended to the Indian country. *Donnelly v. United States*, (1913) 228 U. S. 243, 33 S. Ct. 449, 57 U. S. (L. ed.) 820, Ann. Cas. 1913E 710.

Murder.—Where the crime of murder is committed in the Indian country it is within the exclusive jurisdiction of the United States. *U. S. v. Pelican*, (1914) 232 U. S. 442, 34 S. Ct. 396, 58 U. S. (L. ed.) 676; *U. S. v. Berry*, (D. C. Colo. 1880) 4 Fed. 779; *U. S. v. Martin*, (D. C. Ore. 1883) 14 Fed. 817; *U. S. v. Beebe*, (1880) 2 Dak. 292, 11 N. W. 505. And the United States statutes in reference to the crime must govern. *Brown v. U. S.*, (1899) 2 Indian Ter. 582, 52 S. W. 56. The rule obtains when the crime is committed by an Indian against a white man. *U. S. v. Monte*, (1884) 3 N. M. 126, 3 Pac. 45. Likewise the killing of an Indian by a person not of Indian blood, when committed upon an Indian reservation,

within the limits of a state is cognizable in the federal courts. *Donnelly v. U. S.*, (1912) 228 U. S. 243, 33 S. Ct. 449, 57 U. S. (L. ed.) 820.

The murder of one negro by another within the limits of an Indian reservation in a territory is committed within a place or district under the exclusive jurisdiction of the United States, within the meaning of R. S. sec. 5339 (embodied in Penal Laws, secs. 273, 275, and repealed by sec. 341 thereof; see PENAL LAWS) defining and punishing the crime of murder, as extended by this section to the Indian country, when not within the exceptions made by R. S. sec. 2146, *infra*, p. 812, which by reason of the race of the accused and deceased do not apply. *Pickett v. U. S.*, (1910) 216 U. S. 456, 30 S. Ct. 265, 54 U. S. (L. ed.) 566.

Murder committed against an Indian by one not an Indian, upon an Indian reservation, within the limits of a state is included within the terms of this section. *Donnelly v. U. S.*, (1913) 228 U. S. 243, 33 S. Ct. 449, 57 U. S. (L. ed.) 820.

Larceny when committed upon an Indian reservation is punishable under the laws of the United States, within this section. *U. S. v. Bridleman*, (1881) 7 Fed. 894; *In re Ingram*, (1902) 12 Okla. 54, 69 Pac. 868; *State v. Condon*, (1914) 79 Wash. 97, 139 Pac. 871.

When the crime is committed by a white man, the provisions of R. S. sec. 5356 (embodied in Penal Laws, sec. 287, and repealed by sec. 341 thereof; see PENAL LAWS) apply; when committed by an Indian, the provisions of the Act of March 3, 1885, ch. 341 (embodied in Penal Laws, sec. 328, and repealed by sec. 341 thereof; see PENAL LAWS) apply. *U. S. v. Ewing*, (1891) 47 Fed. 809.

Larceny by one not an Indian.—Larceny committed in an Indian reservation in the territory of Oklahoma by one not an Indian is a crime against the laws of the United States and cognizable by the District Courts of the territory while exercising the jurisdiction vested in the Circuit and District Courts of the United States. *Brown v. U. S.*, (1906) 146 Fed. 975, 77 C. C. A. 173, *affirming* (1904) *Herd v. U. S.*, 13 Okla. 512, 75 Pac. 291. One not an Indian, committing a crime on an Indian allotment against an Indian allottee, may be punished by a federal court. *U. S. v. Pelican*, (1914) 232 U. S. 442, 34 S. Ct. 396, 58 U. S. (L. ed.) 676.

Incest.—The provisions of this and the following section are not affected by any subsequent legislation except by Act March 3, 1885, ch. 341, 23 Stat. L. 385 (embodied in Penal Laws, sec. 328; see PENAL LAWS), which makes certain enumerated crimes committed by an Indian against the person or property of another Indian within a territory, either within or without a reservation, subject to punishment in accordance with

the laws of such territory. Act March 3, 1887, ch. 397, § 4, 24 Stat. L. 635 (embodied in Penal Laws, sec. 397; see PENAL LAWS), which defines and prescribes the punishment for the crime of incest, is not therefore in force within an Indian reservation where both parties to the alleged act are Indians and there is no law making such act a crime. *Ex p. Hart*, (1907) 157 Fed. 130.

Rape.—The crime of rape, not being provided for in this title, is punishable by proceedings in the United States courts, when committed by a white man upon a white woman within an Indian reservation. *U. S. v. Partello*, (1891) 48 Fed. 670.

Robbery.—Under the United States statutes, robbery is not punishable with death "in a place within the sole and exclusive jurisdiction of the United States," but only when committed upon the high seas, and such crime, therefore, when committed in the Indian country is not punishable with death. Anonymous, (1843) 1 Fed. Cas. No. 447.

Jurisdiction.—State courts.—A state has jurisdiction, except as restricted by Congress, over crimes committed on an Indian reservation by persons other than tribal Indians. *State v. Campbell*, (1893) 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169.

Where the enabling act, by which a state is admitted into the Union, contains no exclusion of jurisdiction as to crimes committed upon an Indian reservation within its borders by others than Indians or against Indians, the state courts are vested with sole jurisdiction to try and punish such crimes. *Draper v. U. S.*, (1896) 164 U. S. 240, 17 S. Ct. 107, 41 U. S. (L. ed.) 419; *U. S. v. McBratney*, (1881) 104 U. S. 621, 26 U. S. (L. ed.) 869.

Federal courts.—The United States courts have no jurisdiction of crimes committed by a white man upon a white man within a reservation which is not within the sole and exclusive jurisdiction of the United States. *U. S. v. McBratney*, (1881) 104 U. S. 621, 26 U. S. (L. ed.) 869.

Offenses by white man against Indian and vice versa.—The United States courts have jurisdiction of crimes committed upon reservations within their districts by a white man upon the person of an Indian, and vice versa, provided the crime is defined by a law of the United States directly applicable to the Indian country, or made so by this section or R. S. sec. 2146. *U. S. v. Bridleman*, (1881) 7 Fed. 894. See also *Goodson v. U. S.*, (1898) 7 Okla. 117, 54 Pac. 423.

When reservation has no local law governing crime.—The murder of one tribal Indian by another, their tribes being different, and the murder having been committed within the reservation of a third

tribe, which has no law governing the case, is not punishable in the United States courts, notwithstanding any clause in the treaty of the tribe to which the murdered Indian belonged. (1883) 17 Op. Atty.-Gen. 560.

Crime must be committed in Indian country.—The prohibition by this section of the jurisdiction of a court of the United States over a crime committed by one Indian upon another is one which is personal to the Indian only when the crime is committed in the Indian country. *In re Wolf*, (1886) 27 Fed. 606.

Statute abrogated by treaty.—A treaty which confers upon the United States courts jurisdiction over crimes committed by one Indian upon the person of another has the effect of abrogating this section as to the treaty-making tribe. *U. S. v. Crow Dog*, (1882) 3 Dak. 106, 14 N. W. 437.

Jurisdiction of Indian court.—To give an Indian court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian. *Ex p. Kenyon*, (1878) 5 Dill. 385, 14 Fed. Cas. No. 7,720.

Oklahoma.—The provisions of the Organic Act of Oklahoma are not inconsistent with the provisions of this section and do not repeal the same. *Brown v. U. S.*, (C. C. A. 8th Cir. 1906) 146 Fed.

975, 77 C. C. A. 173, affirming *Herd v. U. S.*, (1904) 13 Okla. 512, 75 Pac. 291; *Goodson v. U. S.*, (1898) 7 Okla. 117, 54 Pac. 423.

Alaska was held not to be Indian country within the above section, and any inhabitant thereof committing a crime against the person of another could be prosecuted in the United States courts thereof. *Kie v. U. S.*, (1886) 27 Fed. 351; *U. S. v. Kie*, (1885) 26 Fed. Cas. No. 15,528a. See also note to R. S. sec. 2127, *supra*, p. 805.

An indictment sufficiently negatives the first two clauses of this section by alleging that the defendant is a "white man." *Westmoreland v. U. S.*, (1895) 155 U. S. 545, 15 S. Ct. 243, 39 U. S. (L. ed.) 255.

A white man adopted in an Indian tribe is not an Indian, within the meaning of this section. *U. S. v. Rogers*, (1846) 4 How. 567, 11 U. S. (L. ed.) 1105.

No repeal of this section by implication. —The provisions of this section should not be considered to be repealed by implication by subsequent treaties or Acts of Congress. The implication must be necessary, and there must be a positive repugnancy between the provisions of the new laws and those of the old. *Ex p. Crow Dog*, (1883) 109 U. S. 556, 3 S. Ct. 396, 27 U. S. (L. ed.) 1030.

Sec. 2146. [Exceptions to the operation of the preceding sections.]

The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. [R. S.]

Act of March 27, 1854, ch. 26, 10 Stat. L. 270.

R. S. sec. 2146, as originally enacted, was amended to read as above by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318, which inserted after the words "shall not be construed to extend to," the words "crimes committed by one Indian against the person or property of another Indian, nor to."

See section 328 of the Penal Laws given in PENAL LAWS.

Sec. 2147. [Removal of persons from Indian country.] The superintendent of Indian affairs, and the Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 730.

As to the abolition of superintendencies see the notes to R. S. secs. 2046-2051, noted *supra*, p. 753.

Decision of officials final.—Whether any person is within the Indian country contrary to law is a question left to the officials mentioned in this section, and the courts will not review their decision. *U. S. v. Sturgeon*, (1879) 6 Sawy. 29, 27 Fed. Cas. No. 16,413.

The duty to call upon the military forces for the removal of persons improperly upon a reservation follows necessarily from the granting of such power. (1900) 23 Op. Atty.-Gen. 214.

Authority of military.—Under this section and the section immediately following

the military department has no authority to hold a person apprehended for being unlawfully in the country indefinitely as a prisoner, nor to destroy property so found. *U. S. v. Crook*, (1875) 179 Fed. 391.

Secretary of War may call upon military.—It is not essential that the order directing the military force to remove persons from reservations should be issued by the President in his own hand. Such

an order is sufficient if issued by the Secretary of War. (1894) 14 Op. Atty.-Gen. 451.

Agent cannot evict lessee.—This section does not give an Indian agent authority to eject the lessee of a citizen of an Indian nation on the ground that such lease is invalid. *Stephens v. Quigley*, (C. C. A. 8th Cir. 1903) 126 Fed. 148, 61 C. C. A. 214; *Quigley v. Stephens*, (1900) 3 Indian Ter. 265, 54 S. W. 814.

Sec. 2148. [Penalty for return.] If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars. [*R. S.*]

Act of Aug. 18, 1856, ch. 128, 11 Stat. L. 80.

Indian country—In general.—"Indian country is a country to which the Indians retained the right of use and occupancy, involving—under certain restrictions—freedom of action and of enjoyment in their capacity as a distinct people, unless by virtue of some reservation expressed at the time of extinguishment of such title, and clearly appearing. In the absence of such, the term does not apply to any tract owned and controlled by the government and devoted by it, whether as a so-called reservation or mere foundation, to the benefit of the Indians, exclusively or otherwise, unattended by any semi-independent use and occupancy involving such title, ownership, and control as has always inhered in the Indians as a distinct people and not merely as individual wards. Whether a reservation for any purpose affecting Indians is of a character sufficient to stamp such lands as Indian country within the meaning of the law must depend upon the scope and purpose of the act creating it, and the nature of the title, use, and occupancy, how held, exercised, and enjoyed." *U. S. v. Myers*, (C. C. A. 8th Cir. 1913) 206 Fed. 387, 124 C. C. A. 269.

Land set apart for schools.—The setting apart of a limited tract of the public domain for a school which the government devotes mainly, or even entirely, to the training and education of Indian children, attending in their individual capacity, does not operate to convert that tract into Indian country as defined in the statute. *U. S. v. Myers*, (C. C. A. 8th Cir. 1913) 206 Fed. 387, 124 C. C. A. 269.

The land relinquished to the United States by the Act of June 8, 1900, ch. 813, 31 Stat. 676, passed in ratification of an agreement between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma entered into Oct. 21, 1892, is no longer Indian land within the meaning of this section although part of the land was reserved by order of the Secretary of the Interior for agency, school, religious and other pur-

poses. *U. S. v. Myers*, (C. C. A. 8th Cir. 1913) 206 Fed. 387, 124 C. C. A. 269.

When penalty accrues.—Under this section in connection with *R. S.* secs. 2147 and 2149, it has been held that the penalty imposed is incurred when the return is made after removal under *R. S.* sec. 2149. *U. S. v. Baker*, (1903) 4 Indian Ter. 544, 76 S. W. 103.

Return after removal not an indictable offense.—A return to the Indian country after being removed therefrom is not an indictable offense and cannot be prosecuted by criminal proceedings. It is an offense for which *R. S.* sec. 2124, *supra*, p. 798, prescribes a penalty with the mode of enforcing the same. *U. S. v. Payne*, (1884) 22 Fed. 426; *In re Seagraves*, (1896) 4 Okla. 422.

The penalty provided by this section can only be recovered in a civil action, and not as a fine in a criminal proceeding. *U. S. v. Baker*, (1903) 4 Indian Ter. 544, 76 S. W. 103.

Contra.—This section was originally part of the Act of 1856, which, when passed, was not intended as an amendment but rather as a supplement to the Act of 1834. The incorporation of this section into the Revised Statutes and the accompanying change of the wording of *R. S.* sec. 2124, *supra*, p. 798, so as to read "this title" instead of "this act," do not operate to make the remedy for the recovery of penalties provided for in *R. S.* sec. 2124, applicable in an exclusive sense to this section. And the penalty prescribed in this section may be recovered by indictment or debt. *U. S. v. Howard*, (1883) 17 Fed. 638; *U. S. v. Stocking*, (1898) 87 Fed. 857.

Return to pursue lawful occupation.—Where persons have been found fishing upon an Indian reservation and have been removed therefrom by the proper officials, their return for the purpose of continuing their business of fishing is not a return to continue a lawful occupation and is a violation of the above section. *U. S. v. Sturgeon*, (1879) 6 Sawy. 29, 27 Fed. Cas. No. 16,413.

Sec. 2149. [Removal from reservations.] The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person. [R. S.]

Act of June 12, 1858, ch. 155, 11 Stat. L. 332.

Alderman of incorporated town.—Under this section the commissioner, prior to the Act Cong. May 27, 1902, ch. 888, 32 Stat. L. 245, which prohibited the removal of certain citizens from the Indian Territory, with the approval of the Secretary of the Interior, was authorized to remove a person from the Indian Territory who, in his judgment, was detrimental to the welfare of the Indians, though he was an alderman of an incorporated town in the territory. *Ex p. Carter*, (1903) 4 Indian Ter. 539, 76 S. W. 102.

Removal of collectors.—The commissioner of Indian affairs is authorized, with the approval of the Secretary of the Interior, to cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians; and this although the reservation be within a state and the Indians be the holders, under trust patents issued to them pursuant to Act

Feb. 8, 1887, ch. 119, 24 Stat. L. 388, *infra*, p. 821, of allotments adjacent to the reservation, and be, therefore, citizens of the United States and the state. *Rainbow v. Young*, (C. C. A. 1908) 161 Fed. 835, 88 C. C. A. 653.

Confinement after removal.—This section authorizes only the removal of troublesome persons from a reservation, and does not imply authority to detain them in confinement after such removal. *In re By-A-Lil-Le*, (1909) 12 Ariz. 150, 100 Pac. 450.

Decision of officials final.—Whether any person found upon a tribal reservation is detrimental to the peace and welfare of the Indians is a question left to the officials mentioned in this section, and the courts will not review their decision. *U. S. v. Sturgeon*, (1879) 6 Sawy. 29, 27 Fed. Cas. No. 16,413; (1891) 20 Op. Atty.-Gen. 245.

This section applies to an Indian as well as to a white person. *U. S. v. Crook*, (1878) 5 Dill. 453, 25 Fed. Cas. No. 14,891.

Sec. 2150. [Employment of the military in apprehending persons violating the law.] The military forces of the United States may be employed in such manner and under such regulations as the President may direct—

First. In the apprehension of every person who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the Territory or judicial district in which such person shall be found, to be proceeded against in due course of law;

Second. In the examination and seizure of stores, packages, and boats, authorized by law;

Third. In preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law;

Fourth. And also in destroying and breaking up any distillery for manufacturing ardent spirits set up or continued within the Indian country. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 732.

Alaska was held to be Indian territory within the meaning of this section. *In re Carr*, (1875) 3 Sawy. 316, 5 Fed. Cas.

No. 2,432, holding that the United States forces might be used to make arrests therein of persons violating the law as to

the introduction of spirituous liquors. See also note to R. S. sec. 2127, *supra*, p. 805.

Removal of Indians from one reservation to another.—This Act does not authorize the military forces to remove Indians from one reservation to another without their consent. *U. S. v. Crook*, (1879) 5 Dill. 453, 25 Fed. Cas. No. 14,891.

Apprehension of persons by military under Act of June 30, 1834.—Persons apprehended by the military for unlawful traffic with the Indians, and also the property taken with them, should be placed in the custody of the marshal of the territory

or judicial district in which the capture occurred, whereupon it will be the duty of the United States attorney to institute proceedings for the recovery of the penalty and for the forfeiture of the property under sections 27, 28 of the Act, now R. S. secs. 2124, 2125, *supra*, p. 798. Where the parties apprehended have not only been engaged in unlawful traffic with the United States, but in violating the articles of war by relieving hostile Indians with ammunition, they may be tried and punished by court-martial, or be turned over to the civil authorities to be proceeded against as above mentioned. (1871) 13 Op. Atty-Gen. 470.

Sec. 2151. [Detention of persons apprehended by the military.] No person apprehended by military force under the preceding section shall be detained longer than five days after arrest and before removal. All officers and soldiers who may have any such person in custody shall treat him with all the humanity which the circumstances will permit. [*R. S.*]

Act of June 30, 1834, ch. 161, 4 Stat. L. 733.

A person arrested under this section is not a military prisoner and cannot be detained longer than the time prescribed.

Waters v. Campbell, (1877) 5 Sawy. 17, 29 Fed. Cas. No. 17,265; *In re Carr*, (1875) 3 Sawy. 316, 5 Fed. Cas. No. 2,432.

Sec. 2152. [Arrest of absconding Indians guilty of crime.] The superintendents, agents, and sub-agents shall endeavor to procure the arrest and trial of all Indians accused of committing any crime, offense, or misdemeanor, and of all other persons who may have committed crimes or offenses within any State or Territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize. The President may direct the military force of the United States to be employed in the apprehension of such Indians, and also in preventing or terminating hostilities between any of the Indian tribes. [*R. S.*]

Act of June 30, 1834, ch. 161, 4 Stat. L. 732.

As to the abolition of superintendencies, see the notes to R. S. secs. 2046-2051, noted *supra*, p. 753.

Bandits and outlaws committing robberies within the Indian country cannot be apprehended by the aid of the United States troops, unless they are illegally

intruding or attempting to intrude upon the Indian country, or are absconding offenders, within the provisions of this section. (1894) 21 Op. Atty-Gen. 72.

Sec. 2153. [Executing process.] In executing process in the Indian country, the marshal may employ a posse comitatus, not exceeding three persons in any of the States respectively, to assist in executing process by arresting and bringing in prisoners from the Indian country, and allow them three dollars for each day in lieu of all expenses and services. [*R. S.*]

Act of June 14, 1858, ch. 163, 11 Stat. L. 363.

The Act of June 4, 1888, ch. 343, 25 Stat. L. 167, provided:

"That after the passage of this act any United States marshal is hereby authorized and required, when necessary to execute any process connected with any criminal proceedings issued out of the Circuit or District Court of the United States for the district of which he is marshal, or by any commissioner of either of said courts, to enter the Indian Territory, and to execute the same therein in the same manner that

he is now required by law to execute like processes in his own district." This Act was expressly repealed by a provision in the Act of March 3, 1899, ch. 427, 30 Stat. L. 1237.

Sec. 2154. [Reparation for injured property.] Whenever, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 731.

A negro cannot be convicted and sentenced under the provisions of this and the following sections for stealing the property of an Indian. *U. S. v. Perryman*, (1879) 100 U. S. 235, 25 U. S. (L. ed.) 645.

Sec. 2155. [Payment where the offender is unable.] If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 731.

Sec. 2156. [Injuries to property by Indians.] If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or sub-agent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 731; Act of Feb. 28, 1859, ch. 66, 11 Stat. L. 401.

This section would appear to be affected by the "Indian Depredation Act" of March 3, 1891, ch. 538, 26 Stat. L. 851, providing for the adjudication and payment of claims arising from Indian depredations. See the title CLAIMS.

Adjudications under section 2156.— This section and the acts from which it was evolved were reviewed in the following cases: *Leighton v. U. S.*, (1896) 161 U.

S. 291, 16 S. Ct. 495, 40 U. S. (L. ed.) 703; (1894) 29 Ct. Cl. 288; *Johnson v. U. S.*, (1896) 160 U. S. 546, 16 S. Ct. 377, 40 U. S. (L. ed.) 529; *Corralitos Co. v.*

U. S., (1900) 178 U. S. 280, 20 S. Ct. 941, 44 U. S. (L. ed.) 1069; (1898) 33 Ct. Cl. 342; U. S. v. Andrews, (1900) 179 U. S. 96, 21 S. Ct. 46, 45 U. S. (L. ed.) 105; Garrison v. U. S., (1895) 30 Ct. Cl. 272; Hegwer v. U. S., (1895) 30 Ct. Cl. 405; Brown v. U. S., (1897) 32 Ct. Cl. 432; Brice v. U. S., (1896) 32 Ct. Cl. 23; Welch v. U. S., (1897) 32 Ct. Cl. 106; 105; Valk v. U. S., (1893) 28 Ct. Cl. 241; Marks v. U. S., (1893) 28 Ct. Cl. 147; (1894) 29 Ct. Cl. 332; Garrison v. U. S.,

(1895) 30 Ct. Cl. 272; Hegwer v. U. S., (1895) 30 Ct. Cl. 405; Brown v. U. S., (1897) 32 Ct. Cl. 432; Brice v. U. S., (1896) 32 Ct. Cl. 23; Welch v. U. S., (1897) 32 Ct. Cl. 106; Price v. U. S., (1897) 33 Ct. Cl. 106; Jaeger v. U. S., (1898) 33 Ct. Cl. 214; McKinzie v. U. S., (1899) 34 Ct. Cl. 278; Thomison v. U. S., (1900) 35 Ct. Cl. 395; Merchant v. U. S., (1900) 35 Ct. Cl. 403; Ayres v. U. S., (1899) 35 Ct. Cl. 26.

Sec. 2157. [Superintendents, agents, and sub-agents authorized to take depositions.] The superintendents, agents, and sub-agents within their respective districts are authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the three preceding sections, and to administer oaths to the deponents. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 732.

SEC. 5. [Indian traders, how appointed, etc.] * * * And hereafter the Commissioner of Indian Affairs shall have the sole power and authority to appoint Traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. [19 Stat. L. 200.]

This is from the Indian Appropriation Act of Aug. 15, 1876, ch. 289.

The provisions of the text, together with those of Act of March 3, 1901, ch. 832, § 1, given as amended *infra*, p. 818, supersede those of R. S. secs. 2128-2131, noted *supra*, p. 806.

Pueblo Indians.—This Act does not apply to the Pueblo Indians of New Mexico. (1891) 20 Op. Atty.-Gen. 215. See also note to R. S. sec. 2133, *supra*, p. 807.

[Sec. 1.] [Sale of cattle of Indians to persons not members of same tribe prohibited.] * * * That where Indians are in possession or control of cattle or their increase which have been purchased by the Government such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void and the offending purchaser on conviction thereof shall be fined not less than five hundred dollars and imprisoned not less than six months. [23 Stat. L. 94.]

This was from the Indian Appropriation Act of July 4, 1884, ch. 180.

Earlier provisions relating to this subject were made by R. S. sec. 2127, *supra*, p. 805.

Applicability of section.—All cattle purchased by the government are affected by this section. U. S. v. Anderson, (1913) 228 U. S. 52, 33 S. Ct. 500, 57 U. S. (L. ed.) 727.

3 F. S. A.—27

Inapplicable to cattle purchased by Indians with own funds.—The statute is a part of the Act of July 4, 1884, making an appropriation for the support and contingent expenses of the Indian depart-

ment. It provides that the President may use any sum appropriated for the subsistence of the Indians and not absolutely necessary for that purpose for the purchase of cattle for the benefit of the Indians for whom such appropriation is made. Cattle purchased with money so appropriated are the property of the United States. They do not cease to be such because of their delivery to the Indians for a particular purpose and with a limited right of disposal thereof. It was to protect such property and to prevent the purchase thereof from the Indians without the consent of the government that the criminal provision of the statute was inserted. Where, however, cattle are purchased by an Indian with his own funds or by some officer of the government with funds belonging to him the law referred to can have no application and was not so intended. *U. S. v. Anderson*, (D. C. Ore. 1911) 189 Fed. 262.

"Sale" as including mortgage.—The statute has been construed to apply to mortgages. *Rider v. La Clair*, (1914) 77 Wash. 788, 138 Pac. 3, wherein the court said: "That a mortgage is not a sale, but only a lien, has been declared by many if not a majority of all the courts; but it seems to us that it can make no difference whether it is a sale or a lien within the statute. It has been so often declared by statute as well as by judicial decisions that an Indian is not *sui juris*, that because of his inaptitude and congenital lack of an understanding of values, he should, so long as he maintains his tribal relations, be considered a ward of the government—that we find ready application of one of the first prin-

ciples of statutory construction, that is, a consideration of the old law, the mischief and the remedy. From the time of *Worcester v. Georgia*, (1832) 6 Pet. 515, 8 U. S. (L. ed.) 483, down to *U. S. v. Celestine*, (1909) 215 U. S. 278, 30 S. Ct. 93, 54 U. S. (L. ed.) 195, it has been the rule of all courts to construe doubtful legislation in favor of the Indian. When so considered, we have no hesitation in holding that a mortgage made by an Indian on cattle held in virtue of the statute is void when made without the sanction of the agent having supervision of the affairs of his tribe. The point is made that the statute is limited in its application to cattle in the possession of the Indian at the time of the passage of the Act, because the Act is not general, but was included in a bill appropriating money for the Indian department for the fiscal year 1884. Were this a state statute, there might be some merit in this contention; but it is well known that many of the general laws passed by Congress are tacked onto appropriation bills and to the sundry civil bill, there being no constitutional limitation to hamper Congress in this respect. We think, too, that the Act is broad enough to cover the increase of such cattle as the government may furnish."

Knowledge.—When one purchases from an Indian cattle which have been previously purchased by the government within the meaning of the Act of Congress referred to, he violates the law, although he may not have known that the cattle were so purchased. *U. S. v. Anderson*, (D. C. Ore. 1911) 189 Fed. 262.

[SEC. 1.] [Regulation of trade with Indians.] * * * That that portion of the Act of Congress approved March third, nineteen hundred and one (Thirty-first Statutes, page one thousand and sixty-five), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," which reads as follows: "That on and after July first, nineteen hundred and one, any person desiring to trade with the Indians on said reservation shall, upon establishing the fact to the satisfaction of the Commissioner of Indian Affairs that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians," is hereby amended and extended so as to apply to all Indian reservations. [31 Stat. L. 1066, as amended by 32 Stat. L. 1009.]

This section was originally enacted as a part of the Indian Appropriation Act of March 3, 1901, ch. 832, and was amended as here given by the Indian Appropriation Act of March 3, 1903, ch. 994, § 10.

The provisions of the text, together with those of the Act of Aug. 15, 1876, ch. 289, § 5, supersede R. S. secs. 2128-2131, noted *supra*, p. 806.

VI. INDIAN HOMESTEADS AND ALLOTMENTS OF LANDS TO INDIANS IN SEVERALTY

SEC. 15. [Certain Indians entitled to benefit of homestead laws.] That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: *Provided, however,* That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: *Provided,* That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void. [18 Stat. L. 420.]

This and the following section 16 are from the Deficiencies Appropriation Act of March 3, 1875, ch. 131.

The Act of May 20, 1862, mentioned in the text was incorporated in various sections of the Revised Statutes constituting title 32, ch. 5, "Public Lands." Section 8 of said Act, excepted in the text, was incorporated in R. S. sec. 2301. See PUBLIC LANDS.

See further the Act of July 4, 1884, ch. 180, § 1, given *infra*, p. 820.

The period of limitation on alienation is twenty-five years, where lands were occupied under this Act but title thereto was not acquired until after the Act of July 4, 1884, *infra*, p. 820. U. S. v. Hemmer, (D. C. S. D. 1912) 195 Fed. 790; Frazee v. Spokane County, (1902) 29 Wash. 278, 69 Pac. 779. See also U. S. v. Saunders, (1899) 96 Fed. 268.

Computation of time.—The period within which the lands patented under this section are to remain inalienable is to be computed by including the date on which the patent issued. Taylor v. Brown, (1893) 147 U. S. 640, 13 S. Ct. 549, 37 U. S. (L. ed.) 313.

Period of exemption from taxation.—Lands patented to Indians under the provisions of this section and before the Act of July 4, 1884, *infra*, p. 820, went into effect, are held in trust by the United States for the sole use and benefit of the Indians to whom such patents have issued and are exempt from state or territorial

taxation for five years from the date of the patent. (1888) 19 Op. Atty-Gen. 161.

Foreign immigrants.—The benefit of the homestead law provided for in this section is extended only to Indians "born in the United States." (1877) 18 Op. Atty-Gen. 557.

Citizenship.—This and similar statutes do not admit Indians, who avail themselves of the provisions therein, to the privileges and responsibilities of citizenship within the meaning of the first section of the Fourteenth Amendment of the Constitution. "Whether any Indian tribes or any members thereof have become so far advanced in civilization that they should be let out of the state of pupilage, . . . is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself." Elk v. Wilkins, (1884) 112 U. S. 94, 5 S. Ct. 41, 28 U. S. (L. ed.) 643.

SEC. 16. [Entries heretofore made, confirmed.] That in all cases in which Indians have heretofore entered public lands under the homestead-law, and have proceeded in accordance with the regulations prescribed by the Commissioner of the General Land Office, or in which they may hereafter be allowed to so enter under said regulations prior to the promulgation

of regulations to be established by the Secretary of the Interior under the fifteenth section of this act, and in which the conditions prescribed by law have been or may be complied with, the entries so allowed are hereby confirmed, and patents shall be issued thereon; subject, however, to the restrictions and limitations contained in the fifteenth section of this act in regard to alienation and incumbrance. [18 Stat. L. 420.]

See the notes to the preceding section 15 of the text.

Condition in patent void.—A conditional clause inserted in a patent issued under this statute, taken from the special Act of Jan. 18, 1881, relating to the Winnebago Indians of Wisconsin, restraining

alienation within a period of twenty-five years, is without authority of law and void. U. S. v. Saunders, (1899) 96 Fed. 268.

[Sec. 1.] [Further application of homestead laws to Indians—patented lands held in trust.] That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. [23 Stat. L. 96.]

This is from the Indian Appropriation Act of July 4, 1884, ch. 180.

See the Act of March 3, 1875, ch. 131, § 15, *supra*, p. 819, and the notes thereto.

This Act did not repeal, amend, or modify any of the provisions of the Act of March 3, 1875, ch. 131, § 15, *supra*, p. 819. It did not extend from five years to twenty-five years the restriction of the lands acquired by an Indian homesteader under the earlier Act. Hemmer v. U. S., (C. C. A. 8th Cir. 1912) 204 Fed. 898, 123 C. C. A. 194.

Laws governing issuance of patent.—Though an Indian entered on public land under Act March 3, 1875, ch. 131, 18 Stat. L. 402, *supra*, p. 819, extending the privileges of the homestead laws to Indians who have abandoned their tribal relations, and prohibiting alienation until five years after patent is issued, but was not entitled to make final proof until after the enactment of this section continuing the homestead privilege but extending the prohibition of alienation to twenty-five years, it was held that the

patent was issuable under the latter Act so that the twenty-five years' prohibition of alienation applied to such land. Frazee v. Piper, (1908) 51 Wash. 278, 98 Pac. 760.

Restriction on alienation.—This Act controls the period within which lands may be alienated which were entered upon under the Act of March 3, 1875, ch. 131, *supra*, p. 819, but patented after this Act went into effect. U. S. v. Hemmer, (D. C. S. D. 1912) 195 Fed. 790; Frazee v. Spokane County, (1902) 29 Wash. 278, 69 Pac. 779.

But where the right of homestead was perfected under the Act of March 3, 1875, ch. 131, *supra*, p. 819, the period of five years, within which the land could not be alienated as provided therein, is not extended by this Act. U. S. v. Saunders, (1899) 96 Fed. 268.

Where an Indian held under this section, extending the homestead privilege to

Indians, but inhibiting the alienation of land patented thereunder for a period of twenty-five years after patent, an attempted sale within that period was void. *Frazer v. Piper*, (1908) 51 Wash. 278, 98 Pac. 760.

Period of exemption from taxation.—This Act is supplemental to and somewhat in modification of the Act of March 3, 1875, ch. 131, *supra*, p. 819, and lands entered on under the Act of 1875, but patented after this Act became operative, as well as lands entered on and patented under this Act, are held in trust by the United States for the benefit of the patentees, exempt from taxation for a period of twenty-five years. Patents issued prior to the time this Act became law are not affected thereby. (1888) 19 Op. Atty-Gen. 161.

A patent erroneously issued under a

prior law will not deprive an Indian of the limitations and conditions of this Act under which the patent should have been issued. *Frazer v. Spokane County*, (1902) 29 Wash. 278, 69 Pac. 779.

Ejectment.—An Indian patentee of public land, who was entitled to present and exclusive possession thereof, though the land was held in trust for him by the United States for a period of twenty-five years, at the end of which time he would acquire the fee, could maintain ejectment therefor alone without joining the United States; his title being sufficient to support a possessory action. *Frazer v. Piper*, (1908) 51 Wash. 278, 98 Pac. 760.

Citizenship, within the meaning of the Fourteenth Amendment of the Constitution, is not granted by this and similar acts. *Elk v. Wilkins*, (1884) 112 U. S. 94, 5 S. Ct. 41, 28 U. S. (L. ed.) 643.

An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

[Act of Feb. 8, 1887, ch. 119, 24 Stat. L. 388.]

SEC. 1. [Allotments on reservations—irrigable and non-irrigable lands—effect of treaty provisions.] That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided*, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further*, That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act

subject, however, to the basis of equalization between irrigable and non-irrigable lands established herein, but in such cases allotments may be made in quantity as specified in this Act, with the consent of the Indians expressed in such manner as the President in his discretion may require. [24 Stat. L. 288, as amended by 26 Stat. L. 794, 36 Stat. L. 859.]

This is the first section of the "Dawes Act" or the "General Allotment Act." As originally enacted it was as follows:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

"To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual." [24 Stat. L. 388.]

It was amended by an Act of Feb. 28, 1891, ch. 383, § 1, to read as follows: "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided the land in such reservation or reservations shall be allotted to each individual pro rata, as near as may be, according to legal subdivisions: *Provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided the President, in making allotments upon such reservation, shall allot the land to each individual Indian of said classes belonging thereon in quantity as specified in such treaty or act, and to other Indians belonging thereon in quantity as herein provided: *Provided further*, That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may require: *And provided further*, That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities." [26 Stat. L. 794.]

Said amending Act of Feb. 28, 1891, ch. 383, § 1, was again amended to read as given in the text by the Act of June 25, 1910, ch. 431, § 17. See the notes to section 1 of said Act, *infra*, p. 853.

Constitutionality.—Construing the Act of Feb. 8, 1887, it was held to be not in conflict with the Constitution of the United States, art. 1, § 8, which provides that Congress shall have power "to establish an uniform rule of naturalization." *State v. Norris*, (1893) 37 Neb. 299, 55 N. W. 1086.

Effect of statute.—The effect of this statute was a legislative recognition and confirmation of prior executive orders establishing Indian reservations and confirming beyond challenge the Indian title thereto. *In re Wilson*, (1891) 140 U. S. 575, 11 S. Ct. 870, 35 U. S. (L. ed.) 513; (1911) 29 Op. Atty.-Gen. 239.

Construction.—Under the general Indian Allotment Act of 1887, a continuing power was vested in the President, which was not exhausted by the first order for allotments. *U. S. v. Fairbanks*, (1909) 171 Fed. 337, 96 C. C. A. 229.

Power was conferred upon the President, when he had determined the facts as set out in section 1 of the Act of Feb. 8, 1887, to allot lands in severalty to Indians on reservations. (1896) 21 Op. Atty-Gen. 430.

The reservation is not revoked by the allotment of the lands in severalty. These cases were under the Act of Feb. 8, 1887. *Eells v. Ross*, (1894) 64 Fed. 419, citing *The Kansas Indian*, (1866) 5 Wall. 737, 18 U. S. (L. ed.) 667; *State v. Columbia George*, (1901) 39 Ore. 127, 65 Pac. 604.

Jurisdiction.—The probate courts of Minnesota have no jurisdiction to determine heirship and descent of land allotted to a Chippewa Indian upon the White Earth reservation, under the Act of Feb. 8, 1887, and that of Jan. 14, 1889 (25 Stat. 642, ch. 24, relating especially to the White Earth reservation), where the allottee dies before the approval of his allotment. *Holmes v. Praun*, (1915) 130 Minn. 487, 153 N. W. 951.

Leases to other than native members of their respective tribes were not provided for by any treaty, Act of Congress, or otherwise, until the passage of the Act of Feb. 28, 1891. *U. S. v. Flournoy Live-Stock, etc., Co.*, (1895) 69 Fed. 886. See also *Beck v. Flournoy Live-Stock, etc., Co.*, (C. C. A. 1894) 65 Fed. 30, 27 U. S. App. 618, 12 C. C. A. 497.

The new policy toward Indians.—The Act of Feb. 8, 1887, together with the preceding acts of March 3, 1875, Jan. 18, 1881, and July 4, 1884, mark "a new epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore. It is dismemberment of the tribes or bands, and absorption, as citizens, of the individuals composing them, by the states and territories containing the lands on which such individuals settle or may be settled, that is the policy of this new legislation. But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy." (1890) 19 Op. Atty-Gen. 559, quoting (1888) 19 Op. Atty-Gen. 161.

SEC. 2. [Selection of allotments.] That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner. [24 Stat. L. 388.]

Erroneous reference.—The surveys and resurveys erroneously referred to in section 9 of this Act, as mentioned in the above section, are provided for in the preceding section 1. (1887) 18 Op. Atty-Gen. 593.

Analogy to taking up homestead.—In *State v. Norris*, (1893) 37 Neb. 299, 55 N. W. 1086, it was said that the part taken by an Indian in this proceeding is analogous to "taking up a homestead," in that he selects the land he wishes and

the local authorities of the government confirm or reject the selection.

Right to allotment.—Where the mother of P., a Walla Walla Indian, married an Iroquois, and P., who was born within the Walla Walla region, was a minor when her mother again married a French Canadian, but never severed her tribal relations, which were subsequently expressly recognized by a general Indian council, it was held that the marriage of her mother did not deprive P. of the right

to select lands held for allotment in the Umatilla Indian reservation for herself and her children. *Smith v. Bonifer*, (1907) 154 Fed. 883, *affirmed* (1909) 166 Fed. 846, 92 C. C. A. 604.

In *La Clair v. U. S.*, (1910) 184 Fed. 128, it was held that the plaintiffs were not debarred from the right to receive allotments on the Yakima reservation by the fact that their parents had received allotments on the Puyallup reservation as heads of families, and that the plaintiffs were named in the patents as members of such families.

Recovery of lands from divorced wife.—In *Morrisett v. U. S.*, (1904) 132 Fed. 891, it appeared that the plaintiff, an Indian of the Walla Walla tribe, selected and claimed the allotment to him of 160 acres of land in the Umatilla reservation as the head of a family consisting of himself and his wife. He alleged that through the misrepresentation of his wife that she was a single woman, eighty acres of the tract so selected was allotted to her, and the remainder only to him as a single person. His wife afterward obtained a divorce. It was held that the extra allotment of eighty acres to which the plaintiff was at the time entitled under the law resulted from his status as a married man, and that after he had lost such status, presumably through his own fault, he had no standing in equity to recover from his wife the land which, if allotted to him, would have been on her account, if not in her right.

Allotment to adopted members of tribe.—In *La Clair v. U. S.*, (1910) 184 Fed.

128, it appeared that the plaintiffs, who were formerly members of the Puyallup tribe of Indians, but were of Yakima half blood, were invited by the Yakimas to become members of that tribe for the purpose of sharing in the allotment of the lands of their reservation in severalty, which they did, having been formally adopted by the tribe in accordance with its customs. The Indian agent and the allotting agent were fully advised of such action, which was taken with their approval, and with full knowledge of the facts recommended the plaintiffs for allotments, and their recommendation was approved by the Secretary of the Interior, and patents were issued to the plaintiffs, which recited that they were Indians "residing on the Yakima Indian reservation," who had been allotted land therein. None of plaintiffs had received allotments elsewhere. The lands have since been for the most part resided upon and improved by the allottees, and have become valuable. It was held that the things done were all that were required to make plaintiffs members of the Yakima tribes, and that, even if official ratification of the adoption was required, the action of the department amounted to such ratification.

Persons born after Act passed.—The fact that a member of an Indian tribe was born after the passage of this Act or of the Nelson Act of 1889 (Act Jan. 14, 1889, ch. 24, 25 Stat. L. 642), does not exclude such persons from the right to an allotment under either of such Acts. *U. S. v. Fairbanks*, (C. C. A. 1909) 171 Fed. 337, 96 C. C. A. 229.

SEC. 3. [Allotments, by whom to be made—certificates.] That the allotments provided for in this Act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office. [*24 Stat. L. 389, as amended by 36 Stat. L. 857.*]

This section was amended to read as above given by an Act of June 25, 1910, ch. 431, § 9. See the notes to section 1 of said Act, *infra*, p. 853. As originally enacted this section was as follows:

"Sec. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office." [*24 Stat. L. 389.*]

Reservations not abolished.—The provisions of the section as originally enacted clearly contemplate agents in charge of the reservations and refute the idea that this Act revokes the reservations. *Eells v. Ross*, (1894) 64 Fed. 419.

Allotment to be made by special agents and reservation agents jointly.—The above section as originally enacted represents a step in the proceeding of partition following the selection of lands by a single agent as authorized by section 2. Under the provisions of that section the allot-

ment of lands was required to be made jointly by an agent specially appointed for that purpose and the agent in charge of the reservation. (1887) 19 Op. Atty.-Gen. 14.

This section is quoted, as originally enacted, in *Leecy v. U. S.*, (C. C. A. 8th Cir. 1911) 190 Fed. 289, 111 C. C. A. 254, on the question of the authority of an Indian agent or the Secretary of the Interior to withdraw a certain section from allotment.

SEC. 4. [Indians not on reservations, etc., may make selection of public lands — fees of land officers to be paid from Treasury.] That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior. [24 Stat. L. 389.]

See further the Act of Feb. 28, 1891, ch. 383, § 4, given as amended, *infra*, p. 838.

Exemption from taxation.—Lands allotted under this section, as well as lands allotted under the preceding sections, are exempt from taxation for a period of twenty-five years. (1888) 19 Op. Atty.-Gen. 161.

A half-breed child of a white man and an Indian woman is not an Indian by birth, and consequently not entitled to the benefit of the provisions of this section. *Keith v. U. S.*, (1899) 8 Okla. 446, 58 Pac. 507.

SEC. 5. [Patents to be held in trust — descent and partition — purchase of unallotted lands — disposition of purchase money — confirmation of prior occupancy — preference as to employees — Indians of Siletz Reservation.] That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge

or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void:

Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act:

And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress:

Provided however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education:

And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.

The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto.

And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to conform such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just;

but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is hereby authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act. [24 Stat. L. 389, as amended by 31 Stat. L. 1085.]

This section was amended by an Act of March 3, 1901, ch. 832, § 9, by adding thereto the last proviso relating to the Indians on the Siletz reservation, making the section to read as given in the text.

"The act of 1887 was adopted as part of the Government's policy of dissolving the tribal relations of the Indians, distributing their lands in severalty, and conducting the individuals from a state of dependent wardship to one of full emancipation with its attendant privileges and burdens. Realizing that so great a change would require years for its accomplishment and that in the meantime the Indians should be safeguarded against their own improvidence, Congress, in prescribing by the Act of 1887 a system for allotting the lands in severalty whereby the Indians would be established in individual homes, was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent, but is in reality an allotment certificate, declaring that for a period of twenty-five years, or such enlarged period as the President should direct, the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period would convey to him by patent the fee, discharged of the trust and free of any charge or incumbrance; and, as a safeguard against improvident conveyances or contracts made in anticipation of the ultimate or real patent, it was expressly provided that any conveyance of the land, or any contract touching the same, made before the expiration of the trust period

should be absolutely null and void. It is thus made plain that it was the intention of Congress that the title should remain in the United States during the entire trust period, and that, when conveyed to the allottee or his heirs by the ultimate patent at the expiration of that period, it should be unaffected by any prior conveyance or contract touching the land." *Monson v. Simonson*, (1913) 231 U. S. 341, 34 S. Ct. 71, 58 U. S. (L. ed.) 260.

Application of section.—This section applies only to patents issued after the passage of the Act, and the Puyallup Indians to whom lands were patented under treaty of Dec. 26, 1854, are not Indians for whom the government holds the patented lands in trust for a period of twenty-five years. *U. S. v. Koppe*, (1901) 110 Fed. 160. See also (1889) 19 Op. Atty.-Gen. 255, holding that the provisions of this and the other sections of this Act regulating the proceedings in partition, and the title to be conveyed by these proceedings, are applicable only to land held in common at the date of the passage of the Act.

Title and control.—Under this Act the United States retains title and control over the allotted lands during the trust period without any right in the allottee, except to occupy and cultivate the lands under a paper or writing showing that at a particular time in the future, unless extended by the President, the allottee would be entitled to a patent for the fee.

U. S. v. Gardner, (1904) 133 Fed. 285, 66 C. C. A. 663; *Bond v. U. S.*, (1910) 181 Fed. 613.

Title of allottee.—The selection of and the filing upon an allotment of land are the inceptions of the title of the Indian allottee or his heirs, and when the patent, which is only the evidence of title, is issued, it relates back to the inception of the title. *Hooks v. Kennard*, (1911) 28 Okla. 457, 114 Pac. 744.

Effect of allotment.—An Indian allottee by accepting an allotment does not cease to be a ward of the government, but still remains in a condition of pupilage and dependency; the determination of all disputes concerning the allotment, its occupancy and possession, and the general control of the Indian remaining within the jurisdiction of the Secretary of the Interior. *Bond v. U. S.*, (1910) 181 Fed. 613.

Right of United States to maintain suit.—The United States may maintain a suit in its own name to cancel a deed to allotted Indian lands, although made under an order of court, if the sale was in violation of the statutory restrictions on alienation. *U. S. v. Bellm*, (1910) 182 Fed. 161. See also *U. S. v. Dooley*, (1906) 151 Fed. 697.

Cancellation of patents.—Where the Interior Department by its officers and agents has recognized the right of Indians to allotments of land as members of a tribe, after full investigation, with full knowledge of the facts and without fraud, and allotments have been made and patents issued to the allottee, the department is without authority to subsequently cancel such patents because of a change in its interpretation of the law; nor is there any equity which warrants a court in canceling the patents at suit of the government, the allotment being satisfactory to the tribe from whose lands they were made. *La Clair v. U. S.*, (1910) 184 Fed. 128.

Validity of restrictions on alienation.—Restrictions placed by Act of Congress upon the alienation by Indians of lands allotted to them in severalty, and embodied in the patents issued for such lands, are pursuant to a general and beneficent policy of the government for the protection of the Indians, and are valid. *Nelson v. John*, (1906) 43 Wash. 483, 86 Pac. 933.

Purpose of restriction.—The purpose of Congress in restricting alienation within the period of twenty-five years was to protect the Indian from the greed and superior intelligence of the white man, and the law will be construed with a view to giving that protection. *Beck v. Flournoy Live-Stock, etc., Co.*, (C. C. A. 1894) 65 Fed. 30, 27 U. S. App. 618, 12 C. C. A. 497.

The Indian's right of occupancy is the right to enjoy the land forever, with the

right of alienation limited to one alienee, the United States, or to such persons as the United States, in its capacity as guardian over the Indians, may permit. (1891) 20 Op. Atty-Gen. 42.

Taxation.—Neither the land allotted nor the permanent improvements thereon, nor the personal property obtained from the United States and used by the Indians on the allotted lands, are subject to state or local taxation during the period of trust established by this section, and the United States has such an interest in the matter as to entitle it to maintain a suit to restrain such taxation. *U. S. v. Rickert*, (1903) 188 U. S. 432, 23 S. Ct. 478, 47 U. S. (L. ed.) 532, reversing (1901) 106 Fed. 1; *U. S. v. Thurston County*, (C. C. A. 8th Cir. 1906) 143 Fed. 287, 74 C. C. A. 425, reversing (C. C. Neb. 1905) 140 Fed. 456.

Timber rights.—During the period within which the lands allotted under this Act are held in trust by the government, an Indian allottee has no right to cut and sell growing timber upon the land, except such as it may be necessary to cut in clearing the premises for agricultural or grazing purposes, or to erect suitable buildings thereon, and it is the duty of the Department of the Interior to prevent the cutting of timber except for the purposes mentioned, whether the land is within an Indian reservation or not. (1889) 19 Op. Atty-Gen. 232. Dead timber, however, standing or fallen, may be removed and sold. (1890) 19 Op. Atty-Gen. 559.

Conveyance of Indian lands.—Where a conveyance by an Indian of land allotted to him was void because the title remained in the United States, the fact that subsequently the Indian obtained a patent and could convey did not inure to the benefit of the purchaser; the rule that where a vendor having no title sells and title subsequently procured by him inures to the benefit of the purchaser not applying where such sale was prohibited by law. *Starr v. Long Jim*, (1909) 52 Wash. 138, 100 Pac. 194.

A deed and mortgages, executed by a member of the absentee Shawnee tribe or band of Indians, of lands allotted to such Indian and held in trust for him by the United States, under Act of Congress Feb. 8, 1887, ch. 119, 24 Stat. 388, as amended by Act of March 3, 1891, ch. 543, 26 Stat. L. 1018, are void. *Perkins v. Cissell*, (1912) 32 Okla. 827, 124 Pac. 7.

Right to maintain trespass.—Although the government by this Act holds in trust the legal title to land allotted in severalty to an Indian, the latter, who is in the rightful possession of the land and has the beneficial use therein, may recover damages for an unlawful trespass upon it. *Smith v. Mosgrove*, (1908) 51 Ore. 495, 94 Pac. 970.

Sale of growing corn.—A member of the

Prairie band of Pottawatomie Indians can sell the corn growing on the land allotted to him by the government, and the contract of sale is not a contract touching the land or any interest therein. *McClain v. Miller*, (1915) 95 Kan. 794, 149 Pac. 399.

Leases void.—The restraint upon alienation imposed by this section is not removed or qualified by section 6 of this Act, conferring the rights, privileges, and immunities of citizenship; and leases made by Indians in violation of this section are null and void. *Beck v. Flournoy Live-Stock, etc., Co.*, (C. C. A. 1894) 65 Fed. 30, 27 U. S. App. 618, 12 C. C. A. 497; *U. S. v. Flournoy Live-Stock, etc., Co.*, (1895) 69 Fed. 886.

A note given by a sublessee of allotted lands to the original lessee, for the rent of the lands, is a nullity, the lease and sublease being void. *Larson v. Pender First Nat. Bank*, (1901) 62 Neb. 303, 87 N. W. 18.

An Indian allottee cannot lawfully lease the whole or any part of his allotment, either with or without the permission of the Secretary of the Interior, nor can he give to a third person, by contract, the right to erect upon his allotment mills for manufacturing purposes. (1890) 19 Op. Atty-Gen. 559.

Effect of citizenship.—The conferring of the rights of citizenship upon an Indian allottee does not authorize him to alienate or lease the land allotted to him, or to make any contract in relation thereto in violation of this section. *Williams v. Steinmetz*, (1905) 16 Okla. 104, 82 Pac. 986.

Power to will.—It has been held that an allottee under this Act who died within the twenty-five year period had no power to devise his interest in the land allotted. *In re House*, (1907) 132 Wis. 212, 112 N. W. 27.

Dower.—The widow of an Indian to whom an allotment of lands in severalty had been made, as authorized by this Act, is entitled to dower in such lands. *Wheeler v. Petite*, (1907) 153 Fed. 471.

White persons as "heirs."—The term "heirs," as used in the first paragraph of this section, includes white persons adopted as members of a tribe of Indians. *Reed v. Clinton*, (1909) 23 Okla. 610, 101 Pac. 1055.

Jurisdiction of state courts.—So long as the United States recognizes the national character of the Indians and that they are under the protection of treaties and laws of Congress, their property is outside the operation of state laws, and the state courts have no jurisdiction over controversies concerning the titles to Indian allotments while the same are held in trust by the United States. *Smith v. Mosgrove*, (1908) 51 Ore. 495, 94 Pac. 970.

Construction of first proviso.—The

proviso to the first paragraph of this section does not contemplate that the President may extend the period of twenty-five years as to all trust patents issued to Indian allottees of land, but only that such extension may be made in particular cases, in the discretion of the President. (1905) 25 Op. Atty-Gen. 483.

Construction of second proviso.—In *U. S. v. Bellm*, (1910) 182 Fed. 161, it was held that the proviso in the second paragraph of section 5, adopting the laws of descent of Kansas, was merely for the purpose of providing a rule by which the heirs should be determined, and that the partition statutes were adopted only so far as they provided for a division of the land in case the heirs could not agree to hold it in common; that there was no intention of abrogating the trust in any case, and that the clause "except as herein otherwise provided" excluded the application of a provision of a state partition statute authorizing a sale of the land where it could not be advantageously divided; and that such a sale of land in the Indian Territory, although under an order of court based on the Kansas statute, was null and void.

State laws of descent and partition—Kansas.—The statute of Kansas relating to descent (Gen. Stat. 1889, ch. 33, §§ 20, 21, 29), which by this section is made to govern the descent of lands allotted in severalty to the members of certain tribes in Indian Territory, provides that if an intestate leaves neither husband, nor wife, nor issue, his estate shall go to his parents, and, if his parents be dead, shall be disposed of in the same manner as if they, or either of them, had outlived the intestate and died in the ownership and possession of the portion thus falling to their share, or to either of them, and that "children of the half blood shall inherit equally with children of the whole blood." It has been held that the word "children," as so used, should be construed as meaning "kindred," and that under such provision, where an Indian woman, whose parents were dead, died unmarried and without issue, but leaving a half-brother, he inherited her land, to the exclusion of her uncles and cousins. *Finley v. Abner*, (C. C. A. 1904) 129 Fed. 734, 64 C. C. A. 262.

Minnesota.—Under this Act where the allottee of land in Minnesota dies after his trust patent has issued, his allotment descends to his heirs, as provided by the laws of that state, to be ascertained by the probate court of the county in which the lands are located. *U. S. v. Park Land Co.*, (1911) 188 Fed. 383.

Washington.—Under the laws of descent of Washington which by this section are made applicable to allotted and patented Indian lands therein, the estate of a Puyallup Indian, allotted lands under a patent from the United States which contained

restrictions on alienation, and provided for forfeiture upon neglect to till the soil or on return to a nomadic life, was an inheritable estate in the lands on his death in 1888. *Little Bill v. Swanson*, (1911) 64 Wash. 650, 117 Pac. 481.

This section is cited generally in *Leecy*

v. U. S., (C. C. A. 8th Cir. 1911) 190 Fed. 289, 111 C. C. A. 254; *Vachon v. Nichols-Chisholm Lumber Co.*, (1913) 126 Minn. 303, 144 N. W. 223, 148 N. W. 288; *Chase v. Dextater*, (1911) 147 Wis. 581, 132 N. W. 904.

SEC. 6. [Citizenship rights to allottees on issue of fee simple title — restrictions removed — jurisdiction in trust patents continued — Indian Territory not included.] That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory. That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final. [24 Stat. L. 390, as amended by 31 Stat. L. 1447, 34 Stat. L. 182.]

This section was amended to read as above given by the Burke Act of May 8, 1906, ch. 2348. Prior to its amendment by the last cited Act it was as follows:

"SEC. 6. That upon the completion of said allotments and the patenting of the lands

to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." [24 Stat. L. 390.]

It was first amended by the Act of March 3, 1901, ch. 868, 31 Stat. L. 1447, which inserted in the last sentence, between the words "civilized life" and "is hereby declared to be a citizen," the words "and every Indian in Indian Territory," and was subsequently amended by said Act of May 8, 1906, ch. 2348, to read as given in the text.

The above section 6 in the text apparently wholly supersedes R. S. sec. 2312, which read as follows:

"SEC. 2312. Whenever any of the chiefs, warriors, or heads of families of the tribes mentioned in section twenty-three hundred and ten, having filed with the clerk of the District Court of the United States a declaration of his intention to become a citizen of the United States, and to dissolve all relations with any Indian tribe, two years previous thereto, appears in such court, and proves to the satisfaction thereof, by the testimony of two citizens, that for five years last past he has adopted the habits of civilized life; that he has maintained himself and family by his own industry; that he reads and speaks the English language; that he is well disposed to become a peaceable and orderly citizen; and that he has sufficient capacity to manage his own affairs; the court may enter a decree admitting him to all the rights of a citizen of the United States, and thenceforth he shall be no longer held or treated as a member of any Indian tribe, but shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities to taxation of other citizens of the United States. But nothing herein contained shall be construed to deprive such chiefs, warriors, or heads of families of annuities to which they are or may be entitled." Act of March 3, 1865, ch. 127, 13 Stat. L. 562.

The Indians mentioned in R. S. sec. 2310, to which the above section 2312 refers, are "each of the chiefs, warriors, and heads of families of the Stockbridge Munsee tribes of Indians, residing in the county of Shawana, State of Wisconsin."

The last provision of the foregoing section 6, relating to the disposition of the land of a deceased allottee, was superseded by the Act of May 29, 1908, ch. 216, § 1, *infra*, p. 851.

The purpose of this section is to grant the personal rights of citizenship and the protection of the laws not only to those Indians who might receive patents under the Act of Feb. 8, 1887, but also to those who might have received or might be entitled to receive them "under any law or treaty," and consequently the fifty-seven Kickapoo Indians who, prior to the passage of that Act, had obtained allotments under the treaty of 1862, art. 2, are entitled to the benefits of the Act of 1887, having taken the oath and furnished the proof required by the third article of the treaty of 1862, and having received their patents. (1889) 19 Op. Atty.-Gen. 255.

Authority of Congress to confer citizenship.—"It was undoubtedly competent for Congress to thus confer upon Indians the privileges of citizenship." *People v. Bray*, (1894) 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158, citing *Elk v. Wilkins*, (1884) 112 U. S. 95, 5 S. Ct. 41, 28 U. S. (L. ed.) 643.

Acquirement of citizenship.—The only way to citizenship for an Indian, it would seem is in complying with the requirement of this Act. *In re Burton*, (1900) 1 Alaska 111.

Who become citizens.—When lands composing an Indian reservation have been allotted and patented in severalty among the members of the band or tribe of Indians occupying such lands, each and every allottee becomes a citizen of the state wherein such reservation is located, and subject to the laws thereof. *Moore v. Nah-con-be*, (1905) 72 Kan. 169, 83 Pac. 400.

Citizenship accorded to Indians.—By the provisions of the Act of Congress approved Feb. 8, 1887 (chapter 119, 24 Stat. 388, 390), all Indians born within the territorial limits of the United States, to whom allotments of land in severalty had been made under the provisions of said Act, or other law or treaty, and all Indians, born as aforesaid, who had voluntarily taken up their residence in the United States

separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, were made citizens of the United States, and such Indians residing in Nebraska were citizens thereof. *Kitto v. State*, (1915) 98 Neb. 164, 152 N. W. 380, L. R. A. 1915F 587.

When citizenship attaches.—An Indian allottee on the receipt of his first patent must be deemed within the provision of section 6 that, "upon the completion of said allotments and the patenting of the lands to said allottees," each allottee shall have the benefits of, and be subject to, the laws of the state where he resides, in view of the further grant of citizenship which that section extends to every allottee, and of the fact that the issue of the final patent provided for by section 5 was to be delayed for twenty-five years, when it was to be issued to the first patentee or his heirs. *Matter of Heff*, (1905) 197 U. S. 488, 25 S. Ct. 506, 49 U. S. (L. ed.) 848.

The issuance of a patent to an Indian to whom lands have been allotted under this Act is not essential to his complete citizenship. When one who possesses the statutory qualifications accepts the lands allotted and complies with the law in other respects, he becomes entitled to a patent to his land and his citizenship attaches. Accordingly, the Indians of Winnebago and Perry precincts in Thurston county, Nebraska, as well as those to whom patents had issued, were qualified electors and entitled to vote at the election of Nov. 3, 1891. *State v. Norris*, (1893) 37 Neb. 299, 55 N. W. 1086. See also *Hankey v. Bowman*, (1901) 82 Minn. 328, 84 N. W. 1002.

Effect of granting citizenship.—The grant of citizenship to the Indians was intended for their protection, and was not a renunciation by the United States of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights. *U. S. v. Allen*, (1910) 179 Fed. 13, 103 C. C. A. 1.

Effect on laws of descent.—Under the various provisions of this Act providing for the allotment of Indian lands, the laws of descent of the state apply to these lands. *Guyatt v. Kautz*, (1905) 41 Wash. 115, 83 Pac. 9.

Effect on electoral franchise.—To entitle an Indian to vote in the state of Nebraska by virtue of his citizenship under the Act of Feb. 8, 1887, it was held prior to the amendment of May 8, 1906, that it must be shown that the Indian offering to vote was born within the territorial limits of the United States, and that an allotment of land has, in fact, been made to such Indian by the government of the United States in pursuance of said Act, or of like authority of law or treaty of the United States. *State v.*

Frazier, (1890) 28 Neb. 438, 44 N. W. 471.

Federal control of proceeds of land after citizenship.—A patent issued to an Indian allottee, pursuant to the treaty of Sept. 30, 1854, authorizing the President to assign land to Indians with such restrictions on the power of alienation as he may impose, stipulated that neither he nor his heirs should sell the tract without the consent of the President. Regulations approved by the President provided that the proceeds of timber taken from allotted lands should be deposited in a national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent. It has been held that, though an allottee becomes a citizen under this section, his power to dispose of the proceeds received from the sale of his timber is subject to the approval of the Indian agent. *Tomkins v. Campbell*, (1906) 129 Wis. 93, 108 N. W. 216.

Taxation.—Land allotted under an Indian treaty which exempts such land from levy, sale, or forfeiture until the state legislature shall, with the consent of Congress, remove the restriction, can no longer escape taxation after the Indian patentee has become a citizen under this section, which in addition to the grant of citizenship provides that Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which they may reside, and the ten years during which Congress, by the Act of March 3, 1893, 27 Stat. L. 612, 633, ch. 209, postponed the operation of the provision of Wash. Laws 1889, 1890, p. 499, granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state," and removing all restrictions in reference thereto, have expired. *Goudy v. Meath*, (1906) 203 U. S. 146, 27 S. Ct. 48, 51 U. S. (L. ed.) 130, affirming (1905) 38 Wash. 126, 80 Pac. 295.

An Indian who has lived since, and for a long time prior to, the passage of the Act of Feb. 8, 1887, separate and apart from any tribe, and after the manner of a civilized white citizen, is not an Indian within the meaning of the above section and is not entitled to hold his lands exempt from taxation by virtue of the Act of July 13, 1887, art. 3, providing that the lands and property of Indians shall never be taken from them without their consent. *Miami County v. Godfroy*, (1901) 27 Ind. App. 610, 60 N. E. 177.

Reservation not revoked.—The citizenship conferred by the Act does not emancipate the Indians from all control, or abolish the reservation. "Some of the restraints of a reservation may be inconsistent with the rights of citizens; the advantages of a reservation are not;" and

if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they (the Indians) have to complain. *Eells v. Ross*, (1894) 64 Fed. 419; *U. S. v. Flournoy Live-Stock, etc., Co.*, (1896) 71 Fed. 576. See also *State v. Columbia George*, (1901) 39 Ore. 127, 65 Pac. 604; *Frazee v. Spokane County*, (1902) 29 Wash. 278, 69 Pac. 778.

Government control of liquor traffic not disturbed.—This section does not deprive the government of its power to regulate commerce with Indians situated as referred to therein, to protect them, as its wards, against their appetites, passions, and incompetence; and laws making the selling of spirituous liquors to such Indians punishable by fine or imprisonment are passed in the proper exercise of that power. *Farrell v. U. S.*, (C. C. A. 1901) 110 Fed. 942, 49 C. C. A. 183; *State v. Wise*, (1897) 70 Minn. 99, 72 N. W. 843. See further the notes under section 1 of the Act of Jan. 30, 1897, ch. 109, *infra*, p. 919.

Introducing intoxicating liquor.—The introduction of intoxicating liquor upon an Indian allotment made under the Act of Feb. 8, 1887, ch. 119, prior to its amendment by the Burke Act of May 8, 1906, ch. 2348, constituted a crime under the federal statute, R. S. sec. 2139 as amended by Act of Jan. 30, 1897, ch. 109, *infra*, p. 919. *U. S. v. Sutton*, (1909) 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200, *reversing* (E. D. Wash. 1908) 165 Fed. 253.

Cutting of timber.—The unlawful cutting of timber by an Indian, upon the land which he holds in severalty, is not an offense punishable under the Act of Congress of the 4th of June, 1888, making it unlawful to cut timber upon "lands belonging to or occupied by any tribe of Indians under authority of the United States." (1888) 19 Op. Atty.-Gen. 183.

Authority to sue.—Indians to whom lands have been allotted under this section are given, among their other rights, privileges, and immunities, the right to sue in the proper forum. The government itself may sue when necessary for the protection of the rights of Indians, but an Indian agent has no authority to do so. *In re Celestine*, (1902) 114 Fed. 551.

The right to bring and defend actions in the state courts is conferred upon Indians who comply with the provisions of this Act. *Wa-La-Note-Tke-Tynin v. Carter*, (1898) 6 Idaho 85, 53 Pac. 106. See also *Bird v. Winyer*, (1901) 24 Wash. 269, 64 Pac. 178.

In *Hatch v. Ferguson*, (1893) 57 Fed. 959, it was held that an Indian woman who married a white man and voluntarily took a residence apart from the tribe to which she belonged became entitled to the same rights as other female citizens, and after the death of her husband was en-

titled to sue in the federal courts a citizen of another state.

In *Bem-Way-Bin-Ness v. Eshelby*, (1902) 87 Minn. 108, 91 N. W. 291, it was held that a tribal Indian, whether a citizen under the above section or not, may maintain an action in the courts of the state of Minnesota to redress any wrong committed outside the limits of his reservation against his person or property.

Restraint on alienation not inconsistent with citizenship.—Prior to the amendment of May 8, 1906, giving the Secretary of the Interior discretionary power to cause to be issued a patent in fee simple, after which all restrictions on alienation were removed, it was held that the restraint on alienation of the lands allotted in severalty was not inconsistent with the citizenship conferred in the section. *Beck v. Flournoy Live-Stock, etc., Co.*, (C. C. A. 1894) 65 Fed. 30, 27 U. S. App. 618, 12 C. C. A. 497; *U. S. v. Flournoy Live-Stock, etc., Co.*, (1895) 69 Fed. 886; *U. S. v. Flournoy Live-Stock, etc., Co.*, (1896) 71 Fed. 576; *Frazee v. Spokane County*, (1902) 29 Wash. 278, 69 Pac. 779. See also *Jones v. Meehan*, (1899) 175 U. S. 1, 20 S. Ct. 1, 44 U. S. (L. ed.) 49, holding that, while citizenship as conferred in the above section does not enable Indians to alienate lands which before were not alienable, it certainly does not take away a power of alienation conferred by the treaty under which the allotment was made.

Application to tribal Indians.—This section has no application to a tribe of Indians, as the Eastern Band of Cherokees of North Carolina, but is intended to cover the case of the individual Indian who has taken up his residence separate and apart from his tribe, and has adopted the habits of civilized life. *U. S. v. Boyd*, (1897) 83 Fed. 547.

Applicable to Alaska.—Two classes of Indians born within the territorial limits of the United States are declared to be citizens thereof, namely, Indians who have received allotments under any act or treaty, and Indians who have severed their tribal relations by taking up their residence separate and apart from any tribe, and have adopted the habits of civilization. The Act is so specific and far-reaching in its scope that it must be held to be general in its purpose and intent, and to apply to every Indian within the territorial limits of the United States. Being such, R. S. sec. 1891 (title TERRITORIES) makes it applicable in Alaska; it being organized territory. *Nagle v. U. S.*, (C. C. A. 9th Cir. 1911) 191 Fed. 141, 111 C. C. A. 621.

Under this Act those Indians or half-breeds in Alaska who have voluntarily taken up their residence separate and apart from any tribe of Indians, and have adopted the habits of civilized life, become

thereby citizens of the United States by naturalization. *In re Minook*, (1904) 2 Alaska 200.

The Puyallup Indians, by virtue of patents issued to them Dec. 26, 1854, to certain lands of the Puyallup reservation, Washington Territory, and by reason of the citizenship conferred by the above section prior to its amendment, were held to be the owners in fee of the said lands and could permit the building of a railroad upon the same, and the government had no authority to interfere. *Ross v. Eells*, (1893) 56 Fed. 855. See also *U. S. v. Kopp*, (1901) 110 Fed. 160.

Jurisdiction of state courts.—The provision in this section and other sections of this Act, providing for the allotting of lands constituting an Indian reservation to the Indians in severalty, and the issuing of patents to the allottees therefor, and further providing that, upon the completion of said allotments and the issuing of patents to each of the allottees constituting the tribe, each allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state in which he may reside, upon completion of the allotments and the issuing of patents to each of the allottees, confers jurisdiction on the state courts to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation. *Ex p. Savage*, (1908) 158 Fed. 205; *In re Now-ge-zhuck*, (1904) 69 Kan. 410, 76 Pac. 877.

After public land has been allotted to an Indian under this Act he is not subject to prosecution for violating Act of Jan. 15, 1897, ch. 29, § 5, 29 Stat. L. 487 (which was embodied in Penal Laws, section 328; see PENAL LAWS), prohibiting the commission of rape within the limits of an Indian reservation, but which contains no express provision that it should be applicable to Indians residing on allotted lands, but is subject to the laws of the state in which the crime was alleged to have been committed. *U. S. v. Kiya*, (1903) 126 Fed. 879. Upon the completion of allotments made and the

patenting of the lands to the allottees by trust patents, each and every member of the respective bands or tribes of Indians to whom allotments are made "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside;" and the state courts accordingly have jurisdiction to try an Indian for any public offense, except the introduction of liquor into the Indian country, where such Indian has taken an allotment. *State v. Lott*, (1912) 21 Idaho 646, 123 Pac. 491.

The language that such Indians "should be subject to the laws, both civil and criminal, of the state or territory in which they reside," is as plain and comprehensive as it could well be made. It could not have been the intention of Congress to render these Indians subject generally to the criminal laws both of the state and the nation. The language quoted plainly makes them amenable to the criminal laws of the state, and thereby removes them from the plane of national penal legislation, unless such legislation is by express provision in particular cases made applicable to them. *State v. Nimrod*, (1912) 30 S. D. 239, 138 N. W. 377.

The jurisdiction of federal courts over crimes committed by Indians on Indian reservations is not abandoned by the declaration in this section that the Indians to whom lands have been allotted shall be subject to the laws of the state in which they reside. *In re Blackbird*, (1895) 66 Fed. 541; *State v. Columbia George*, (1901) 39 Ore. 127, 65 Pac. 604.

The state courts, however, have jurisdiction of crimes committed by persons other than Indians on Indian reservations. *Draper v. U. S.*, (1896) 164 U. S. 240, 17 S. Ct. 107, 41 U. S. (L. ed.) 419.

Restrictions upon alienation contained in patents issued to Indian allottees of lands in severalty, as required by different Acts of Congress, were not repealed by this section. *Nelson v. John*, (1906) 43 Wash. 483, 86 Pac. 491.

This amendment is not retroactive in its effect. *State v. Lott*, (1912) 21 Idaho 646, 123 Pac. 491.

The Act is cited in *Chase v. Dostater*, (1911) 147 Wis. 581, 132 N. W. 904.

SEC. 7. [Secretary of Interior to prescribe rules for use of waters for irrigation.] That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor. [24 Stat. L. 390.]

See the provisions of the Act of March 3, 1909, ch. 263, *infra*, p. 853.

SEC. 8. [Act not to extend to lands of certain tribes.] That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order. [24 Stat. L. 391.]

The provisions of this Act are extended to the Wea, Peoria, Kaaskaskia, Piankeshaw, and Western Miami tribes by Act of March 2, 1889, ch. 422. 25 Stat. L. 1013. *Compilers' note, 1 Supp. R. S. 536.* This Act is given *infra*, p. 836.

SEC. 9. [Appropriation for surveys.] That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act. [24 Stat. L. 391.]

Appropriations for surveys, etc., under the Act are made annually. The current appropriations are contained in the Act of Aug. 1, 1914, ch. 222, 38 Stat. L. 582.

Erroneous reference — intention of law-makers to be given effect.— The reference in this section to section 2 of this Act is erroneous, the surveys and resurveys alluded to being mentioned in section 1, but since it is the plain intention of the law-

makers that the costs of these surveys should be paid by the appropriation contained in the above section, the law will be so construed as to carry out that intention. (1887) 18 Op. Atty-Gen. 593.

SEC. 10. [Rights of way for railroads, etc., not affected.] That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation. [24 Stat. L. 391.]

As to rights of way over Indian lands see subdivision VII of this title, *infra*, p. 893.

SEC. 11. [Removal of Southern Utes not affected by act.] That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe. [24 Stat. L. 391.]

An act authorizing the Secretary of the Interior to accept the surrender of and cancel land patents to Indians in certain cases.

[Act of Oct. 19, 1888, ch. 1214, 25 Stat. L. 611.]

[SEC. 1.] [Acceptance of surrender of land patents from Indians.] That the Secretary of the Interior be, and he is hereby, authorized to accept the surrender of and to cancel patents conveying the land therein described and issued to the following-named * * * Indians, * * * and to allot

and patent to said Indians, under the act of February eighth, eighteen hundred and eighty-seven, such lands as they would be thereby entitled to had no previous patents to them severally been made. [25 Stat. L. 611.]

Section 1 of this Act is special, and only so much is here retained as is necessary to an understanding of section 2, which contains the only general legislation in the Act. The Act of Feb. 8, 1887, ch. 119, to which the text refers, is set forth *supra*, p. 821.

SEC. 2. [Indians may surrender patents, and receive allotments in severalty.] The Secretary of the Interior is hereby authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under the statute aforesaid, to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: *Provided*, That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of the act of February eighth, eighteen hundred and eighty-seven. [25 Stat. L. 612.]

See the note to the preceding section 1 of this Act.

[SEC. 1.] [Provisions of Allotment Act extended to certain tribes.] That the provisions of chapter One hundred and Nineteen of the acts of eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," are hereby declared to extend to and are made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Miami tribe of Indians, now located in the northeastern part of the Indian Territory and to their reservation, in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said act, except as to section six of said act, and as otherwise hereinafter provided. * * * [25 Stat. L. 1013.]

This was a part of an Act of March 2, 1889, ch. 422, entitled "An Act to provide for allotment of land in severalty to United Peorias and Miamies in Indian Territory, and for other purposes."

The remaining portions of the section and the other sections of this Act, making various allotments, are omitted as special only.

The Act of Feb. 8, 1887, ch. 119, mentioned in the text, is given *supra*, p. 821.

An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes."

[Act of Feb. 28, 1891, ch. 383, 26 Stat. L. 794.]

SEC. 2. [Existing allotments in certain cases to be augmented — no existing approved allotment to be reduced.] That where allotments have

been made in whole or in part upon any reservation under the provisions of said act of February eighth, eighteen hundred and eighty-seven, and the quantity of land in such reservation is sufficient to give each member of the tribe eighty acres, such allotments shall be revised and equalized under the provisions of this act: *Provided*, That no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity. [26 Stat. L. 795.]

Section 1 of this Act amended the Act of Feb. 8, 1887, ch. 119, § 1, *supra*, p. 821, and is noted under said section.

SEC. 3. [Leases of allotments, when permitted.] That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: *Provided*, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. [26 Stat. L. 795.]

The first part of this section, down to the proviso, may be regarded as superseded by the provision from the Act of May 31, 1906, ch. 598, § 1, *infra*, p. 845.

Subsequent provisions relating to the lease of surplus tribal lands were made by the Act of Aug. 15, 1894, ch. 290, § 1, *infra*, p. 841.

Authority of Secretary.—For the non-payment of rent and for the commission of waste the Secretary of the Interior has not power to cancel and annul the lease, though by the terms of the lease all the parties thereto covenant and agree that it is made with the express proviso that if any of the rent shall remain unpaid for thirty days after the same shall have become payable, or if the lessee shall commit waste or suffer it to be committed on such premises, the lease shall thereupon expire at the option of the lessors, with the approval of the Secretary of the Interior, without notice or demand, with the right of re-entry, as the secretary has not authority to adjudge and determine that the contingencies upon which the lease should terminate have happened. *Mosgrove v. Harper*, (1898) 33 Ore. 252, 54 Pac. 187.

Rights of lessee.—A lease can be made in the first instance only under certain circumstances, and by the consent and approval of the Secretary of the Interior, but after it has been executed by an allottee competent to enter into such an agreement, and has been approved, it becomes a complete contract, binding upon all the parties, and can be canceled or

abrogated only in the same manner, for the same reason, and by the same tribunal, as any other similar contract. "By such a contract the lessee secures a vested interest, of which he can no more be deprived by an order of the Secretary of the Interior than he can be deprived by such order of any other property lawfully acquired." *Mosgrove v. Harper*, (1898) 33 Ore. 252, 54 Pac. 187.

Liability for rent when approval delayed.—By the terms of a lease the lessee was to pay rent on a certain date, but the statute contains a provision that it should not be valid or enforceable until it was approved by the Secretary of the Interior, and it was not approved until four months after such date. If the lease had been delivered as soon as it was approved, it could not have constituted a binding agreement between the parties before its approval and there could not have been any liability upon the lessee to pay the rent on the date named. *Lemmon v. U. S.*, (C. C. A. 1901) 106 Fed. 650, 45 C. C. A. 518.

The words "bought and paid for" are not limited to lands which have been actually paid for in cash, or to lands which have been patented and the title thereto

actually parted with by the United States, but it was the intention of Congress that the statute and these words should apply to all lands which have been purchased by the Indians, either by the payment of money, or exchange or surrender of the possession of other property. *Strawberry Valley Cattle Co. v. Chipman*, (1896) 13 Utah 454, 45 Pac. 348.

Action for use and occupation.—An Indian may recover, in an action for mesne profits, the rental value of lands allotted to him by the United States government, from a person who has used and occupied the same under a lease that is void because not sanctioned and approved by the officers of the Interior Department. *Phillips v. Reynolds*, (1907) 79 Neb. 626, 113 N. W. 234.

Suit for breach of lease.—The United States has capacity to sue to recover damages for the breach of a lease made by an Indian allottee with the approval of the Secretary of the Interior, or to protect or enforce any other Indian property right which remains under the control and supervision of the secretary or the Indian agent, his subordinate, because such suits are indispensable to the protection and enforcement of the government rights of the United States and its governmental policy to protect the property rights of the Indians and to teach them the arts of civilized life. *U. S. v. Gray*, (C. C. A. 8th Cir. 1912) 201 Fed. 291, 119 C. C. A. 529. See also *U. S. v. Fitzgerald*, (C. C. A. 8th Cir. 1912) 201 Fed. 295, 119 C. C. A. 533.

Approved by Secretary of Interior.—This section does not authorize the leasing of the lands embraced within an Indian allotment, unless it is made to appear to the Secretary of the Interior that the allottee cannot, by reason of age or other disability, personally and with benefit to himself occupy or improve his allotment or any part thereof. *Williams v. Steinmetz*, (1905) 16 Okla. 104, 82 Pac. 986.

The statutory requirement that leases made by Indian allottees of the Cherokee and other civilized tribes in the Indian Territory should be subject to approval by the Secretary of the Interior before being effective confers on the secretary only the power of approval or disapproval, and gives him no authority to initiate or make a lease, or to change or ignore its provisions, and his approval of an assignment of a lease, made without the consent of the lessor, in direct violation of its conditions, does not validate such assignment. *Midland Oil Co. v. Turner*, (1910) 179 Fed. 74, 102 C. C. A. 368, *modifying* (1909) 167 Fed. 646.

Where a party holds a lease of Indian lands which has been approved by the proper officers of the Interior Department, such lease containing a provision that the party holding the lease will not, at any time during the period for which the said lands and premises are leased, sublet the same to any person without the consent thereto of the party of the first part and the approval of the same by the Secretary of the Interior, a subleasing of the same without the consent of the Secretary of the Interior is void, and conveys no right by such subleasing, and the sublease cannot be enforced. The doctrine of estoppel between landlord and tenant does not apply. *Reeves v. Sheets*, (1905) 16 Okla. 342, 82 Pac. 487.

A lease of an Indian allotment which has not been approved by the Secretary of the Interior is absolutely null and void; and where a party under such a lease plants the land to corn and cultivates it, and the cattle of the allottee, in connection with the cattle of another, break down the fence and destroy such corn, the lessee cannot recover for the value of his share thereof. The lease having been made in violation of a positive statute, the law will grant him no relief. *Williams v. Steinmetz*, (1905) 16 Okla. 104, 82 Pac. 986.

SEC. 4. [Allotment of public lands to Indians — patents — officers' fees.] That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the

manner and with the restrictions provided in the Act of which this is amendatory. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior. [26 Stat. L. 795, as amended by 36 Stat. L. 859.]

This section was amended to read as above given by the Act of June 25, 1910, ch. 431, § 17. See the notes to section 1 of said Act, *infra*, p. 853. This section as originally enacted was as follows:

"SEC. 4. That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children, in quantities and manner as provided in the foregoing section of this amending act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions provided in the act to which this is an amendment. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior." [26 Stat. L. 795.]

By a provision of said amending Act of June 25, 1910, ch. 431, § 17, 36 Stat. L. 859, there was repealed so much of the Act of March 3, 1909, ch. 263, § 1, 35 Stat. L. 782, as provided: "That the Secretary of the Interior be, and he hereby is, authorized, under the direction of the President, to allot any Indian on the public domain who has not heretofore received an allotment, in such areas as he may deem proper, not to exceed, however, eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian, such allotment to be made and patent therefor issued in accordance with the provisions of the Act of February eighth, eighteen hundred and eighty-seven."

SEC. 5. [Determination of descent — "Cherokee Outlet" lands excepted.] That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have co-habited together as husband and wife according to the custom and manner of Indian life the issue of such co-habitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: *Provided*, That the provisions of this act shall not be held or construed as to apply to the lands commonly called and known as the "Cherokee Outlet" * * * [26 Stat. L. 795.]

A further provision of this section, "that no allotment of lands shall be made or annuities of money paid to any of the Sac and Fox of the Missouri Indians who were not enrolled as members of said tribe on January first, eighteen hundred and ninety; but this shall not be held to impair or otherwise affect the rights or equities of any person whose claim to membership in said tribe is now pending and being investigated," was repealed by a provision of the Indian Appropriation Act of March 2, 1895, ch. 188, § 1, 28 Stat. L. 902.

See further the Act of June 25, 1910, ch. 431, *infra*, p. 853.

Effect of section.—The original Act of Feb. 8, 1887 (*supra*, p. 821), is a general one, applying to the Indians upon the various reservations, but there appears to have been no intention of extending its provisions to the Umatilla reservation and the Indians concerned, provided for under the special Act of March 3, 1885. The clause in the Act of 1887 touching inheritance and partition did not supersede the provisions touching the same subject in the special Act of 1885, and it follows that this section did not affect the special Act. *McBean v. McBean*, (1900) 37 Ore. 195, 61 Pac. 418.

Scope of Act.—This Act is amendatory of, and further extends the provisions of, the general allotment Act of Feb. 8, 1887, 24 Stat. L. 388, ch. 119, which in section 8 (*supra*, p. 835) by express terms does not include the territory then occupied by the Creeks in the Indian Territory. This text section expressly provides that its provisions shall not be held or construed to apply to the lands commonly called and known as the "Cherokee Outlet." But in no wise does the amending Act extend its provisions to the territory occupied by the Creeks, who, as we have seen, were expressly reserved from its operation by the Act of Feb. 8, 1887. This act of 1887, as to the territory named in section 8 thereof, was therefore not affected by the passage of the later statute; hence that provision of the text section, conferring upon an illegitimate child the right to inherit from the father, was without effect upon the right of inheritance as to the Creek Indians in the Indian

Territory. *Porter v. Wilson*, (1913) 36 Okla. 500, 135 Pac. 732.

Jurisdiction of state courts to determine descent.—Where, in the proceedings for the settlement of the estate of an Indian allottee, there being other property than the land which warranted administration, the parties, by stipulation and mutual consent, submitted to the state court the question whether S. was heir of the decedent, it was held that the court had jurisdiction to determine the question, though the judgment did not transfer the title to, or disturb the possession of, the allotted land held by the United States in trust for decedent and his heirs; the government being entitled to recognize, or refuse to recognize, the order as conclusive or *prima facie* evidence of the fact. *Smith v. Smith*, (1909) 140 Wis. 599, 123 N. W. 146.

Legitimacy of issue.—Though Act Cong. Feb. 8, 1887, ch. 119, 24 Stat. L. 390, *supra*, p. 821, declares Indians receiving allotments in severalty thereunder to be citizens of the United States, subject to the laws of the state in which they live, and Act Cong. March 3, 1885, ch. 319, 23 Stat. L. 340, makes the state law of alienation and descent applicable to such allotments, yet under the direct provisions of this section the issue of a male and female Indian, who cohabited as husband and wife according to the custom of Indian life, is deemed legitimate, to determine the descent of land. *Kalyton v. Kalyton*, (1903) 45 Ore. 116, 74 Pac. 491, 78 Pac. 332; *In re House*, (1907) 132 Wis. 212, 112 N. W. 27; *Smith v. Smith*, (1909) 140 Wis. 599, 123 N. W. 146.

[SEC. 1.] [Costs of legal contests by or against Indians — one-half fees — district attorneys to represent Indians.] * * * To enable the Secretary of the Interior, in his discretion, to pay the legal costs incurred by Indians in contests initiated by or against them, to any entry, filing, or other claims, under the laws of Congress relating to public lands, for any sufficient cause affecting the legality or validity of the entry, filing or claim, five thousand dollars: *Provided*, That the fees to be paid by and on behalf of the Indian party in any case shall be one-half of the fees provided by law in such cases, and said fees shall be paid by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, on an account stated by the proper land officers through the Commissioner of the General Land Office. In all states and Territories where there are reservations or allotted Indians the United States District Attorney shall represent them in all suits at law and in equity. [27 Stat. L. 631.]

This is from the Indian Appropriation Act of March 3, 1893, ch. 209.

Appropriations for purposes similar to those mentioned in the text are made annually. Those for the fiscal year ending June 30, 1915, were contained in the Indian Appropriation Act of Aug. 1, 1914, ch. 222, 38 Stat. L. 585.

[SEC. 1.] [Lease of surplus lands of tribe.] * * * That the surplus lands of any tribe may be leased for farming purposes by the council of such tribe under the same rules and regulations and for the same term of years as is now allowed in the case of leases for grazing purposes. [28 Stat. L. 305.]

This and the following two paragraphs are from the Indian Appropriation Act of Aug. 15, 1894, ch. 290.

Previous provisions relating to this subject were made by the Act of Feb. 28, 1891, ch. 383, § 3, *supra*, p. 836.

[Jurisdiction of actions for allotments — parties — judgment — appeals.] That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases. [28 Stat. L. 305, as amended by 31 Stat. L. 760.]

See the note to the preceding paragraph of this section.

As originally enacted, this section from the Indian Appropriation Act of Aug. 15, 1894, ch. 290, 28 Stat. L. 305, did not contain the provision in parentheses relating to the claimant as plaintiff and the United States as defendant. This provision was inserted to make the section read as given in the text, and the following section 2 was added by the amending Act of Feb. 6, 1901, ch. 217, 31 Stat. L. 760.

The Circuit Courts were abolished and their powers and duties conferred on the District Courts by the Judicial Code of March 3, 1911, ch. 13, §§ 289-291. See the title JUDICIARY.

Purpose of section.—By this Act Congress authorized suits to be brought against the United States in the federal courts "involving the right of any person, in whole or in part of Indian blood or descent" (with certain exceptions) "to any allotment of lands under any law or treaty." Prior to the amendment, the United States could not be sued in such a case. But the amendment required that "in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Commenting upon this, the court said in *Mc-*

Kay v. Kalyton, (1907) 204 U. S. 458, 469, 27 S. Ct. 346, 51 U. S. (L. ed.) 566: "Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject." *Heckman v. U. S.*, (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.)

820. See also *Goat v. U. S.*, (1912) 224 U. S. 458, 32 S. Ct. 544, 56 U. S. (L. ed.) 841.

Jurisdiction—repeal.—Under this section the law clearly gives the Circuit Court of the United States (now District Court; see secs. 289–291 of the Judicial Code, title JUDICIARY) jurisdiction over matters growing out of the Allotment Act, but whether it is confined to questions concerning the right to an allotment, or is broad enough to include disputes over possession, descent and partition of the lands after the date of the allotment and before final patent, is by no means clear. This particular question seems never to have been directly passed upon by the courts, although suits to ascertain the heirs of the deceased allottees have been instituted and decided. Thus in *Hy-Yu-Tse-Mil-Kin v. Smith*, (C. C. A. 9th Cir. 1902) 119 Fed. 114, 55 C. C. A. 216, *affirmed* (1904) 194 U. S. 401, 24 S. Ct. 676, 48 U. S. (L. ed.) 1039, it was held that the language of this statute is broad enough to confer upon the Circuit Court (now District Court) jurisdiction to hear and determine the complaint of any person who is "in whole or in part of Indian blood," who claims "to have been unlawfully denied or excluded from any allotment or any parcel of land" to which such person claims "to be lawfully entitled by virtue of any Act of Congress," and the action of the Secretary of the Interior in making the allotment of the land in controversy was not final and was subject to review in the courts. See also *Sloan v. U. S.*, (1899) 95 Fed. 193; *Sloan v. U. S.*, (1902) 118 Fed. 283.

But in *Bond v. U. S.*, (C. C. Ore. 1910) 181 Fed. 613, it was said that if Congress intended by the foregoing section to confer upon the courts jurisdiction to determine questions of heirship and descent as they may affect allotted lands during the trust period this was a jurisdiction which it could take away at any time, and this it did by the Act of June 25, 1910, ch. 431, 36 Stat. L. 855 (*infra*, p. 853), making the Secretary of the Interior a special tribunal to determine such questions and declaring that his decision shall be final and conclusive, thus making the jurisdiction conferred upon him exclusive and to that extent operating as a repeal by implication of the Act of Feb. 6, 1901, conferring jurisdiction upon the courts. And in *Hallowell v. Commons*, (1916) 239 U. S. 506, 36 S. Ct. 202, 60 U. S. (L. ed.) 409, *affirming* (C. C. A. 8th Cir. 1914) 210 Fed. 793, 127 C. C. A. 343, the court said: "This Act [Act of June 25, 1910, ch. 431] restored to the secretary the power that had been taken from him by Acts of Aug. 15, 1894, ch. 290, 28 Stat. L. 305, and Feb. 6, 1901, ch. 217, 31 Stat. L. 760. *McKay v. Kalyton*, (1907) 204 U. S. 458, 468, 27 S. Ct. 346, 51 U. S. (L. ed.) 566, 570. It made his jurisdiction exclusive in terms, it made no exception for

pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States." And to the same effect see *Pel-Ata-Yakot v. U. S.*, (C. C. Idaho 1911) 188 Fed. 387. See also *U. S. v. Mani*, (D. C. S. D. 1912) 196 Fed. 160.

It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior Department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants. *Leecy v. U. S.*, (C. C. A. 8th Cir. 1911) 190 Fed. 289, 111 C. C. A. 254.

Exclusive federal jurisdiction.—State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession of Indian allotments while the same were held in trust by the United States, by the provision of the Act of Aug. 15, 1894, 28 Stat. L. 286, ch. 290, delegating to the Federal Circuit (now District) Courts the power to determine such questions, since the purpose of that Act to continue the exclusive federal control over disputes concerning allotments which, prior to that Act, could only have been decided by the Secretary of the Interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of this section that in such suits "the parties thereto shall be the claimants as plaintiff and the United States as party defendant." *McKay v. Kalyton*, (1907) 204 U. S. 458, 27 S. Ct. 346, 51 U. S. (L. ed.) 566, *reversing* (1904) 45 Ore. 116, 74 Pac. 491, 73 Pac. 332.

Under this section the United States Circuit (now District) Courts had jurisdiction of a suit by the only child of a deceased Indian to recover lands allotted to him in the Umatilla reservation under Act March 3, 1885, ch. 319, 23 Stat. L. 341, which provided that the lands allotted thereunder should be held in trust by the United States for the sole use and benefit of the allottee, "or in case of his decease, of his heirs, according to the laws of the state of Oregon," although it was alleged that the lands were withheld by complainant's stepmother under a claim of dower therein. *Patawa v. U. S.*, (1904) 132 Fed. 893.

The District Court of the territory of Oklahoma had jurisdiction of suits brought therein by persons of Indian blood or descent to establish their rights to allotments, pursuant to this section. *Young v. U. S.*, (1910) 176 Fed. 612.

Retrospective effect.—An invalid retrospective effect is not given to the provision of this section authorizing Indians claiming to be entitled to an allotment of land to prosecute, in the proper federal court, any action in relation to their

right thereto, by construing such Act to include a suit by an Indian to obtain an allotment to which she claims she was, at the time of the passage of such Act, entitled, under the Allotment Act of March 3, 1885, 23 Stat. L. 340, ch. 319, and to have canceled the alleged improper allotment of such land to another. *Hy-Yu-Tse-Mil-Kin v. Smith*, (1904) 194 U. S. 401, 24 S. Ct. 676, 48 U. S. (L. ed.) 1039, *affirmed* (1902) 119 Fed. 114, 55 C. C. A. 216.

Scope of action.—In an action brought by a person claiming the right to an allotment of land on an Indian reservation against the United States to establish such right, as authorized by this section the jurisdiction of the court is not restricted to a determination of the right of the plaintiff to any allotment; but, where a particular tract is claimed, the right of any adverse claimant may also be litigated, and for that purpose he may, and should, be joined as a party defendant. *U. S. v. Fairbanks*, (1909) 171 Fed. 337, 96 C. C. A. 229.

Joinder of actions.—Where several claimants of allotments sued jointly to establish their rights to separate allotments in a District Court of the territory of Oklahoma, it was held that a demurrer to their petition was properly sustained by the District Court, where one of the grounds of the demurrer was a misjoinder of causes of action. *Young v. U. S.*, (1910) 176 Fed. 612.

Parties.—The United States cannot be regarded as a necessary party to a suit brought under the Act of Aug. 15, 1894, 28 Stat. L. 286, 305, ch. 290, prior to the amendatory Act of Feb. 6, 1901, 31 Stat. L. 760, ch. 217, to determine the respective rights of two Indians, each claiming under the Allotment Act of March 3, 1885, in view of the provision of the Act under which the action was brought, that the judgment or decree of the court in favor of any claimant to an allotment upon being properly certified to the Secretary of the Interior, shall have the same effect as if the allotment had been allowed and approved by the Secretary. *Hy-Yu-Tse-Mil-Kin v. Smith*, (1904) 194 U. S. 401, 24 S. Ct. 676, 48 U. S. (L. ed.) 1039, *affirmed* (1902) 119 Fed. 114, 55 C. C. A. 216.

The jurisdiction of suits by Indians, involving their right to lands allotted under any law or treaty, conferred on the Circuit Courts of the United States by this section, is exclusive, but in all such actions the United States must be made a party defendant as therein provided. *Parr v. U. S.*, (1904) 132 Fed. 1004.

Decision of Land Department.—In an action brought under this section, which gives to a person in whole or in part of Indian blood or descent the right to bring such action to establish the right to an allotment of land by virtue of an Act of

Congress, which he claims to have been unlawfully denied him, the decision of the Land Department, upon the question whether or not the plaintiff when a person of mixed blood was recognized as a member of the tribe entitled to the benefit of the Act, will not in all cases be followed, since in case of an adverse ruling such rule would leave the plaintiff without the remedy which it was the purpose of the statute to give him. *Waldron v. U. S.*, (1905) 143 Fed. 413.

Appointment of receiver.—Under this section the courts have power to appoint a receiver for the lands involved in a suit where a proper showing therefor is made. *Smith v. U. S.*, (1905) 142 Fed. 225.

United States bound by decree.—“The provision in the statute that the decree of the court in an action like this shall have the same effect as an allotment made by the Secretary of the Interior gives to the successful party the right to a patent for the land allotted to him by the decree, and is in effect a consent upon the part of the United States to be bound by such decree and to issue its patent in accordance therewith.” *Hy-Yu-Tse-Mil-Kin v. Smith*, (C. C. A. 1902) 119 Fed. 114, 55 C. C. A. 216, *affirmed* (1904) 194 U. S. 401, 24 S. Ct. 676, 48 U. S. (L. ed.) 1039.

Selection of specific land necessary before suit.—This section contemplates the selection of specific land for allotment by the claimant before the institution of a suit, upon which the judgment or decree may operate as a complete allotment. *Reynolds v. U. S.*, (1909) 174 Fed. 212, 98 C. C. A. 220.

Right to share in tribal property.—Originally the test of the right of individual Indians to share in tribal lands and other tribal property was existing membership in the tribe; but this rule has been so broadened by Act March 3, 1875, ch. 131, § 15, 18 Stat. L. 420, (*supra*, p. 819), and Act Feb. 8, 1887, ch. 119, § 6, 24 Stat. L. 390 (*supra*, p. 830), and other Acts, as to place individual Indians who have abandoned tribal relations once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing in respect of this right as though they had maintained their tribal relations. *Oakes v. U. S.*, (1909) 172 Fed. 305, 97 C. C. A. 139.

A white man of no Indian blood, married to a full-blooded Indian woman in accordance with the Indian customs of the reservation upon which they thereafter resided, was held not to be entitled to the benefit of this statute. *Drapeau v. U. S.*, (C. C. S. D. 1912) 195 Fed. 130.

This section was also considered in *Sully v. U. S.*, (C. C. S. D. 1912) 195 Fed. 113, wherein was involved the proposition, within the issues presented by the pleadings, whether the complainants were persons in whole or in part of Indian blood or descent.

SEC. 2. [Service of petition — district attorney to represent Government — failure to plead — claim to be established by proof.] That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. [31 Stat. L. 760.]

See the notes to the preceding paragraph of the text.

An act authorizing the Secretary of the Interior to correct errors where double allotments of land have erroneously been made to an Indian, to correct errors in patents, and for other purposes.

[Act of Jan. 26, 1895, ch. 50, 28 Stat. L. 641.]

[Errors in allotments and patents to be corrected — cancellation of patents — opening of land to settlement.] That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: *And provided*, That such lands shall not be open to settlement for sixty days after such cancellation: *And further provided*, That no conditional patent that shall have heretofore or that may hereafter be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the

patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress. [28 Stat. L. 641, as amended by 33 Stat. L. 297.]

This section was amended to read as above given by an amending Act of April 23, 1904, ch. 1489, 38 Stat. L. 297. As originally enacted it was as follows:

"That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistake and cancel any patent which have been erroneously and wrongfully issued, whenever in his opinion the same ought to be canceled for error in the issue thereof, or for the best interests of the Indian, and, if possession of the original patent cannot be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open the lands so allotted to settlement." [28 Stat. L. 641.]

Purpose of Act.—This law was doubtless enacted to give the Secretary of the Interior the extraordinary power to correct certain mistakes in patents to Indians because of the condition of wardship. It has long been the settled law, in the absence of express statutes, that after the issuance of patents the Secretary could no longer correct any mistakes therein; while before such issue he had such jurisdiction, the courts alone have such power after issue. To give the secretary such power as to a special class of patents would evidence no intention to take from the court its general jurisdiction in such matter. It is a part of the general jurisdiction of the court to correct such accidents and mistakes, and the United States being a party, the federal courts have jurisdiction over such questions. *U. S. v. Chehalis County*, (N. D. Wash. 1914) 217 Fed. 281.

Effect as restricting power of court.—This Act was intended to limit the power of the secretary to cases specifically men-

tioned therein, and not to allow him to cancel any trust patent wherever he thought it ought to be canceled for the best interests of the Indian. It does not disclose any purpose to restrict the power of the court to cancel such a patent. *La Roque v. U. S.*, (1915) 239 U. S. 62, 36 S. Ct. 22, 60 U. S. (L. ed.) 147, affirming (C. C. A. 8th Cir. 1912) 198 Fed. 645, 117 C. C. A. 349.

Scope of statute.—This Act was not intended to render the general statute of limitations inapplicable by retaining jurisdiction over the lands during the whole of the trust period, except in the cases specified, and a suit by the United States to cancel such patents on other grounds is subject to the limitation of six years from the date of their issuance imposed by Act March 3, 1891, ch. 561, § 8, 26 Stat. L. 1099 (title PUBLIC LANDS), on suits generally to cancel patents. *La Clair v. U. S.*, (1910) 184 Fed. 128.

[SEC. 1.] [Leases of Indian lands of disabled allottee.] * * * That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, disability, or inability, any allottee of Indian lands can not personally, and with benefit to himself, occupy or improve his allotment or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary for a term not exceeding five years, for farming purposes only. [31 Stat. L. 229.]

This is from the Indian Appropriation Act of May 31, 1900, ch. 598.

Similar provisions in somewhat different form have occurred in like Appropriation Acts for previous years.

The Indian Appropriation Act of May 18, 1916, ch. 125, § 1, 39 Stat. L. 128, contained a similar provision with the stipulation that such lease might be made for a term of not exceeding ten years. See Pamph. Supp. No. 7, Fed. Stat. Ann. p. 6, 1918 Supp. Fed. Stat. Ann.

SEC. 3. [Condemnation of allotted lands for public purposes.] * * *

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee. [31 Stat. L. 1083.]

This is the latter part of section 3 of the Indian Appropriation Act of March 3, 1901, ch. 832. For the first part of said section 3 see *infra*, p. 896.

SEC. 7. [Sale by heirs of allotted lands.] That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: *Provided*, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children. [32 Stat. L. 275.]

This section is from the Indian Appropriation Act of May 27, 1902, ch. 888.

Resolution No. 24, May 27, 1902, 32 Stat. L. 742, provided that said Act "shall take effect from and after July first, nineteen hundred and two, except as otherwise specially provided therein."

Construction and validity.—In case of the death of the allottee, his allotment may be sold by his heirs themselves, if adult, and by the guardians of the heirs where they themselves are minors. This is the plain import of the language used, and that the government, acting through Congress, had the same power to remove the restriction upon alienation that it had to place it there in the first instance, and could change the manner of transferring title to another cannot be questioned. *Egan v. McDonald*, (1915) 36 S. D. 92, 153 N. W. 915.

Approval of Secretary of Interior.—Under this section the approval of the Secretary of the Interior is necessary to the validity of any conveyance, whether by an adult or a guardian. *U. S. v. Leslie*, (1909) 167 Fed. 670.

Jurisdiction to appoint guardian of minor heirs.—Under the terms of this section which provides that the interests of minor heirs "shall be sold by a guardian duly appointed by the proper court," the probate courts of Oklahoma territory were the proper courts to appoint guardians of minor heirs of a deceased Indian to whom a patent containing restrictions upon alienation had

been issued for lands allotted to him, and had jurisdiction to order a sale of such lands. *U. S. Fidelity, etc., Co. v. Hansen*, (1912) 36 Okla. 459, 129 Pac. 60, Ann. Cas. 1915A 402.

Effect on trust.—This section, permitting the sale of allotted land, is silent as to the disposition of the proceeds. It was held in *U. S. v. Thurston County*, (C. C. A. 8th Cir. 1906) 143 Fed. 287, 74 C. C. A. 425, that the Secretary of the Interior by virtue of the Act was vested with authority to regulate the disposition of the proceeds. In that case the money was deposited in a bank in accordance with a requirement of the department, and it was held that the government thereby retained control over it. The reasoning of the court leads to the conclusion that the government had the option either to retain or relinquish control, and that the Secretary of the Interior had the authority to exercise this option. This case has been relied upon as establishing the rule that the proceeds of the sale of the land is impressed with the same trust that existed upon the land.

Similarly in *National Bank of Commerce v. Anderson*, (C. C. A. 9th Cir. 1906) 147 Fed. 87, 77 C. C. A. 259, wherein

it appeared that lands were allotted to an Indian citizen under the Allotment Act of 1877, restraining alienation for twenty-five years, it was held that this section did not vacate the trust of such lands held by the United States, but that on the sale of the lands, with the consent of the Secretary of the Interior, by the heirs of the deceased allottee, the trust attached to the proceeds, which was only payable to such heirs under rules prescribed by the Interior Department.

But in *U. S. Fidelity, etc., Co. v. Hansen*, (1912) 36 Okla. 459, 129 Pac. 60, Ann. Cas. 1915A 402, the court held that the foregoing cases established the rule that the proceeds of the sale is impressed with the same trust that existed upon the land, only so far as the United States retains the possession or control and that the trust character ended when the possession and control was relinquished by the government.

Lien of judgment.—A judgment of the District Court against an adult Indian is not a lien upon his inherited lands situated in the county where such judgment

is rendered. *Beall v. Graham*, (1907) 75 Kan. 98, 88 Pac. 543.

Exemption from taxation.—The proceeds of the sales of allotted lands by the Indian heirs of the allottees under this section, which have been deposited by direction of the Secretary of the Interior in a bank selected by the commissioner of Indian affairs to the credit of the heirs in proper proportions, subject to their checks only when approved by the agent or officer in charge, are held in trust by the United States for the same purposes as were the lands, and are exempt from taxation by any state or county for the same reason. *U. S. v. Thurston County*, (1906) 143 Fed. 287, 74 C. C. A. 425, *reversing* (1905) 140 Fed. 456.

Illegitimate child.—Where a child was born out of wedlock to an Indian woman to whom Indian reservation lands were allotted, and such child survived her, it was held that he was her heir at law. *Beam v. U. S.*, (1907) 153 Fed. 474, *affirmed* (C. C. A. 1908) 162 Fed. 260, 89 C. C. A. 240.

An Act Providing that the statute of limitations of the several States shall apply as a defense to actions brought in the United States courts for the recovery of lands patented in severalty to members of any tribe of Indians under any treaty between it and the United States of America.

[*Act of May 31, 1902, ch. 946, 32 Stat. L. 284.*]

[SEC. 1.] [State statutes of limitation applicable to actions for lands patented in severalty.] That in all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians. [32 Stat. L. 284.]

Section 2 of this Act was as follows:

"SEC. 2. That this Act shall not apply to any suits brought within one year from and after its passage." [32 Stat. L. 284.]

[SEC. 1.] [Restrictions on alienation of lands removed.] * * * And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors,

are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded. [33 Stat. L. 204.]

This and the following paragraph are provisions of the Indian Appropriation Act of April 21, 1904, ch. 1402.

Constitutionality.—The provision of this Act for the removal of restrictions on the alienation of lands was within the power of Congress. It is not unconstitutional under the provision of the Fifth Amendment that no person shall be deprived of his property without due process of law nor does it impair the obligation

of the contract or binding agreement previously made between the United States and the Choctaw and Chickasaw nations respecting allotments. *Williams v. Johnson*, (1915) 239 U. S. 414, 36 S. Ct. 150, 60 U. S. (L. ed.) 358, *affirming* (1912) 32 Okla. 247, 122 Pac. 485.

[Exchange of private lands in Indian reservation.] * * * That any private land over which an Indian reservation has been extended by Executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant, nonmineral, nontimbered, surveyed public lands of equal area and value and situated in the same State or Territory. [33 Stat. L. 211.]

See the notes to the preceding paragraph of this section.

Provisions similar to those of the text were made by the Act of March 3, 1903, ch. 994, 32 Stat. L. 1000.

[SEC. 1.] [Leases of allotted lands — investigation — cancellation — approval.] * * * It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case where in his opinion the evidence warrants it refer the matter to the Attorney-General for suit in the proper United States court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud, or in violation of such agreements, judgment shall be rendered canceling the same upon such terms and conditions as equity may prescribe, and it shall be allowable in cases where all parties in interest consent thereto to modify any lease and to continue the same as modified: *Provided*, No lease made by any administrator, executor, guardian or curator which has been investigated by and has received the approval of the United States court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General: *Provided further*, No lease made by any administrator, executor, guardian, or curator shall be valid or enforceable

without the approval of the court having jurisdiction of the proceeding. [33 Stat. L. 1060.]

This is from the Indian Appropriation Act of March 3, 1905, ch. 1479.

[SEC. 1.] [Continuing alienation restrictions.] That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best: *Provided, however,* That this shall not apply to lands in the Indian Territory. [34 Stat. L. 326.]

This and the following four paragraphs and the succeeding section 2 are from the Indian Appropriation Act of June 21, 1906, ch. 3504.

[Allotments in severalty — lands not liable for prior debts.] * * * That the Act entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, be, and is hereby, amended by adding the following: No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor. [34 Stat. L. 327.]

The foregoing paragraph and the following three paragraphs of this section were added to the General Allotment Act of Feb. 8, 1887, ch. 119, *supra*, p. 821 et seq., mentioned in the text, by a provision of the Indian Appropriation Act of June 21, 1906, ch. 3504.

[Trust funds.] * * * That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior. [34 Stat. L. 327.]

See the notes to the second paragraph of this section, *supra*, this page.

[Interest on funds held for minors — disposition.] * * * That the shares of money due minor Indians as their proportion of the proceeds from the sale of ceded or tribal Indian lands, whenever such shares have been, or shall hereafter be, withheld from their parents, legal guardians, or others, and retained in the United States Treasury by direction of the Secretary of the Interior, shall draw interest at the rate of three per centum per annum unless otherwise provided for, from the period when such proceeds have been or shall be distributed per capita among the members of the tribe of which such minor is a member; and the Secretary of the Treasury is hereby authorized and directed to allow interest on such unpaid amounts belonging to said minors as shall be certified by the Secretary of the Interior as entitled to draw interest under this Act. [34 Stat. L. 327.]

See the notes to the second paragraph of this section, *supra*, this page.

[Sale of allotted lands — disposition of proceeds.] * * * That any Indian allotted lands under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, may sell and convey any part thereof, under rules and regulations prescribed by the Secretary of the Interior, but such conveyance shall be subject to his approval, and when so approved shall convey full title to the purchaser the same as if final patent without restrictions had been issued to the allottee: *Provided*, That the consideration shall be placed in the Treasury of the United States, and used by the Commissioner of Indian Affairs to pay the construction charges that may be assessed against the unsold part of the allotment, and to pay the maintenance charges thereon during the trust period, and any surplus shall be a benefit running with the water right to be paid to the holder thereof. [34 Stat. L. 327.]

See the notes to the second paragraph of this section, *supra*, p. 849.

[SEC. 2.] [Nez Perces — leases permitted — certificate.] * * * That if any adult member of the Nez Perce tribe of Indians in Idaho believes himself or herself competent to make leases and transact his or her affairs, such member may file a request with the Commissioner of Indian Affairs for a permit to lease the lands which have been allotted to him or her and the minor children of such member. And if upon consideration and examination of the request the said Commissioner finds said member to be fully competent and capable of managing and caring for his or her own individual affairs, he may issue a certificate to such member authorizing him or her to make leases or rental contracts for the lands allotted to such member and his or her minor children. [34 Stat. L. 334.]

See the note to the first paragraph of section 1 of this Act, *supra*, p. 849.

[Alienation restrictions removed — leases by nonresident allottees — lands of minors.] * * * All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kikapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided*, That any such Indian allottee who is a nonresident of the United States may lease his allotment without restrictions for a period not exceeding five years: *Provided further*, That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee. [34 Stat. L. 363.]

See the note to the first paragraph of section 1 of this Act, *supra*, p. 849.

[SEC. 1.] [Payment of taxes from share of allottee in tribal funds — restriction.] * * * In any case where the restrictions as to alienation have been removed with respect to any Indian allottee, or as to any portion of the lands of any Indian allottee, and such allottee as an individual, or as

a member of any tribe, has an interest in any fund held by the United States beyond the amount by law chargeable to such Indian or tribe on account of advances, the Commissioner of Indian Affairs is hereby authorized, prior to the date at which any penalties for the nonpayment of taxes would accrue under the Laws of the State or Territory in which such land is situated, to pay such taxes and charge the amount thereof to such allottee, to be deducted from the share of such allottee in the final distribution or payment to him from such fund: *Provided*, That no such payment shall be made by said Commissioner where it is in excess of the amount which will ultimately be due said allottee. [34 Stat. L. 1016.]

The provisions of this and the following paragraph are from the Indian Appropriation Act of March 1, 1907, ch. 2285.

[Noncompetent Indians — sale of allotments — proceeds — fee title to issue.] * * * That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee-simple patent had been issued to the allottee. [34 Stat. L. 1018.]

See the note to the preceding paragraph of this section.

An Act To authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes.

[Act of May 29, 1908, ch. 216, 35 Stat. L. 444.]

[SEC. 1.] **[Indian allotments — sale on petition of allottee — excepted lands — lands of minors, etc. — heirs to have fee simple title — use of proceeds — patent to purchaser — states excepted.]** That the lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma, and the States of Minnesota and South Dakota may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe; and the lands of a minor, or of a person deemed incompetent by the Secretary of the Interior to petition for himself, may be sold in the same manner, on the petition of the natural guardian in the case of infants, and in the case of Indians deemed incompetent as aforesaid, and of orphans without a natural guardian, on petition of a person designated for the purpose by the Secretary of the Interior. That when any

Indian who has heretofore received or who may hereafter receive, an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple for said lands; but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided: *Provided*, That the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs: *And provided further*, That upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold: *And provided further*, That nothing in section one herein contained shall apply to the States of Minnesota and South Dakota. [35 Stat. L. 444.]

Sections 2-30 of this Act, inclusive, are omitted as special. The provisions of the text supersede the last provision of the Act of Feb. 8, 1887, ch. 119, § 6, *supra*, p. 830, relating to the effect of the death of an allottee before the expiration of the trust period.

Provisions authorizing the sale of surplus land of members of the Kaw, or Kansas, or Osage Indians in Oklahoma were made by the Act of March 3, 1909, ch. 256, 35 Stat. L. 778.

- Provisions for the sale of the interest of minors in lands of the Yakima Reservation, in the state of Washington, were made by the Act of March 27, 1908, ch. 107, 35 Stat. L. 49.

[SEC. 1.] [Allotments in severalty — lease of mineral lands — regulations.] That all lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this paragraph into full force and effect. [35 Stat. L. 783.]

This and the two paragraphs following are from the Indian Appropriation Act of March 3, 1909, ch. 263.

[Exchange of lands unsuitable for allotment, etc. — restriction — regulations.] That if any Indian of a tribe whose surplus lands have been or shall be ceded or opened to disposal has received or shall receive an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect. [35 Stat. L. 784.]

See the note to the preceding paragraph of this section.

[Irrigation of allotted lands.] That in carrying out any irrigation project which may be undertaken under the provisions of the Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), known as "The Reclamation Act," and which may make possible, and provide for in connection with the reclamation of other lands, the irrigation of all or any part of the irrigable lands heretofore included in allotments made to Indians under the fourth section of the general allotment Act, the Secretary of the Interior be, and he hereby is, authorized to make such arrangement and agreement in reference thereto as said Secretary deems for the best interest of the Indians: *Provided*, That no lien or charge for construction, operation, or maintenance shall thereby be created against any such lands: [35 Stat. L. 798.]

See the note to the first paragraph of this section, *supra*, p. 852.

A further provision of this paragraph relating to appropriations is omitted as temporary only.

As to irrigation of allotted lands, see the Act of Feb. 8, 1887, ch. 119, § 7, *supra*, p. 834.

For the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. L. 388, mentioned in the text, see the title **WATERS**.

[SEC. 1.] [Report of cost of survey and allotment work.] * * *
That hereafter the Secretary of the Interior shall transmit to Congress annually on the first Monday in December a cost account for the preceding fiscal year of all survey and allotment work on Indian reservations. [36 Stat. L. 270.]

This is from the Indian Appropriation Act of April 4, 1910, ch. 140.

An Act To provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes.

[Act of June 25, 1910, ch. 431, 30 Stat. L. 855.]

[SEC. 1.] [Indian trust allotments — disposal to heirs of intestate Indians — partition — sales, etc. — patents in fee — proceeds — competency certificates — deposit of Indian funds in banks — indemnity bond.]
That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their

petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of ten per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid in deferred payments, a further amount, not exceeding fifteen per centum of the purchase price may be so forfeited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: *Provided*, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear: *Provided further*, That the Secretary of the Interior is hereby authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: *Provided further*, That hereafter any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: *Provided*, That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior. [36 Stat. L. 855.]

Sections 19 and 20 of this Act were as follows:

"SEC. 19. That sections four hundred and sixty-eight, four hundred and sixty-nine, and two thousand and ninety-one of the Revised Statutes of the United States be, and they are hereby, repealed." [36 Stat. L. 860.]

"SEC. 20. That the following sections in the following Acts making appropriations for the current and contingent expenses of the Indian service, to wit: Section eight of the Act of March third, eighteen hundred and seventy-five; section eight of the Act of March second, eighteen hundred and ninety-five; section eight of the Act of March third, nineteen hundred and one; and section six of the Act of May twenty-seventh, nineteen hundred and two, be, and they are hereby, repealed." [36 Stat. L. 861.]

Section 21 was special only.

Section 22 amended the Act of July 1, 1898, ch. 545, § 6, *supra*, p. 801.

Section 23, relating to the purchase of Indian supplies, is given *supra*, p. 791.

Sections 24-30 were special only.

Section 6 of this Act, amending sections 50 and 53 of the Penal Laws of March 4, 1909, is incorporated therein. See the title PENAL LAWS.

Section 9 amended the Act of Feb. 8, 1887, ch. 119, § 1, and is given *supra*, p. 821.

Sections 11, 12 and 15 were special only.

Section 16 amended the Act of March 2, 1889, ch. 374, § 1, and is incorporated therein, *infra*, p. 893.

Section 17 repealed a provision of the Act of March 3, 1909, ch. 263, 35 Stat. L. 782. Said section 17 also amended the Act of Feb. 28, 1891, ch. 383, §§ 1, 4. The Act of Feb. 28, 1891, ch. 383, § 1, had previously amended the Act of Feb. 8, 1887, ch. 119, § 1. Said amending provisions are incorporated in the sections amended, *supra*, pp. 821, 838.

Section 18 was special only.

Power and jurisdiction of Secretary of the Interior.—The Secretary of the Interior has exclusive jurisdiction under

this statute to ascertain the legal heirs. This Act restored to the secretary the power that had been taken from him by

the Acts of 1894, ch. 290, and Feb. 6, 1901, *supra*, p. 841. It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. *Hallowell v. Commons*, (1916) 239 U. S. 508, 36 S. Ct. 202, 60 U. S. (L. ed.) 409, *affirming* (C. C. A. 8th Cir. 1914) 210 Fed. 793, 127 C. C. A. 343. And to the same effect see *Bond v. U. S.*, (C. C. Ore. 1910) 181 Fed. 613; *Pel-Ate-Yakot v. U. S.*, (C. C. Idaho 1911) 188 Fed. 387.

This Act merely clothed the Secretary of the Interior with jurisdiction to identify the legal heirs of a deceased allottee and in doing so he is as much bound by the laws of descent in the jurisdiction where the lands are located as any other tribunal. *U. S. v. Lane*, (1915) 43 App. Cas. (D. C.) 414.

Conclusiveness of decision of Secretary of the Interior.—In ascertaining the legal heirs of a deceased allottee the decision of the Secretary of the Interior is final and conclusive, but this does not mean that he can arbitrarily ignore the legal heirs of a deceased allottee and decide in favor of a collateral heir or a stranger in blood. Such a decision would be arbitrary or capricious and not sustainable under

any view of this Act. *U. S. v. Lane*, (1915) 43 App. Cas. (D. C.) 414.

Status of purchase price on sale of allotment.—Upon the sale of an allotment of an incompetent Indian, the purchase price received by the United States has the same legal status as the allotment itself had, and therefore is not subject to alienation by the Indian, and property that is purchased by the United States for the Indian with said purchase price, the title being taken in the United States, also has the legal status of the allotment, and is not subject to alienation. In other words, the purchase price of such allotment when sold by the United States, or its proceeds when the United States uses such purchase price to purchase other property for the Indian, taking title in the name of the United States, does not become subject to alienation by the Indian. The United States taking the title in its own name in trust for the Indian is as an express and unequivocal manifestation of its intention not to relinquish the trust—not to turn the property over to the Indian to do with as he may please; it rests exclusively with the United States, as trustee and as guardian of the Indian, to determine when, if at all, it will relinquish the trust and turn over the property to the Indian to do therewith as he may choose. *Rider v. La Clair*, (1914) 77 Wash. 488, 138 Pac. 3.

[SEC. 2.] **[Disposal by will of land held under trust, patent, etc.—approval of will—effect—sale of land as issuance of patent in fee—exceptions.]** That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: *Provided further*, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the

devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided also*, That sections one and two of this Act shall not apply to the Five Civilized Tribes or the Osage Indians. [36 Stat. L. 856, as amended by 37 Stat. L. 678.]

This section was amended to read as above given by an Act of Feb. 14, 1913, ch. 55, entitled "An Act Regulating Indian Allotments disposed of by Will." As originally enacted it was as follows:

"SEC. 2. That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior: *Provided further*, That sections one and two of this Act shall not apply to the State of Oklahoma." [36 Stat. L. 856.]

See the notes to the preceding section 1 of this Act.

Power of Secretary of the Interior — the preceding section 1, *supra*, p. 854.
 repeal of earlier Acts.—See note under

SEC. 3. [Surrender of trust allotments to children — conditions.] That in any case where an Indian has an allotment of land, or any right, title, or interest in such an allotment, the Secretary of the Interior, in his discretion, may permit such Indian to surrender such allotment, or any right, title, or interest therein, by such formal relinquishment as may be prescribed by the Secretary of the Interior, for the benefit of any of his or her children to whom no allotment of land shall have been made; and thereupon the Secretary of the Interior shall cause the estate so relinquished to be allotted to such child or children subject to all conditions which attached to it before such relinquishment. [36 Stat. L. 856.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 4. [Leases of trust allotments.] That any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior. [36 Stat. L. 856.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 5. [Inducing conveyances by Indians of trust interests unlawful — punishment for.] That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars for the first offense, and if convicted for a second offense may be punished by a fine not exceeding five hundred dollars or imprisonment not

exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That this section shall not apply to any lease or other contract authorized by law to be made. [36 Stat. L. 857.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 7. [Indian reservations — sales of timber on unallotted lands in.] That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin. [36 Stat. L. 857.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 8. [Sales of timber on trust allotments.] That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior. [36 Stat. L. 857.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 10. [Indians in Washington — inalienable patents to lots in Indian villages.] That the Secretary of the Interior be, and he is hereby, authorized, whenever in his opinion it shall be conducive to the best welfare and interest of the Indians living within any Indian village on any of the Indian reservations in the State of Washington, to issue a patent to each of said Indians for the village or town lot occupied by him, which patent shall contain restrictions against the alienation of the lot described therein to persons other than members of the tribe, except on approval of the Secretary of the Interior; and if any such Indian shall die subsequent to the approval of this Act, and before receiving patent to the lot occupied by him, the lot to which such Indian would have been entitled if living shall be patented in his name and shall be disposed of as provided for in section one of this Act. [36 Stat. L. 858.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 13. [Indian reservations — power, etc., sites in, may be reserved.] That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress: *Provided*, That if no irrigation project shall be authorized prior to the opening of any Indian reservation containing such power or reservoir sites the Secretary of the Interior may, in his discretion, reserve such sites pending future legislation by Congress for their disposition, and he shall report to Congress all reservations made in conformity with this Act. [36 Stat. L. 858.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 14. [Trust allotments — canceling patents in power sites, etc. — reimbursing Indians — lieu allotments.] That the Secretary of the Interior, after notice and hearing, is hereby authorized to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site and for allotments or such portions of allotments as are located upon or include lands set aside, reserved, or required within any Indian reservation for irrigation purposes under authority of Congress: *Provided*, That any Indian allottee whose allotment shall be so canceled shall be reimbursed for all improvements on his canceled allotment, out of any moneys available for the construction of the irrigation project for which the said power or reservoir site may be set aside: *Provided further*, That any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the area subject to irrigation by any such project. [36 Stat. L. 859.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 31. [National forests — allotments to Indians living in — applications, etc.] That the Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws as amended by section *of this Act, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture, who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided. [36 Stat. L. 863.]

See the notes to section 1 of this Act, *supra*, p. 854.

* The section intended to be inserted in the space left blank in the text was apparently section 17 of this Act, which amended the Act of Feb. 28, 1891, ch. 383, § 1, which section had previously amended the General Allotment Act of Feb. 8, 1887, ch. 119, § 1, *supra*, p. 821.

SEC. 32. [Five Civilized Tribes — title to lands deeded to deceased Indians.] Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life. [36 Stat. L. 863.]

See the notes to section 1 of this Act, *supra*, p. 854.

Purpose of section.—"The intent and meaning of this statute, in our opinion, was to make the patented land part of the estate of the nominal patentee *quoad hoc* — the most important words being 'as if

the deed had issued to the deceased grantee during life.' The section was not intended to exclude other provisions of law otherwise applicable, and to give a title at all events to the heir or other party named in

the Act as purchaser." *Perryman v. Woodward*, (1915) 238 U. S. 148, 35 S. Ct. 830, 59 U. S. (L. ed.) 1242.

Scope of section.—This section has no application where there is no allottee. It assumes that deeds have been issued to a

legal allottee, who has died before the approval of the deed. It does not deal with a case where there never was an allottee in existence. *Iowa Land, etc., Co. v. U. S.*, (C. C. A. 8th Cir. 1914) 217 Fed. 11, 133 C. C. A. 121.

SEC. 33. [Provisions not affecting Osages, etc.] That the provisions of this Act shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma, except as provided in section thirty-two. [36 Stat. L. 863.]

See the notes to section 1 of this Act, *supra*, p. 854.

SEC. 17. [Deposit of tribal funds.] * * * The net receipts from the sales of surplus and unallotted lands and other tribal property belonging to any of the Five Civilized Tribes, after deducting the necessary expense of advertising and sale, may be deposited in national or State banks in the State of Oklahoma in the discretion of the Secretary of the Interior, such depositories to be designated by him under such rules and regulations governing the rate of interest thereon, the time of deposit and withdrawal thereof, and the security therefor, as he may prescribe. The interest accruing on such funds may be used to defray the expense of the per capita payments of such funds. [36 Stat. L. 1070.]

This is from the Indian Appropriation Act of March 3, 1911, ch. 210.
See the Act of Aug. 1, 1914, ch. 222, § 17, *infra*, p. 860.

[**SEC. 1.] [Administration of oaths — heirs of deceased Indians. — witnesses at hearings.]** * * * That hereafter any officer or employee appointed or designated by the Secretary of the Interior or the Commissioner of Indian Affairs as special examiner in heirship cases shall be authorized to administer oaths in investigations committed to him: *Provided further*, That the provisions of this paragraph shall not apply to the Osage Indians, nor to the Five Civilized Tribes of Indians in Oklahoma: *And provided further*, That hereafter upon the determination of the heirs of a deceased Indian by the Secretary of the Interior, there shall be paid by such heirs, or from the estate of such deceased Indian, or deducted from the proceeds from the sale of the land of the deceased allottee, or from any trust funds belonging to the estate of the decedent, the sum of \$15, to cover the cost of determining the heirs to the estate of the said deceased allottees; which amount shall be accounted for and paid into the Treasury of the United States and a report made annually to Congress by the Secretary of the Interior, on or before the first Monday in December, of all moneys collected and deposited, as herein provided: *And provided further*, That the authority delegated to judges of the United States courts by section forty-nine hundred and eight of the Revised Statutes is hereby conferred upon the Secretary of the Interior to require the attendance of witnesses at hearings, upon proper showing by any of the parties to determine the heirs of

decedents, held in accordance with section one of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes, page eight hundred and fifty-five), and the amendment of February fourteenth, nineteen hundred and thirteen (Thirty-seventh Statutes, page six hundred and seventy-eight), under such rules and regulations as he may prescribe. [38 Stat. L. 586.]

The provisions of the foregoing section 1 and the following section 17 are from the Indian Appropriation Act of Aug. 1, 1914, ch. 222.

Provisions similar to those of the second proviso of the text, relating to the determination of the heirs of deceased allottees, were made by the Act of June 30, 1913, ch. 4, 38 Stat. L. 80.

For R. S. sec. 4908 mentioned in the text see the title **PATENTS**.

The Act of June 25, 1910, ch. 431, § 1, mentioned in the text, is given *supra*, p. 853, and the Act of Feb. 14, 1913, ch. 55, mentioned in the text, amended section 2 of said Act of June 25, 1910, ch. 431, *supra*, p. 855.

SEC. 17. [Five Civilized Tribes — contracts for services in relation to enrollment — interest on funds deposited — per capita payments.]

* * * Unless the consent of the United States shall have previously been given, all contracts made with any person, or persons, now or hereafter applicants for enrollment as citizens in the Five Civilized Tribes for compensation for services in relation thereto, are hereby declared to be void and of no effect, and the collection or receipt of any moneys from any such applicants for citizenship shall constitute an offense against the laws of the United States, punishable by a fine of not exceeding \$500 or imprisonment for not exceeding six months, or both, and lands allotted to such applicants whether Indians or freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under the laws of the United States: *Provided further*, That the interest accruing from tribal funds and deposited in banks in the State in Oklahoma may be used as authorized by the Act of March third, nineteen hundred and eleven, under the direction of the Secretary of the Interior, to defray the expense of per capita payments authorized by Congress. [38 Stat. L. 601.]

See the notes to the preceding section 1 of the text.

The Act of March 3, 1911, ch. 210, § 17, mentioned in the text, is given *supra*, p. 859.

An Act To provide for drainage of Indian allotments of the Five Civilized Tribes.

[Act of March 27, 1914, ch. 46, 38 Stat. L. 310.]

[Five Civilized Tribes — drainage district — payment of assessments.]

That whenever a drainage district is organized in any county in the Five Civilized Tribes of the State of Oklahoma, under the laws of that State, for the purpose of draining the lands within such district, the Secretary of the Interior is authorized, in his discretion, to pay from the funds or moneys arising from any source under his control or under the control of the United States, and which would be pro rated to such allottee, the assessment for drainage purposes against any Indian allottee or upon the lands of any allottee who is not subject to taxation or whose lands are exempt

from taxation or from assessment for taxation under the treaties or agreements with the tribe to which such allottee may belong, or under any Act of Congress; and such amount so paid out shall be charged against such allottee's pro rata share of any funds to his credit under the control of the Secretary of the Interior or the United States: *Provided*, That the Secretary of the Interior, before paying out such funds, shall designate some person with a knowledge of the subject of drainage, to review the schedules of assessment against each tract of land and to review the land assessed to ascertain whether such Indian allottee, or his lands not subject to taxation, have been assessed more than their pro rata share as compared with other lands located in said district similarly situated and deriving like benefits. And if such Indian lands have been assessed justly when compared with other assessments, then, in that event, said funds shall be paid to the proper county in which such drainage district may be organized, or, in the option of the Secretary of the Interior, to the construction company or bondholder shown to be entitled to the funds arising from such assessment: *Provided further*, That in any event such assessment on any Indian allotment shall not exceed \$15 per acre, and no such assessment shall be made unless the Indian allottee affected, or his legal guardian, shall consent thereto: *And provided further*, That nothing in this Act shall be so construed as to deprive any allottee of any right which he might otherwise have individually to apply to the courts for the purpose of having his rights adjudicated. [38 Stat. L. 310.]

An Act To provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.

[Act of April 26, 1906, ch. 1876, 34 Stat. L. 137.]

[SEC. 1.] [Five Civilized Tribes — final disposition of affairs — enrollment rules.] That after the approval of this Act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this Act, in which cases such motion shall be made within sixty days after the passage of this Act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law. [34 Stat. L. 137.]

This is the first section of the "Curtis Act," or "Disposition of Affairs Act." It was affected by the Act of May 27, 1908, ch. 199, *infra*, p. 881 et seq.

By the Osage Act of June 28, 1906, ch. 3572, 34 Stat. L. 539, and the supplementary and amendatory Act of Aug. 18, 1912, ch. 83, 37 Stat. L. 86, provisions were made for the division of the lands and funds of the Osage Indians in Oklahoma territory.

Review of judgment of citizenship court.—No authority has been conferred upon the Secretary of the Interior by this

Act to review the judgments of the citizenship court. (1907) 26 Opp. Atty.-Gen. 127.

[SEC. 2.] **[Minor children — illegitimate children — payment to Cherokees — equalization of Creek allotments continued — completion of rolls — filing enrollment applications restricted.]** That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and reenacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment. [34 Stat. L. 137, as amended by 34 Stat. L. 342.]

This section was amended to read as above by the Indian Appropriation Act of June 21, 1906, ch. 3504. The amendment consisted of substituting the last proviso above given for two provisos which originally closed the section.

Effect upon courts.—The lands involved in the present Act were public lands belonging to the Choctaw and Chickasaw Nations, and not to the individual members thereof. The disposition of such lands falls within the legislative domain, the power of Congress is supreme, and its action is conclusive upon the courts. Hence, after the completion of the enrollment, and after the date when by the above section the Secretary of the Interior is forbidden to approve any en-

rollment, the courts have no power to require such secretary to correct errors alleged to have been made in placing the complainants' names on the rolls of freedmen instead of on the rolls of citizens of the tribes, whereby such complainants would receive smaller allotments of land than they would receive were they enrolled as citizens. *Ligon v. Johnston*, (C. C. A. 1908) 164 Fed. 670, 90 C. C. A. 486.

Children included.—See *Gritts v. Fisher*, (1912) 224 U. S. 640, 32 S. Ct. 580, 56 U. S. (L. ed.) 928, wherein the court said: "The controversy here arises out of the provision in section 2 of the Act of April 26, 1906, as amended June 21 following, for the enrollment of 'children who were minors living March 4, 1906,' which the defendants regard as including children born after September 1, 1902, and living on March 4, 1906. The appellants contend, first, that it does not include children born after September 1, 1902, but only such as were born prior to that date and for whom no application for enrollment was made within the time limited by the Act of July 1, 1902; that is, on or before October 31, 1902; and, second, that if it does include children born after September 1, 1902, it arbitrarily takes from the appellants and others similarly situated property which is theirs and gives it to others, and therefore is violative of due process of law. The last contention rests upon another, viz., that the Act of July 1, 1902, vested in the members living on September 1, 1902, who were enrolled under that Act, an absolute right to receive all lands of

the tribe not reserved or allotted thereunder and all funds of the tribe not used in the payment of tribal debts. We are unable to assent to the first contention. The provision in question says 'children who were minors living March 4, 1906,' and those words as naturally and aptly embrace children born after as before September 1, 1902. Had it been intended, as is claimed, merely to extend the time for filing applications on behalf of children living on September 1, 1902, and therefore born on or before that date, it is reasonable to believe that other words more appropriate to the occasion would have been used."

The children of Choctaw freedmen who were minors living March 4, 1906, are entitled to enrollment. (1907) 26 Op. Atty.-Gen. 127.

The Secretary of the Interior had the power of revision and correction until the final moment when jurisdiction was expressly taken from him under this section. *U. S. v. Fisher*, (1912) 223 U. S. 95, 32 S. Ct. 196, 56 U. S. (L. ed.) 364, followed in *Cherokee Nation v. Whitmire*, (1912) 223 U. S. 108, 32 S. Ct. 200, 56 U. S. (L. ed.) 370.

SEC. 3. [Approved roll of Creek freedmen — Cherokee freedmen — Choctaw and Chickasaw freedmen homestead allotments.] That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior. The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior. Lands allotted to freedmen of the Choctaw and Chickasaw tribes shall be considered "homesteads," and shall be subject to all the provisions of this or any other Act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw tribes. [34 Stat. L. 138.]

Construction of statute.—The language of this section constitutes a legislative interpretation of article 9 of the treaty of Aug. 11, 1866, and supersedes pro tanto that treaty. *Garfield v. U. S.*, (1909) 34 App. Cas. (D. C.) 70.

The Secretary of the Interior, after due notice and a hearing, has authority to reverse his action in enrolling the names of persons claiming to be members of the Cherokee Nation and to cancel allotment certificates issued to them, where such

action was taken before the expiration of the time fixed by Congress for the completion of the rolls, notwithstanding the provision in this section which reads as follows: "But this provision shall not prevent the enrollment of any person who

has heretofore made application to the Commission to the Five Civilized Tribes, or its successor, and has been adjudged entitled to enrollment by the Secretary of the Interior." *Garfield v. U. S.*, (1909) 34 App. Cas. (D. C.) 70.

SEC. 4. [Citizens by blood — transfer to roll of, restricted.] That no name shall be transferred from the approved freedmen, or any other approved rolls of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, to the roll of citizens by blood, unless the records in charge of the Commissioner to the Five Civilized Tribes show that application for enrollment as a citizen by blood was made within the time prescribed by law by or for the party seeking the transfer, and said records shall be conclusive evidence as to the fact of such application, unless it be shown by documentary evidence that the Commission to the Five Civilized Tribes actually received such application within the time prescribed by law. [34 Stat. L. 138.]

SEC. 5. [Patents, etc., to issue in name of allottee — all patents, etc., recorded convey legal title — pending contests.] That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issue to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this Act. [34 Stat. L. 138.]

Effect of section when title vests in heirs.—The effect of the provision of this section, that, in the event of the death of an allottee before his patent became effective, it should issue in his name, but that the title to the land should inure to and vest in his heirs, was to vest in the heirs the absolute title to said lands, provided they could make the necessary proof that the deceased had continuously resided thereon. *Criner v. Farve*, (1915) 44 Okla. 618, 146 Pac. 10.

Application of section.—This section has no application where there is no allottee. Its language assumes that there is in existence a legal allottee and provides for the contingency of the death of the allottee before the patent becomes effective, so that, if the death of the allottee occurs before the patent becomes effective, the land shall inure to and vest in his heirs. *Iowa Land, etc., Co. v. U. S.*, (C. C. A. 8th Cir. 1914) 217 Fed. 11, 133 C. C. A. 121.

SEC. 6. [Removal of principal chief — approval of conveyances on failure of chief to execute — approval by principal chief of Seminoles.] That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the

President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe. If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument. *Provided*, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist. [34 Stat. L. 139.]

SEC. 7. [Segregation of specified Choctaw lands—exceptions—appraisal and sale of pine timber, etc.] That the Secretary of the Interior shall, by written order, within ninety days from the passage of this Act, segregate and reserve from allotment sections one, two, three, four, five, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, the east half of section sixteen, and the northeast quarter of section six, in township nine south, range twenty-six east, and sections five, six, seven, eight, seventeen, eighteen, and the west half of section sixteen, in township nine south, range twenty-seven east, Choctaw Nation, Indian Territory, except such portions of said lands upon which substantial, permanent, and valuable improvements were erected and placed prior to the passage of this Act and not for speculation, but by members and freedmen of the tribes actually themselves and for themselves for allotment purposes, and where such identical members or freedmen of said tribes now desire to select same as portions of their allotments, and the action of the Secretary of the Interior in making such segregation shall be conclusive. The Secretary of the Interior shall also cause to be estimated and appraised the standing pine timber on all of said land, and the land segregated shall not be allotted, except as hereinbefore provided, to any member or freedman of the Choctaw and Chickasaw tribes. Said segregated land and the pine timber thereon shall be sold and disposed of at public auction, or by sealed bids for cash, under the direction of the Secretary of the Interior. [34 Stat. L. 139.]

SEC. 8. [Land-office records transferred to clerk of district court—transcripts—fees.] That the records of each of the land offices in the Indian Territory, should such office be hereafter discontinued, shall be transferred to and kept in the office of the clerk of the United States court in whose district said records are now located. The officer having custody of any of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and the disposition of the land and other property of said tribes, upon proper application and payment of such fees as the Secretary of the Interior may prescribe, may make certified copies of such records, which shall be evidence equally with the originals thereof; but fees shall not be demanded for such authenticated copies as may be required by officers of any branch of the

Government nor for such unverified copies as such officer, in his discretion, may deem proper to furnish. Such fees shall be paid to bonded officers or employees of the Government, designated by the Secretary of the Interior, and the same or so much thereof as may be necessary may be expended under the direction of the Secretary of the Interior for the purposes of this section, and any unexpended balance shall be deposited in the Treasury of the United States, as are other public moneys. [34 Stat. L. 139.]

Admissibility of land office records in evidence, in state courts.—Copies of allotment and homestead patents, exemplified in pursuance of the law of the

state, are admissible in evidence in the courts. *Mullen v. Howard*, (1914) 43 Okla. 531, 143 Pac. 659.

SEC. 9. [Payments to loyal Seminoles ratified — recoveries by individuals not barred — Charles F. Winton — claims of estate of.] The disbursements, in the sum of one hundred and eighty-six thousand dollars, to and on account of the loyal Seminole Indians, by James E. Jenkins, special agent appointed by the Secretary of the Interior, and by A. J. Brown as administrator de bonis non, under an Act of Congress approved May thirty-first, nineteen hundred, appropriating said sum, be, and the same are hereby, ratified and confirmed: *Provided*, That this shall not prevent any individual from bringing suit in his own behalf to recover any sum really due him. That the Court of Claims is hereby authorized and directed to hear, consider, and adjudicate the claims against the Mississippi Choctaws of the estate of Charles F. Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principal of quantum meruit, in such amount or amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States. Notice of such suit shall be served on the governor of the Choctaw Nation, and the Attorney-General shall appear and defend the said suit on behalf of said Choctaws. [34 Stat. L. 140.]

SEC. 10. [Tribal schools transferred to control of secretary of interior — school funds — use of remainder of appropriated funds — use of surplus, fees, etc.] That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as practicable, until such time as a public school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools

of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the Act of Congress approved March third, nineteen hundred and five, "for the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations," unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the Act of Congress approved February nineteenth nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds. [34 Stat. L. 140.]

Construction of section.—The provisions of this section in regard to the control of the tribal schools and the lands and property pertaining thereto by the Secretary of the Interior, and the use of the tribal funds for the purpose of defraying the necessary expenses of such schools, is purely a governmental and administrative matter, involving no tak-

ing of the property of the nation. (1907) 26 Op. Atty.-Gen. 340.

The purpose of Congress in sections 10 and 11 of this Act was to give the Secretary of the Interior exclusive control, within limitations stated, of the revenues of the Five Civilized Tribes, including the Seminole Nation. (1907) 26 Op. Atty.-Gen. 340.

SEC. 11. [Tribal revenues to be collected by special officer — payment of claims — tribal taxes abolished — refund — accounting, delivery, etc., of tribal property — failure to account — penalty.] That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided*, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

That every officer, member or representative of the Five Civilized Tribes, respectively, or any other person, having in his possession, custody or control, any money or other property, including the books, documents, records or any other papers, of any of said tribes, shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody or control, and shall deliver all other tribal properties so held by him to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided, prior to July thirty-first, nineteen hundred and eight, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by fine of not exceeding five thousand dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe or tribes in interest for the amount or value of the money or property so withheld. [34 Stat. L. 141, as amended by 35 Stat. L. 316.]

The second paragraph of this section was amended to read as above given by section 13 of the Act of May 27, 1908, ch. 199. In the original form this paragraph was as follows:

"Upon dissolution of the tribal governments, every officer, member, or representative of said tribes, respectively, having in his possession, custody, or control any money or other property of any tribe shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody, or control, and shall deliver all other tribal property so held by him, to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided for sixty days from dissolution of the tribal government, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by a fine of not exceeding five thousand dollars or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe for the amount or value of the money or property so withheld." [34 Stat. L. 141.]

Control of finances.—The Secretary of the Treasury may safeguard all disbursements on behalf of the Seminole Nation now authorized and require that all Seminole warrants issued after Jan. 1, 1907, shall be approved by the United States

inspector for the Indian Territory and paid by the United States Indian agent, instead of being paid by the treasurer of the nation. (1907) 26 Op. Atty-Gen. 340.

SEC. 12. [Choctaw and Chickasaw town lots — sale of those reserved for mining leases — proceeds — forfeiture for nonpayment — resale — reversion of vacated streets, etc.] That the Secretary of the Interior is authorized to sell, upon such terms and under such rules and regulations as he may prescribe, all lots in towns in the Choctaw and Chickasaw nations reserved from appraisement and sale for use in connection with the operation of coal and asphalt mining leases or for the occupancy of miners actually engaged in working for lessees operating coal and asphalt mines, the proceeds arising from such sale to be deposited in the Treasury of the United States as are other funds of said tribes. If the purchaser of any town lot sold under the provisions of law regarding the sale of town sites in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole nations fail for sixty days after approval hereof to pay the purchase price or any installment thereof then due, or shall fail for thirty days to pay the purchase price or any installment thereof falling due hereafter, he shall forfeit all

rights under his purchase, together with all money paid thereunder, and the Secretary of the Interior may cause the lots upon which such forfeiture is made to be resold at public auction for cash, under such rules and regulations as he may prescribe. All municipal corporations in the Indian Territory are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when vacated, shall revert to and become the property of the abutting property owners. [34 Stat. L. 141.]

SEC. 13. [Coal and asphalt lands reserved from sale.] That all coal and asphalt lands whether leased or unleased shall be reserved from sale under this Act until the existing leases for coal and asphalt lands shall have expired or until such time as may be otherwise provided by law. [34 Stat. L. 142.]

The application of this section is restricted by section 14 of the Act of May 27, 1908, ch. 199, given *infra*, p. 892; and by section 7 of the Act of May 29, 1908, ch. 216, 35 Stat. L. 446.

SEC. 14. [Conveyance to owner of lands reserved from allotment or sale — reversion — railroad easements not affected — exception — Murrow Indian Orphans' Home — donation patents to, authorized — conveyance of fractional rights — conveyance of other lands — description.] That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations reserved from allotment or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: *Provided*, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof: *Provided further*, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station, grounds, water stations, stock yards or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality. The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation are, with the approval of the Secretary of the Interior, hereby authorized and directed to issue patents to the Murrow Indian Orphans' Home, a corporation of Atoka, Indian Territory, in all cases where tracts have been allotted under the direction of the Secretary of the Interior for the purpose of allowing the allottees to donate the tract so allotted to said Murrow Indian Orphans' Home. In all cases where enrolled citizens of either the Choctaw or Chickasaw tribe have taken their homestead and surplus allotment and have remaining over an unallotted

right to less than ten dollars on the basis of the allotment value of said lands, such unallotted right may be conveyed by the owners thereof to the Murrow Indian Orphans' Home aforesaid; and whenever said conveyed rights shall amount in the aggregate to as much as ten acres of average allottable land, land to represent the same shall be allotted to the said Murrow Indian Orphans' Home, and certificate and patent shall issue therefor to said Murrow Indian Orphans' Home. And there is hereby authorized to be conveyed to said Murrow Indian Orphans' Home, in the manner hereinbefore prescribed for the conveyance of land, the following-described lands in the Choctaw and Chickasaw nations, to wit: Sections eighteen and nineteen in township two north, range twelve east; the south half of the northeast quarter, the northeast quarter of the northeast quarter, the south half of the northwest quarter of the northeast quarter, the south half of the southeast quarter, the northeast quarter of the southeast quarter, the south half of the northwest quarter of the southeast quarter, the northeast quarter of the northwest quarter of the southeast quarter, the northeast quarter of the southeast quarter of the southwest quarter, and the northwest quarter of the northwest quarter of section twenty-four, and the northwest quarter of the southeast quarter, the north half of the southwest quarter of the southeast quarter, the south half of the southwest quarter of the southwest quarter, the northeast quarter of the southwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter of the southwest quarter of section twenty-three, and the southwest quarter of the southwest quarter of the southeast quarter of section twenty-six, and the southeast quarter of the northwest quarter of the northwest quarter, the south half of the northeast quarter of the northwest quarter, the northeast quarter of the northeast quarter of the northwest quarter, and the east half of the southeast quarter of the northwest quarter of section twenty-five, all in township two north, range eleven east, containing one thousand seven hundred and ninety acres, as shown by the Government survey, for the purpose of the said Home. [34 Stat. L. 142.]

SEC. 15. [Tribal buildings, etc., to be sold — proceeds — purchases by municipalities.] The Secretary of the Interior shall take possession of all buildings now or heretofore used for governmental, school, and other tribal purposes, together with the furniture therein and the land appertaining thereto, and appraise and sell the same at such time and under such rules and regulations as he may prescribe, and deposit the proceeds, less expenses incident to the appraisal and sale, in the Treasury of the United States to the credit of the respective tribes: *Provided*, That in the event said lands are embraced within the geographical limits of a State or Territory of the United States such State or Territory or any county or municipality therein shall be allowed one year from date of establishment of said State or Territory within which to purchase any such lands and improvements within their respective limits at not less than the appraised value. Conveyances of lands disposed of under this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided*, That this section shall not take effect until

the date of the dissolution of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes. [34 Stat. L. 143, as amended by 34 Stat. L. 342.]

This section was amended to read as above given by the Indian Appropriation Act of June 21, 1906, ch. 3504, 34 Stat. L. 342. The amendment consisted of the addition of the last proviso.

SEC. 16. [Residue of unallotted, etc., lands to be sold — proceeds — preference rights of Choctaw and Chickasaw freedmen — reversion and sale on nonpayment — sale of unallotted nonmineral, etc., lands — agricultural lands.] That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of land sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person. [34 Stat. L. 143.]

SEC. 17. [Per capita distribution of tribal funds.] That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians have been sold and the moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes, such distribution to be made under rules and regulations to be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior. [34 Stat. L. 143.]

SEC. 18. [Jurisdiction of tribal suits — set-offs.] That the Secretary of the Interior is hereby authorized to bring suit in the name of the United

States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided*, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition. Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him. [34 Stat. L. 144.]

Suit to cancel patents or deeds.—A suit by the United States for the use of the Creek Nation of Indians to cancel patents or deeds to town lots belonging to said nation in its tribal capacity and sold by the United States for its benefit under Act March 1, 1901, ch. 876, § 10, 31 Stat. L. 864, on the ground that such deeds were obtained by fraud for less than the price at which lots were authorized by such Act to be sold, and to recover such lots for the tribe, is within the authority given by this section, which authorizes the Secretary of the Interior to bring suit in the name of the United States for the use of any of the Five Civilized Tribes "for the collection of any moneys or recovery of any lands claimed by any of said tribes." *U. S. v. Rea-Read Mill, etc., Co.*, (1909) 171 Fed. 501

Prosecution by private counsel.—The provision of this section authorizing the Secretary of the Interior to bring suit in the name of the United States for the use of any of such tribes for the collection of any moneys or the recovery of any lands claimed by it, and "to pay from the funds of the tribe interested the costs and necessary expenses incurred in maintaining and prosecuting such suits," is within the power of Congress, and under such authority the Secretary may employ private counsel to conduct such suits; the United States having no interest therein as a suitor. And in any event a defendant in such a suit cannot be heard to object that it was not brought by a law officer of the government. *U. S. v. Rea-Read Mill, etc., Co.*, (1909) 171 Fed. 501.

SEC. 19. [Alienation restrictions — lease of other than homestead lands — prior conveyances — taxes.] That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however*, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his

homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee. [34 Stat. L. 144.]

Constitutionality.—The power of Congress thus to extend the restriction upon alienation was sustained by this court in *Tiger v. Western Inv. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738. There the question related to a conveyance of inherited lands, made by a Creek Indian, of the full-blood, without the approval of the Secretary of the Interior as required by section 22. The conveyance had been executed after the expiration of the five-year limitation upon alienation prescribed by the supplemental agreement with the Creek Nation (Act of June 30, 1902, ch. 1323, § 16, 32 Stat. 503); but meanwhile, during the continuance of the original restriction, this Act had been enacted. It was held that the restriction of the later statute was valid. *Heckman v. U. S.*, (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820.

The lands of the Seminole Nation having been granted to it merely in its corporate capacity as a nation, the United States government may, as a condition of their allotment in severalty and the extinguishment of its own ultimate interest therein, impose the restrictions upon their alienation provided by this section. (1907) 26 Op. Atty-Gen. 340.

Bond given by lessee of Indian lands.—It is competent for the Secretary of the Interior to require by rules and regulations that all payments under a lease shall be made to an Indian agent, and that the lessee shall give a bond to the

United States to secure the performance of the lease, and in such case the United States may maintain an action against the lessee and his surety on the bond for breach of such conditions. *U. S. v. Comet Oil, etc., Co.*, (1911) 187 Fed. 674.

Taxation.—Under this section providing that "all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottees," and Act May 27, 1908, ch. 199, § 4, 35 Stat. L. 313 (*infra*, p. 887), which provides that "all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes," the exemption from taxation does not exist any longer, in any case, than the time during which the land is inalienable. *U. S. v. Shock*, (1911) 187 Fed. 870.

Provision not retroactive.—The provision that "every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions, be and the same is hereby declared void," is not retroactive. *Casey v. Bingham*, (1913) 37 Okla. 484, 132 Pac. 663.

Cited without specific construction, in *Frame v. Bivens*, (E. D. Okla. 1909) 189 Fed. 785.

SEC. 20. [Leases by full-blood allottees — minors, etc.—leases to be recorded.] That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further*, That all leases entered into

for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory. [34 Stat. L. 145.]

Jurisdiction of Secretary of Interior.—Leases of allotments of Indian minors in the Indian Territory, confirmed and approved by the trial courts of that territory since April 26, 1906, are not subject to the approval or disapproval of the Secretary of the Interior, but the orders of the courts confirming and approving them are final. *Morrison v. Burnette*, (1907) 154 Fed. 617, 83 C. C. A. 391.

Validity of lease.—A lease not made under the order of the proper court as provided in this section is invalid. *Jennings v. Wood*, (C. C. A. 8th Cir. 1911) 192 Fed. 507, 112 C. C. A. 657.

An agricultural lease of restricted lands made since statehood by a Choctaw Indian in violation of the provisions of the Atoka Agreement ratified and approved by Act of Congress June 28, 1898, ch. 517, 30 Stat. L. 495, as modified by this Act, is void, and the validity of such lease may

be questioned in an action by the grantee of the allottee, who holds under a deed from such allottee made after her restrictions have been removed. *Chapman v. Siler*, (1912) 30 Okla. 714, 120 Pac. 608.

Recordation of lease contracts for one year.—The requirement for recording of leases has no application to lease contracts for one year, and, it not being necessary to record such contracts, it follows that it is not necessary to their validity to reduce the same to writing. A parol lease for one year, entered into by an allottee of the Five Civilized Tribes, effecting his allotment, is a contract in conformity with the Acts of Congress relating to the leasing of their allotted lands by the members of the Five Civilized Tribes, and is a valid and binding contract. *Longmeyer v. Jones*, (Okla. 1915) 151 Pac. 864.

SEC. 21. [Lands of allottees dying intestate without heirs — Mississippi Choctaws — claims of heirs.] That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this Act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed. [34 Stat. L. 145.]

SEC. 22. [Conveyance of inherited lands.] That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon

an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. [34 Stat. L. 145.]

Constitutionality.—The rights of the Creek Indians in the Indian Territory who were made citizens of the United States by the Act of March 3, 1901, ch. 868, 31 Stat. L. 1447, with all of the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by this section, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902, ch. 1323, 32 Stat. L. 500, beyond the five-year limitation therein expressed. *Tiger v. Western Invest. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738, *reversing* (1908) 21 Okla. 630, 96 Pac. 602.

Effect upon alienation of land.—The prohibition against the alienation of allotted lands by the allottee or his heirs, without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902, ch. 1323, 32 Stat. L. 500, was continued, as to conveyances by full-blooded Indian heirs, beyond the five-year limitation therein expressed by this section, which, after empowering adult heirs of a deceased Indian of either of the Five Civilized Tribes to convey their inherited lands, provided that "all conveyances made under this provision by heirs who are full-blooded Indians are to be subject to the approval of the Secretary of the Interior," and in section 29 repealed all inconsistent legislation. *Tiger v. Western Invest. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738, *reversing* (1908) 21 Okla. 630, 96 Pac. 602; *U. S. v. Shock*, (1911) 187 Fed. 862.

This section had the effect of removing the restrictions on alienation imposed by section 19 of this Act on lands allotted to Indians of the full blood on their descent to either adult or minor heirs of less than full blood, and on such descent the lands become alienable and therefore taxable. *U. S. v. Shock*, (1911) 187 Fed. 862.

A deed to an undivided interest in the allotment of a citizen of the Creek Nation, set apart to her under Act of June 28, 1898, ch. 517, 30 Stat. L. 495, and who died in possession thereof prior to Act of March 1, 1901, ch. 676, 31 Stat. L. 861, made, executed, and delivered by heirs of said allottee after the expiration of five years from the ratification of the agreement with the Creek Nation contained in said Act of March 1, 1901, and after Act of April 26, 1906, ch. 1876, 34

Stat. L. 145, is valid. *Sanders v. Sanders*, (1909) 28 Okla. 59, 117 Pac. 338. Lands allotted to the Choctaw and Chickasaw Indians under the Act of July 1, 1902, ratifying an agreement with the Choctaw and Chickasaw tribes, could not be conveyed prior to this Act, by the full-blood heirs of said allottees within the period of inhibition named in the former Act; and such attempted conveyances could not be validated by the approval of the Secretary of the Interior under the provisions of this section, as it is not retroactive. (1911) 29 Op. Atty-Gen. 131.

The term "inherited" in the above section is synonymous with the word "descend" as used in the original agreement between the United States and the Creek Nation approved by Act Cong. March 1, 1901, ch. 676, and in the supplemental agreement approved by Act Cong. June 30, 1902, ch. 1323, and covers those cases where heirs take by purchase as well as those where they take by inheritance, technically speaking. The section must be construed together with all other cognate acts and applies to all allotments selected by or for deceased members of the tribe in the hands of their heirs, whether the deceased member died before or after receiving the allotment. The heirs (not full bloods) of a deceased Indian who died before his selection was made or his patent issued may sell and convey the allotment inuring to them as such heirs. *Shulthis v. MacDougal*, (1907) 162 Fed. 331, *affirmed* (C. C. A. 8th Cir. 1909) 170 Fed. 529, 95 C. C. A. 615.

Sale of ward's interest in allotted land.—The guardian and mother of the Cherokee minor children made, under section 22, application to the proper court for an order permitting her to sell and convey to the proposed purchaser of the mother's interest the undivided interest of her minor children and wards in the allotted lands inherited by them from their deceased father by filing in the court her petition, setting up the price offered by said purchaser and her contract to sell her interest to him, and introduced evidence to establish that the price offered for her wards' interests was the fair, reasonable market value thereof. The court thereupon made an order directing the sale of the minors' interests in the lands, and directed the guardian to convey to the purchaser of her interest the interests of her wards and to execute therefor her deed as guardian, all of which was done; and, upon report thereof made by the guardian to the court, the

sale in all things was approved. It was held that the sale was made in substantial compliance with said section 22. *Wilson v. Morton*, (1911) 29 Okla. 745, 119 Pac. 213.

Sale by minor.—This section provides its own special procedure, when it is desired that a minor join with the adult heirs in the sale of an inherited allotment; and prior to statehood, such purpose could only be accomplished through the action of "a guardian, duly appointed by the proper United States court for the Indian Territory, . . . upon order of such court made upon petition filed by guardian." *Talley v. Burgess*, (Okla. 1915) 149 Pac. 120.

A contract of sale, made by a guardian of a Cherokee Indian minor, prior to statehood, but after the approval of this Act and prior to that of May 27, 1908, 36 Stat. 312, ch. 199 (*infra*, p. 881), of inherited lands allotted to his father, there being adult heirs, and without an order of court "made upon petition filed by [the] guardian," is void. *Talley v. Burgess*, (Okla. 1915) 149 Pac. 120.

Approval by Secretary of Interior no

longer necessary.—Since the passage of the Act of May 27, 1908, *infra*, p. 881, section 9 of which continued the right of alienation provided for by this section, deeds by full-blooded Indian heirs do not have to be approved by the Secretary of the Interior although the allottee of the land may have died before the passage of that Act. *U. S. v. Knight*, (C. C. A. 8th Cir. 1913) 206 Fed. 145, 124 C. C. A. 211; *Bartlett v. Okla. Oil Co.*, (E. D. Okla. 1914) 218 Fed. 380.

The approval or disapproval of deeds by the Secretary of the Interior under the provision of this section is purely ministerial and in no sense a judicial action. *Bartlett v. Okla. Oil Co.*, (E. D. Okla. 1914) 218 Fed. 380.

Conveyances prior to this Act.—Prior to the passage of this section full-blooded Indian heirs being members of any of the Five Civilized Tribes in Oklahoma, could not convey their allotted lands unless there had been actual removal of restrictions by the Secretary of the Interior prior to the conveyance. *U. S. v. Knight*, (C. C. A. 8th Cir. 1913) 206 Fed. 145, 124 C. C. A. 211.

SEC. 23. [Disposal of property by will permitted — restriction.] Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner or a judge of a county court of the State of Oklahoma. [34 Stat. L. 145, as amended by 35 Stat. L. 315.]

The closing words of this section, "or a judge of a county court of the State of Oklahoma," were added by section 8 of the Act of May 27, 1908, ch. 199, 35 Stat. L. 315. Said Act is given *infra*, p. 881 et seq.

This section is made applicable to wills executed under section 9 of the Act of May 27, 1908, ch. 199, given *infra*, p. 890.

Purpose of section.—The obvious purpose of this section is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved of by a competent court. *Tiger v. Western Inv. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738.

Effect of section.—A full-blood Creek Indian had the power to make a will prior to this Act, but he had no right to alienate his allotment by a will. By this Act, however, Congress removed the restrictions on alienation by will of all the property of a full-blood Indian of the Five Civilized Tribes, except that no will of a full-blood Indian is valid which disinherits the wife, parent, spouse, or children of the testator, unless acknowledged

as required by the Act. *Wilson v. Greer*, (Okla. 1915) 151 Pac. 629.

State statutes.—It was the evident intent of Congress that state statutes should be superseded in so far only as they interfered with the operation of this Act. *Chestnut v. Capey*, (1915) 45 Okla. 754, 146 Pac. 589, wherein it appeared that a Choctaw Indian of full blood had died leaving his allotment and personal property and also a will dated June 5, 1908, disinheriting his wife, executed pursuant to this action, prior to its amendment by section 8 of the Act of May 27, 1908, ch. 199 (noted above), that he also left a will executed August 16, 1913, disinheriting his wife, but not acknowledged and approved pursuant to this section as amended; that he also on January 6,

1913, left an instrument in writing, containing a clause revoking all other wills theretofore executed by him, executed pursuant to the Oklahoma state statute on wills. The probate court held that the will of Aug. 16, 1913, although not in form to comply with the Act of Congress and hence not sufficient to disinherit the wife of the testator, yet being executed in form to satisfy the law of the state in force at that time, it was sufficient to revoke the will of June 5, 1908. But on appeal it was held that the probate court erred therein. The court said: "Disinheriting his wife, as it did, said will was required to be executed in form to satisfy the Act of Congress, as amended, and, as it did not, the same was defective and the revocatory clause of no effect. On this point this case is governed by *Leard v. Askew*, [1911] 28 Okla. 300, 114 Pac. 251, Ann. Cas. 1912D 234, where in the syllabus we said: 'Though the subsequent will contains a clause expressly revoking the earlier will, yet, if such subsequent will is defectively executed, the revocatory clause will not take effect.'" The probate court also held that the revocatory instrument of Jan. 6, 1913, executed with the formalities prescribed by the state statute, was sufficient to work a revocation of all prior wills. Sustaining the court below and holding that in this respect the state statute governed, the court said: "Was the court right in holding that said statute applied? If he was, we will then determine what the statute means when it says that the instrument of revocation must be executed with the same formalities with which a will should be executed. When Congress provided, as it did, by the Act [this section], and the amendment thereto, that 'every person of lawful age and sound mind may by last will and testament devise and bequeath all his estate, real and personal, and all interest therein,' Congress was legislating for the Indians, and thereby in effect said to this

testator and all other Indians of lawful age and sound mind that thereafter, as to their lands, concerning which Congress had the right to legislate, the same might be devised by will, and, in the manner of so doing, the testator was to be governed by the statute of wills in force in the state at the time of the making of the will, just as is every other citizen of the state. That is, with one exception, to wit, that no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits, among others, his wife, unless the will be acknowledged before and put in force throughout the state by the schedule of the Constitution. It is clear, had not Congress inserted the proviso, the state statute would have furnished the machinery for making this will as a whole. As it is, the will was executed pursuant thereto in every particular except as to its acknowledgment before and approval by a judge of the County Court. By implication, then, we gather that Congress intended the state statute to apply in all matters concerning, not only the execution, but the revocation, of this will, except those matters wherein Congress had expressly otherwise provided. In other words, Congress intended that the state law should yield only so far as it interfered with the operation of the Act of Congress."

Due execution and attestation.—Whether a will is acknowledged before or approved by a judge of the United States court for the Indian territory, or a United States commissioner, or a judge of a County Court of the state of Oklahoma, involves the question of due execution and attestation. *Homer v. McCurtain*, (1914) 40 Okla. 406, 138 Pac. 807.

The acknowledgment and approval of an Indian will under this section was examined and held sufficient in *Proctor v. Harrison*, (1912) 34 Okla. 181, 125 Pac. 479.

SEC. 24. [Choctaw, Chickasaw, and Seminole lands — highways on section lines — damages — expenses — obstruction of highway — penalty — notice.] That in the Choctaw, Chickasaw, and Seminole nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively. All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers, and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation

in which such public highways or roads are established. Any person, firm, or corporation obstructing any public highway or road, and who shall fail, neglect, or refuse for a period of ten days after notice to remove or cause to be removed any and all obstructions from such public highway or road, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars per day for each and every day in excess of said ten days which said obstruction is permitted to remain: *Provided, however,* That notice of the establishment of public highways or roads need not be given to allottees or others, except in cases where such public highways or roads are obstructed, and every person obstructing any such public highway or road, as aforesaid, shall also be liable in a civil action for all damages sustained by any person who has in any manner whatever been damaged by reason of such obstruction. [34 Stat. L. 145.]

Effect on existing allotments.—This section is prospective in its operation, and does not authorize the highway officials of the state to take and condemn without compensation a strip one rod on

each side of the section line traversing the allotment of a full-blood Indian, whose land was allotted prior to the passage of the Act. *Good v. Keel*, (1911) 29 Okla. 325, 116 Pac. 777.

SEC. 25. [Power and light companies granted rights of way, etc. — proceedings, etc. — municipal control, etc. — future control of granted rights.] That any light, or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory. That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this Act: *Provided,* That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior. In case of the failure of any light, or power

company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this Act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an Act of Congress entitled "An Act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Public Numbered Twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said Act shall have no application, and except that hereafter the plats required to be filed by said Act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said Act, for the purpose of this Act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated. [34 Stat. L. 146.]

Sections 15, 17 of the Act of Feb. 28, 1902, ch. 134, mentioned in the text are given *infra*, pp. 898, 900.

SEC. 26. [Municipalities granted additional powers — improvement of streets, etc. — special assessments — maximum — issue of scrip or certificates — taxation of railroad property — municipal assessments — appeal — costs.] That in addition to the powers now conferred by law, all municipalities in the Indian Territory having a population of over two thousand to be determined by the last census taken under any provision of law or ordinance of the council of such municipality, are hereby authorized and empowered to order improvements of the streets or alleys or such parts thereof as may be included in an ordinance or order of the common council with the consent of a majority of the property owners whose property as herein provided is liable to assessment therefor for the proposed improvement; and said council is empowered and authorized to make assessments and levy taxes with the consent of a majority of the property owners whose property is assessed, for the purpose of grading, paving, macadamizing, curbing, or guttering streets and alleys, or building sidewalks upon and along any street, roadway or alley within the limits of such municipality, and the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk constructed, or other improvements under authority of this section, shall be so assessed against the abutting property as to require each parcel of land to bear the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk, as far as it abuts thereon, and in the case

of streets or alleys to the center thereof; and the cost of street intersections or crossings may be borne by the city or apportioned to the quarter blocks abutting thereon upon the same basis. The special assessments provided for by this section and the amount to be charged against each lot or parcel of land shall be fixed by the city council or under its authority and shall become a lien on such abutting property, which may be enforced as other taxes are enforced under the laws in force in the Indian Territory. The total amount charged against any tract or parcel of land shall not exceed twenty per centum of its assessed value, and there shall not be required to be paid thereon exceeding one per centum per annum on the assessed value and interest at six per centum on the deferred payments. For the purpose of paying for such improvements the city council of such municipality is hereby authorized to issue improvement script [*sic*] or certificates for the amount due for such improvements, said script or certificates to be payable in annual installments and to bear interest from date at the rate of six per centum per annum, but no improvement script shall be issued or sold for less than its par value. All of said municipalities are hereby authorized to pass all ordinances necessary to carry into effect the above provisions and for the purpose of doing so may divide such municipality into improvement districts. That the tangible property of railroad corporations (exclusive of rolling stock) located within the corporate limits of incorporated cities and towns in the Indian Territory shall be assessed and taxed in proportion to its value the same as other property is assessed and taxed in such incorporated cities and towns; and all such city or town councils are hereby empowered to pass such ordinances as may be necessary for the assessment, equalization, levy and collection, annually, of a tax on all property except as herein stated within the corporate limits and for carrying the same into effect: *Provided*, That should any person or corporation feel aggrieved by any assessment of property in the Indian Territory, an appeal from such assessment may be taken within sixty days by original petition to be filed in United States court in the district in which such city or town is located, and the question of the amount and legality of such assessment, and the validity of the ordinance under which such assessment is made may be determined by such court and the costs of such proceeding shall be taxed and apportioned between the parties as the court shall find to be just and equitable. [34 Stat. L. 147.]

SEC. 27. [Tribal lands to be held in trust — allotments not affected.] That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress. [34 Stat. L. 148.]

SEC. 28. [Tribal governments continued — restriction — contracts.] That the tribal existence and present tribal governments of the Choctaw,

Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States. [34 Stat. L. 148.]

By a Resolution of March 2, 1907, No. 7, 34 Stat. L. 822, entitled "Joint Resolution Extending the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory," it was provided as follows: "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

This resolution is quoted in the opinion U. S. 101, 26 S. Ct. 588, 50 U. S. (L. ed.) in U. S. v. Cherokee Nation, (1906) 202 949.

Sec. 29. [Repeal.] That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed. [34 Stat. L. 148.]

An Act For the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

[Act of May 27, 1908, ch. 199, 35 Stat. L. 312.]

[SEC. 1.] [Five Civilized Tribes—status of allotments—alienation restrictions removed—restrictions continued—removal by secretary of the interior.] That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions,

wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma. [35 Stat. L. 312.]

This is the first section of the "Restrictions Removal Act."

Sections 13-23, inclusive, of the Act of Feb. 28, 1902, ch. 134, continued in force by the text, are given *infra*, p. 897 et seq.

Section 8 of this Act amended the Act of April 26, 1906, ch. 1876, § 23, *supra*, p. 876.

Section 13 of this Act amended the Act of April 26, 1906, ch. 1876, § 11, *supra*, p. 867.

Constitutionality and effect.—This Act of May 27, 1908, is constitutional and dominates provisions of state laws. *Truskett v. Closser*, (1915) 236 U. S. 223, 35 S. Ct. 385, 59 U. S. (L. ed.) 549, *affirming* (C. C. A. 8th Cir. 1912) 198 Fed. 835, 117 C. C. A. 477. See to the same effect, *Shoat v. Oliver*, (Okla. 1915) 148 Pac. 709.

As to exemption from taxation.—In *Choate v. Trapp*, (1912) 224 U. S. 665, 32 S. Ct. 565, 56 U. S. (L. ed.) 941, it was held that the removal of restrictions against alienation by this Act did not take away from land allotted under the Act of June 28, 1898, 30 Stat. L. 505, the right of exemption from taxation.

And in *Weilep v. Audrain*, (1912) 36 Okla. 288, 128 Pac. 254, it was held that this Act so far as it attempts to subject to taxation lands of Cherokees exempt from taxation by the provisions of section 13 of the Cherokee Agreement of July 1, 1902 (Act of July 1, 1902, ch. 1375, 32 Stat. 717), is unconstitutional.

Cherokee allottees, by virtue of the Cherokee Agreement, under which, in consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of the lands in severalty, which were to be nontaxable for a specified period while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by the United States Constitution, Fifth Amendment, from abrogation during that period, as was attempted by this Act of May 27, 1908, removing the restrictions upon alienation, and providing that lands from which such restrictions had been removed should be subject

to taxation. *Whitmire v. Trapp*, (1912) 33 Okla. 429, 126 Pac. 578.

Right of United States to enforce restrictions.—The plan of the United States government in dissolving the Five Civilized Tribes of Indians and distributing their land in severalty was a great governmental project, having for its object the social and industrial advancement of the Indians, and the various Acts pertaining thereto must be construed in consonance with such purpose and not merely as real estate transactions. The relation of government to the Indians is not to be measured by the law governing the ordinary relation of guardian and ward, nor are the limitations imposed on the alienation of land governed by the strict rules of law relating to grantor or grantee, but the United States, by virtue of its peculiar relationship to the Indians and to prevent the policy to be worked out through such legislation from being defeated, may enforce such restrictions on alienation in the courts although retaining neither a legal nor an equitable estate in the lands after the allotment. *U. S. v. Allen*, (C. C. A. 8th Cir. 1910) 179 Fed. 13, 103 C. C. A. 1 [*reversing* (E. D. Okla. 1909) 171 Fed. 907], *modified and affirmed* (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820.

Power of Congress to extend period of prohibited alienation.—It is within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, although in the meantime he may have been made a citizen. *U. S. v. Allen*, (C. C. A. 8th Cir. 1910) 179 Fed. 13, 103

C. C. A. [reversing (E. D. Okla. 1909) 171 Fed. 907], *modified and affirmed* (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820; U. S. v. Shock, (E. D. Okla. 1911) 187 Fed. 870.

Restrictions terminated by lapse of time.—In U. S. v. Bartlett, (1914) 235 U. S. 72, 35 S. Ct. 14, 59 U. S. (L. ed.) 137, *affirming* (C. C. A. 8th Cir. 1913) 203 Fed. 410, 121 C. C. A. 520, the question arose whether the excepting clause that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act" applied to restrictions terminated by lapse of time. It was held that it did. The court said: "The real controversy is over the meaning of the word 'removed.' It is not questioned that it embraces the action of Congress and of the Secretary of the Interior in abrogating or canceling restrictions in advance of the time fixed for their expiration, but it is insisted that it does not embrace their termination by the lapse of time. In short, the contention is that the word is used in a sense which comprehends only an affirmative act, such as a rescission or revocation while the statutory period was still running. Although having support in some definitions of the word, the contention is, in our opinion, untenable, for other parts of the same act, as also other acts dealing with the same subject, show that the word is employed in this legislation in a broad sense plainly including a termination of the restrictions through the expiration of the prescribed period. This is illustrated in §§ 4 and 5 of the Act of 1908, and § 19 of the Act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), and is recognized in *Choate v. Trapp*, [1912] 224 U. S. 665, 673, 56 U. S. (L. ed.) 941, 945, 32 S. Ct. 565, where, in dealing with some of these allotments, it was said that 'restrictions on alienation were removed by lapse of time.'"

Patent not issued.—The fact that a patent for an allotment had not issued to a Cherokee freedman at the time the restriction against alienation as to a homestead took effect under this Act was held not to be a bar to alienation by the allottee subsequent to the taking effect of the Act. *Benadum v. Armstrong*, (1915) 44 Okla. 637, 146 Pac. 34.

Minors.—A minor within the meaning of that term as used in this section and sections 2 and 6 of this Act includes males under the age of twenty-one years and females under the age of eighteen years, and the marriage of such minor does not confer upon him or her the authority to sell his or her allotted lands independently of the jurisdiction and supervision of the probate courts of the state. *Jefferson v. Winkler*, (1910) 26 Okla. 653, 110 Pac. 755. See also *Kirkpatrick v. Burgess*, (1911) 29 Okla. 121, 116 Pac. 764.

The allotments of minor Creek Indians were made inalienable by section 4 of the treaty of March 1, 1901 (31 Stat. 861), and continued so, where the infancy continued, until the passage of this Act of May 27, 1908. *Texas Co. v. Henry*, (1912) 34 Okla. 342, 126 Pac. 224.

The sixty days specified in this section refers entirely to the status of lands as specified and fixed by this section, and the other sections take effect as of the date of the approval of the Act, unless some other date is specified. (1909) 27 Op. Atty-Gen. 530.

Sale by probate court.—By reason of this section and sections 2 and 6 of this Act the restrictions on the alienation of the allotments of minor Indians of the Creek tribe, having less than half Indian blood, are removed, and allotments of such allottees may be sold under the order and supervision of the probate courts of the state. *Jefferson v. Winkler*, (1910) 26 Okla. 653, 110 Pac. 755.

SEC. 2. [Leases of restricted lands — oil, gas, or mining purposes — lands of minors.] That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of removal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include

all males under the age of twenty-one years and all females under the age of eighteen years. [35 Stat. L. 312.]

Minors.—"When Congress included minors in section 1, it had the right in other sections of the law to declare who should be considered minors for the purposes of that section. This it did in the latter part of section 2 above quoted. It is said that the declaration there made being a proviso is limited to the section in which it is found. Congress expressly declared that such was not its intention, for instead of saying, the term minor or minors as used in this section, it said, 'the term minor or minors, as used in this act.'" *Truskett v. Closser*, (C. C. A. 8th Cir. 1912) 198 Fed. 835, 117 C. C. A. 477.

Renewal of lease for agricultural purposes.—A valid lease for agricultural purposes of a restricted Creek allotment may be made during the existence of a prior, valid lease, provided that it is made for a fair rental, near the termination of the existing lease, and that it does not ex-

tend the term more than five years from the date of the last lease. But where a lease by a Creek citizen of his restricted allotment is made for agricultural purposes, and before it expires another lease for agricultural purposes is made to the same lessee for a period of five years, to commence in the future, the last lease, not being approved by the Secretary of the Interior, is void. *Hudson v. Hildt*, (Okla. 1915) 151 Pac. 1063.

This Act prohibits a male allottee under 21 and a female allottee under 18 years of age from alienating his or her allotments, and renders them subject to the jurisdiction of the County Courts in the exercise of their probate jurisdiction. *Cochran v. Teehee*, (1913) 40 Okla. 388, 138 Pac. 563.

For an application of this section as authority for the leasing of lands for oil and gas, see *Riley v. Kelsey*, (E. D. Okla. 1914) 218 Fed. 391.

SEC. 3. [Rolls of citizens and freedmen evidence of quantum of Indian blood — status of prior leases by allottees — power of owners of unrestricted lands over oil, etc., leases.] That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedmen of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds. and the same shall be recorded in the county where the land is situate. [35 Stat. L. 313.]

Constitutionality.—Plenary authority to fix the terms and conditions under which restrictions from the lands allotted to the members of the Creek tribe of Indians should be removed is vested in Con-

gress, and that portion of the Act containing, as one of such conditions and terms, the provision that the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive

evidence as to the age of said citizen or freedman is not unconstitutional and void, but a valid exercise of the authority vested in Congress. *Yarbrough v. Spalding*, (1912) 31 Okla. 806, 123 Pac. 843.

Purpose of Act.—This section was not intended to be a rule of evidence. The purpose of said Act is to prescribe terms and conditions upon which members of the Five Civilized Tribes of Indians may alienate their lands, and to prescribe a fixed and uniform rule by which those contracting with such members of said tribes could determine the exact date minors may reach their majority for the purpose of alienating their lands. *Phillips v. Byrd*, (1914) 43 Okla. 556, 143 Pac. 684; *Charles v. Thornburgh*, (1914) 44 Okla. 379, 144 Pac. 1033.

Congress did not intend by section 3 to make that which was black white, or the reverse, nor did it undertake to overthrow the multiplication table, neither of which things could it do, nor did it attempt. But what Congress intended to accomplish and did accomplish, by declaring the "enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of such citizen or freedman," was to require resort to the rolls and records as a fixed and definite public record from which it alone can be ascertained whether an allottee does, or does not, possess the qualified age or requisite degree of Indian blood to enable him to alienate his lands. *Bell v. Cook*, (E. D. Okla. 1911) 192 Fed. 597.

Not retroactive.—In an action to cancel conveyances affecting an Indian allotment consummated prior to the enactment of this statute, the "enrollment records" are not conclusive evidence as to the age of the allottee. In such case his age is a question of fact, to be proved by competent testimony, as any other fact at issue in the case. *Freeman v. Boynton First Nat. Bank*, (1914) 44 Okla. 146, 143 Pac. 1165.

Authority of commission.—The Commission to the Five Civilized Tribes which made the enrollment of their citizens and freedmen was a quasi-judicial tribunal empowered to determine who should be allotted and what land should be allotted and in what way it should be allotted to every citizen and freedman, and its adjudication of these questions and of every issue of law and fact that it was necessary for it to determine in order to decide these questions is conclusive and impervious to collateral attack. But its determination, recital or report regarding issues not material to its answers to the questions who should be enrolled and what lands should be allotted to them and how, is, in the absence of special legislation, without judicial or other conclusive effect. *Malone v. Alderdice*, (C. C. A. 8th Cir. 1914) 212 Fed. 868, 129 O. C.

A. 204, wherein it was held that the Commission in making its enrollment had no authority or jurisdiction to decide and adjudge the respective ages of the members of the tribes.

"Approved rolls" and "enrollment records."—The terms "approved rolls" and "enrollment records," as used in this section, have a distinctly different meaning and were intended by Congress to perform separate offices. The term "approved rolls" was intended to be conclusive evidence as to quantum of Indian blood, and the "enrollment records" were intended to be conclusive evidence as to the age of those enrolled. *Scott v. Brakel*, (1914) 43 Okla. 655, 143 Pac. 510; *Campbell v. McSpadden*, (1914) 44 Okla. 138, 143 Pac. 1138.

Enrollment records as conclusive evidence of age.—The enrollment records of the Commissioner to the Five Civilized Tribes are conclusive evidence as to age of the members of said tribes and freedmen, on transactions had after the taking effect of this Act. *Miller v. Thompson*, (Okla. 1915) 161 Pac. 192.

The provision making the rolls conclusive evidence of age is not, however, retroactive and does not affect conveyances made prior to its passage. *Bucher v. Showalter*, (1915) 44 Okla. 690, 145 Pac. 1143, wherein it appeared that an allottee conveyed a portion of his allotment before the statute making the enrollment records conclusive evidence as to age was enacted. At the time of the conveyance he was actually of full age, but the enrollment records showed him to be a minor. After the Act was passed making the enrollment records conclusive as to age, and after those records showed him to be of lawful age, he made another conveyance of the same land to different persons. An action was brought by his first grantee against the second grantee. The court held that the enrollment records were not competent evidence to show that the allottee was a minor at the time the first conveyance was made.

In *Smith v. Bell*, (1914) 44 Okla. 370, 144 Pac. 1058, the court held that in cases involving the validity of conveyances of lands allotted to members of the Five Civilized Tribes, made prior to the taking effect of this Act, where there are living witnesses in court to testify to the age of the allottee, the enrollment records of the Commission to the Five Civilized Tribes as to the age of such allottee are purely hearsay and inadmissible in evidence. See to the same effect, *Grayson v. Durant*, (1914) 43 Okla. 799, 144 Pac. 592; *Charles v. Thornburgh*, (1914) 44 Okla. 379, 144 Pac. 1033.

The enrollment records of the Commission to the Five Civilized Tribes of Indians are not conclusive evidence of the age of an allottee of tribal lands in testing the validity of a deed thereto

executed prior to this Act; and such records are only admissible in such cases as even disputable evidence of age when allowable under the general rules of evidence. *Jackson v. Lair*, (Okla. 1915) 150 Pac. 162.

The enrollment record is relevant, competent and material evidence in determining whether an allottee possesses the requisite age to enable him to alienate his lands. *Diamond v. Perry*, (Okla. 1915) 148 Pac. 88.

It is only where minority at the time of a conveyance appears upon the enrollment record that such minority is conclusively presumed so as to render void such conveyance of allotted lands by a Creek freedwoman who at such time had, in fact, passed the age of her minority, and where the enrollment record of a Creek freedwoman merely shows that she was 18 years old in 1908, without more specific statement as to time, it does not appear therefrom that she was a minor on July 28 or Sept. 18, 1908, when she executed conveyances of allotted lands; and in such case recourse may be had to other evidence to ascertain whether she had attained her majority on those specific dates. *Jackson v. Lair*, (Okla. 1915) 150 Pac. 162.

Contents of "enrollment records."—The "enrollment records" of the Commissioners to the Five Civilized Tribes which this section declares shall hereafter be conclusive evidence as to the age of any enrolled citizen or freedman of said tribes, embraces and includes all of the testimony and exhibits tending to establish age that were in evidence before the Commission, and the conclusions of the Commission based thereon from the date of the application for enrollment of any particular allottee up to the time of the ascertainment by the Commission as to whether the name of such allottee was entitled to be placed upon the roll of the nation in which he claimed citizenship. *Duncan v. Byars*, (1914) 44 Okla. 538, 144 Pac. 1053.

"Census card" as enrollment.—Where it appears that the "census card" constitutes the complete "enrollment records" it is admissible as conclusive evidence of age, not as a "census card," but as the "enrollment records" when so certified by the proper officer. *Scott v. Brakel*, (1914) 43 Okla. 655, 143 Pac. 510, wherein the court said: "It is true that in many instances the census card consists of an entry of a summary of the evidence of the applicant at the time the application was made, whilst in other instances, where the testimony of the applicant was not taken down by a stenographer and subsequently transcribed, the entries consisted of the epitomized statements of the witnesses reduced to census-card form. In such cases the census card is of necessity the enrollment record, and

where the Commissioner to the Five Civilized Tribes certifies that the census card constitutes the entire enrollment record as to the person whose name appears thereon, that will be sufficient. There are many instances where the census card constitutes substantially the complete enrollment record. In such cases, it is admissible as conclusive evidence as to age, not as a census card, but as 'the enrollment record,' when so certified by the proper officer."

Secondary evidence of enrollment records.—The enrollment records are the best evidence, and oral testimony is incompetent to prove them in the absence of a showing that the same were lost or destroyed. *Gilbert v. Brown*, (1914) 44 Okla. 194, 44 Pac. 359, where it appeared that the only evidence contained in a case-made which tended to establish the age of a Choctaw allottee was the oral testimony of the custodian of the enrollment records and such case-made did not contain the enrollment records or a certified copy thereof. It was held that there was not sufficient evidence in the record to support the judgment, as the enrollment records of the Commissioner to the Five Civilized Tribes were conclusive as to the age of a Choctaw allottee where the conveyance involved was executed subsequent to this Act. The court said: "The only evidence contained in the case-made which tends to establish the age of Maud Folsom is the oral testimony of the custodian of the enrollment records. The defendant objected to the introduction of oral testimony on the ground that the enrollment records were the best evidence, but the court admitted such testimony. The enrollment records were never made a part of the case-made; whether they were ever actually in evidence we do not know, and are therefore unable to say, in the absence of the enrollment records, whether they would tend to establish the age of Maud Folsom as 18 years of age on June 5, 1908, or Sept. 25, 1908. This court having heretofore held that the records are conclusive as to the age of an allottee, such records are the best evidence, and oral testimony is incompetent to prove these records, in the absence of a showing that the same were lost or destroyed. We therefore hold that there is not sufficient evidence in the record to support the judgment."

The enrollment records as to the age of persons enrolled are the best evidence and parol evidence by the persons themselves is inadmissible. *Newsom v. Langford*, (Tex. Civ. App. 1915) 174 S. W. 1036.

Restriction on admissibility of rolls.—The rolls of citizenship and of freedmen are made conclusive evidence of the quantum of Indian blood and of age, and therefore are not admissible, by virtue of the Act of Congress, for other purposes. *Warren v. Canard*, (1911) 30 Okla. 514,

120 Pac. 599. See also *Cochran v. Teehee*, (1913) 40 Okla. 388, 138 Pac. 563.

The provision that the rolls of citizenship of the Five Civilized Tribes "shall hereafter be conclusive evidence as to the age of said citizen or freedman," does not make such rolls conclusive evidence of the

age of a citizen, when the transaction involved had been entirely completed prior to the passage of this Act and the suit instituted after the passage of the Act. *Williams v. Joins*, (1912) 34 Okla. 733, 126 Pac. 1013.

SEC. 4. [Unrestricted lands subject to taxation — exemption from prior claims.] That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law. [35 Stat. L. 313.]

Validity and scope — taxation.— This section is valid, and under and by virtue thereof lands of all allottees of the Five Civilized Tribes of Indians, from which restrictions have been or shall be removed, are subject to taxation under the general laws of the state equally with the property of all other persons. *English v. Richardson*, (1911) 28 Okla. 408, 114 Pac.

710; *Gleason v. Wood*, (1911) 28 Okla. 502, 114 Pac. 703; *Choate v. Trapp*, (1911) 28 Okla. 517, 114 Pac. 709; *Alexander v. Rainey*, (1911) 28 Okla. 518, 114 Pac. 710; *Nelson v. Wood*, (Okla. 1912) 122 Pac. 1103. See also note under section 19, Act of April 28, 1906, ch. 1876, *supra*, p. 872.

SEC. 5. [Alienation, etc., of restricted lands void.] That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void. [35 Stat. L. 313.]

Intent of section.— The intent of this section is to render void, contracts, conveyances, etc., made prior to the removal of restrictions. *Casey v. Bingham*, (1913) 37 Okla. 484, 132 Pac. 663.

Validity of mortgage.— Although a mortgage may be void under this section nevertheless if the grantee of a valid deed, containing a covenant against all incumbrances except an invalid mortgage, deducts the amount of such mortgage from the purchase price and retains it, he cannot thereafter set up the invalidity of the mortgage as a defense to its foreclosure. *Jones v. Perkins*, (1914) 43 Okla. 734, 144 Pac. 183, wherein it appeared that prior to the removal of his restrictions, B.,

a minor Creek freedman, executed a warranty deed for his allotment to S., and put him in possession, and where S., after mortgaging the same to P., deeded the land to G., who, while in possession, received a valid conveyance thereto from B., and thereafter conveyed the land to J. by deed containing a covenant of warranty against all incumbrances, except a mortgage for \$705 in favor of P., which said amount was withheld by J. from the purchase money of the land. The court held in a suit for foreclosure that although B.'s deed to S. and the mortgage of S. to P. were void under this section, nevertheless J. was estopped to deny the validity of the mortgage.

SEC. 6. [Authority of Oklahoma probate courts over minor allottees — local agent of Interior Department for estates of minors — duties — appropriation — restriction on lands of minors — appropriation for suits — suits against vendees, etc., of town lots — conclusion of investigation — suits as to title, etc., of restricted lands.] That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is

hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior: *Provided*, That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.

And there is hereby further appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available and available until expended as the Attorney-General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to

any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma: *Provided*, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the western judicial district of Oklahoma.

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisement of such lot: *Provided*, That such investigation must be concluded within six months after the passage of this Act.

Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act. [35 Stat. L. 313.]

"Except as otherwise specifically provided by law."—In *Truskett v. Closser*, (C. C. A. 8th Cir. 1912) 198 Fed. 835, 117 C. C. A. 477, *affirmed* (1915) 236 U. S. 223, 35 S. Ct. 385, 59 U. S. (L. ed.) 549, the court said: "The appellants claim that the phrase 'except as otherwise specially provided by law' refers to and includes the laws of Oklahoma. It is apparent, however, that the law therein mentioned must be federal law, and not state law. It cannot for a moment be supposed that Congress would take the trouble to place under the jurisdiction of a particular court the affairs of Indian minors, and in the same section provide that the state might by its action entirely nullify that provision." See also *Barbre v. Hood*, (E. D. Okla. 1914) 214 Fed. 473.

The provision that the person and property of minor allottees of the Five Civilized Tribes shall, except as otherwise provided by law, be subject to the control and jurisdiction of the probate court of the state of Oklahoma is in the nature of a restriction, by Congress, on the alienation of land belonging to minor allottees, and can be removed only by a regular proceeding, provided by statute, through the instrumentality of the County Court. *Tirey v. Darneal*, (1913) 37 Okla. 606, 133 Pac. 614.

Construction of last clause.—In *Hickman v. U. S.*, (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820, *modifying and affirming* *U. S. v. Allen*, (C. C. A. 8th Cir. 1910) 179 Fed. 13, 103 C. C. A. 1, the court, commenting on the last clause of this section, said: "It is urged that

this clause did not confer authority to sue, but was inserted merely to rebut any possible inference of an intention to deny this right to the United States. This seems to us a strained construction in view of the obvious purpose of the Act. And it fails to give adequate effect to the words 'such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.'"

Jurisdiction.—By the express provisions of this section the probate courts of Oklahoma have jurisdiction of the persons and property of minor allottees of the Five Civilized Tribes. *Truskett v. Closser*, (1915) 236 U. S. 223, 35 S. Ct. 385, 59 U. S. (L. ed.) 549, *affirming* (C. C. A. 8th Cir. 1912) 198 Fed. 835, 117 C. C. A. 477.

In *Barbre v. Hood*, (E. D. Okla. 1914) 214 Fed. 473, the court, construing all the provisions of this Act together, concluded that it was the legislative intent to provide that the allotted lands of minor freedmen and mixed blood Indians, from which restrictions were in terms removed by the provisions of section 1 of the Act, might be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise.

Parties.—The allottee is not an indispensable party to a suit brought by the United States under the authority conferred by this Act to set aside a deed, lease, or contract made by an Indian allottee in violation of the statutory restrictions on alienation. *U. S. v. Allen*,

(C. C. A. 8th Cir. 1910) 179 Fed. 13, 103 C. C. A. 1 [*reversing* (E. D. Okla. 1909) 171 Fed. 907], *affirmed and modified* (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820.

Validity of deed by minor.—This section is construed in the nature of a restric-

tion by Congress as to the alienation of land by minor allottees, and such restriction can only be removed through the instrumentality of the probate court, and a deed executed by a minor is void. *Newsom v. Langford*, (Tex. Civ. App. 1915) 174 S. W. 1036.

SEC. 7. [Contests of selections of allotment — time limited.] That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor. [35 Stat. L. 315.]

See the note to section 1 of this Act, *supra*, p. 882.

SEC. 9. [Allottees — restrictions removed by death — conveyances — distribution of estates of Indians of half-blood or more — in case of no issue — acknowledgment of wills.] That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section. [35 Stat. L. 315.]

Section 23 of the Act of April 26, 1906, mentioned in the text, is given *supra*, p. 879.

Construction of statute.—This section provides that all allotted lands of enrolled full-blood Indians of the Five Civilized Tribes, and enrolled mixed bloods or three-quarters or more Indian blood "shall not be subject to alienation . . . prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions." It further provides that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act." It has been held that the latter provision does not apply to the supplemental agree-

ment with the Creek Indians approved June 30, 1902, ch. 1323, 32 Stat. L. 500, under which the restrictions on alienation of surplus allotments expired Aug. 8, 1907, but only to restrictions theretofore removed by the Secretary of the Interior, under authority of law, and to restrictions removed by Act of Congress theretofore passed, not for the purpose of imposing but of removing restrictions imposed by prior legislation; that under the first provision all allotments, whether of homestead or surplus lands, made to enrolled full bloods and mixed bloods of three-

quarters or more Indian blood are not alienable nor taxable until the restrictions thereby imposed have been removed. *U. S. v. Shock*, (1911) 187 Fed. 870.

Effect of statute.—This section applies to conveyance of interest of heirs of deceased allottee, whether such death occurred before or after May 27, 1908. *Harris v. Gale*, (1911) 188 Fed. 712. *Compare* (1909) 27 Op. Atty-Gen. 530.

Taxation of lands inherited from allottees.—The provision of this section that "the death of an allottee of the Five Civilized Tribes shall operate to remove all the restrictions upon the alienation of said allottee's land" is qualified by the further provision, first, that the full-blood heirs of such allottee cannot dispose of their interest in such inherited lands without the approval of the court having jurisdiction of the settlement of the estate of the deceased allottee, and second, if the deceased allottee be of one-half or more Indian blood, leaving children surviving him born since March 4, 1906, the homestead remains inalienable during the life or lives of such children, or until April 26, 1931, unless restrictions are sooner removed by the Secretary of the Interior. In view of such provisions, the interests of such full-blood heirs and the homesteads of deceased allottees of one-half or more Indian blood leaving children born since March 4, 1906, are not alienable or taxable until such restrictions are removed, but all other interests in such inherited lands are subject to taxation. *U. S. v. Shock*, (1911) 187 Fed. 870.

Necessity for approval by Secretary of the Interior.—Since the passage of this Act the approval by the Secretary of the Interior of a deed by a full-blood Indian heir is not necessary although the death of the allottee occurred before the passage of the Act; approval by the court having jurisdiction over the estate being sufficient. *U. S. v. Knight*, (C. C. A. 8th Cir. 1913) 206 Fed. 145, 124 C. C. A. 211.

The approval of the Secretary of the Interior was not necessary to the validity of the deed of full-blood Indian heirs executed Sept. 16, 1909, whose ancestor died August, 1907, the approval of the court having jurisdiction of the settlement of the ancestor's estate being all that is required by section 9. *MaHarry v. Eatman*, (1911) 29 Okla. 46, 116 Pac. 935.

Approval by the court.—The approval of the court provided for in this section does not require the performance of a judicial function, that is, the approval must not be necessarily the act of the court as distinguished from the act of the judge of the court. *Tiger v. Creek County Court*, (1915) 45 Okla. 701, 146 Pac. 912.

This section continues the right of alienation provided for by section 22 of the Act of April 26, 1906, *supra*, p. 874,

and further provides that the approval shall be by the court mentioned rather than by the Secretary of the Interior. The power and authority conferred upon the court is merely that conferred upon the Secretary of the Interior by the former Act, and the exercise of such authority therefore is purely a ministerial and not a judicial action. *In re Allen*, (1914) 44 Okla. 392, 144 Pac. 1055.

The actual pendency of an administration proceeding is not necessary to confer power upon a County Court to approve conveyance executed by full-blood heirs of Indian allottees to their inherited lands where it is made to appear to the court that the ancestor from whom the land was inherited resided in the county wherein the application for approval is made, at the time of his death. *Mullen v. Short*, (1913) 38 Okla. 333, 133 Pac. 230.

Effect of second proviso.—"While the general effect of the section, aside from the provisos, is to make the death of any allottee operate to remove all restrictions upon the alienation of his allotted lands, the effect of the second proviso is to make the existence of surviving issue, born after March 4, 1906, operate to extend restrictions upon the alienation of the homestead until April 26, 1931, or until the death of such surviving issue, if that occur prior to the last-mentioned date. In other words, in such case the homestead continues inalienable after the death of the allottee, just as it was before his death. The allottee before his death, owner in fee of the homestead, of course had the right of possession and occupancy of the homestead for his use and support; that is, such use and support as he might derive from it by means other than alienation. At the death of the allottee, intestate, the title to the homestead of course vests in his heirs. But, if there be among them a child or children born after March 4, 1906, then it still remains inalienable pending the term provided for in such contingency, and such child or children by force of the Act have the same right of possession and occupancy for their use and support which their ancestor had during his life, to the exclusion of the other heirs, for the term of years extending from the death of the allottee to April 26, 1931, or to the date of the death of such child or children, if that shall happen before the last-mentioned date. *Riley v. Kelsey*, (E. D. Okla. 1914) 218 Fed. 391.

Use and support.—The use and support contemplated by the Act is only such use and support as may be derived from the land by means other than alienation, for it continues inalienable. Such use is clearly only its use for agricultural or grazing purposes, or such other use as will not conflict with the provision against alienation of the land. Leasing the land for oil and gas purposes therefore could

not have been contemplated in the use permitted, because the taking of the oil and gas under the right granted by an oil and gas lease amounts to a disposition of that

portion of the very corpus of the property, represented by the oil and gas, and is, to that extent, an alienation of a portion of the land.

SEC. 10. [Choctaw and Chickasaw warrants — payment of outstanding — payment to holders for value — to original payees.] That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw nations respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw nations, and drawn on the national treasurers thereof prior to January first, nineteen hundred and seven, with six per cent interest per annum from the respective dates of said warrants: *Provided*, That said warrants be presented to the United States Indian agent at the Union Agency, Muskogee, Oklahoma, within sixty days from the passage of this act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: *Provided further*, That such warrants remaining in the hands of the original payee shall be paid by said Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee. [35 Stat. L. 315.]

SEC. 11. [Seminole lands — payment of royalties to lessor, etc.— interest of Seminole Nation to cease June 30, 1908.] That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight. [35 Stat. L. 316.]

SEC. 12. [Deposit of tribal allotment records — appropriation for copies to counties of Oklahoma.] That all records pertaining to the allotment of lands of the Five Civilized Tribes shall be finally deposited in the office of the United States Indian agent, Union Agency, when and as the Secretary of the Interior shall determine such action shall be taken, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available as the Secretary of the Interior may direct, the sum of fifteen thousand dollars, or so much thereof as may be necessary to enable the Secretary of the Interior to furnish the various counties of the State of Oklahoma certified copies of such portions of said records as affect title to lands in the respective counties. [35 Stat. L. 316.]

See the notes to section 1 of this Act, *supra*, p. 882.

SEC. 14. [Town sites — sale of lots in, established — coal and asphalt retained.] That the provisions of section thirteen of the Act of Congress

approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven), shall not apply to town lots in town sites heretofore established, surveyed, platted, and appraised under the direction of the Secretary of the Interior, but nothing herein contained shall be construed to authorize the conveyance of any interest in the coal or asphalt underlying said lots. [35 Stat. L. 316.]

Section 13 of the Act of April 26, 1906, above referred to, is given *supra*, p. 869.

VII. RIGHTS OF WAY THROUGH INDIAN LANDS

An Act To provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes.

[Act of March 2, 1899, ch. 374, 30 Stat. L. 990.]

[SEC. 1.] [Rights of way for railways, etc., through Indian Reservations, etc. — Stations.] That a right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder: *Provided*, That no right of way shall be granted under this Act until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard: *Provided further*, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby.

Provided also, That as a condition precedent to each and every grant of a right of way under authority of this Act, each and every railway company applying for such grant shall stipulate that it will construct and permanently maintain suitable passenger and freight stations for the convenience of each and every town site established by the Government along said right of way. [30 Stat. L. 990, as amended by 36 Stat. L. 859.]

This is the first section of the "Railroad Right of Way Act." It was amended by a provision of the Act of June 25, 1910, ch. 431, § 16, by adding thereto the last proviso, making it read as given in the text.

In so far as it applied to the Indian and Oklahoma Territories, this Act was repealed by an Act of Feb. 28, 1902, ch. 134, § 23, 32 Stat. L. 50, *infra*, p. 902.

SEC. 2. [Width of right of way — stations.] That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include grounds adjacent thereto for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed two hundred feet in width by a length of three thousand feet, and not more than one station to be located within any one continuous length of ten miles of road. [30 Stat. L. 990, as amended by 34 Stat. L. 330.]

This section was amended to read as above given by the Act of June 21, 1906, ch. 3504, § 1. As originally enacted it was as follows:

"**SEC. 2.** That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road: *Provided*, That this section shall apply to all rights of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the Act granting the same." [30 Stat. L. 990.]

SEC. 3. [Survey, and proceedings for award of compensation.] That the line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian

Territory, then to the United States district court for such State or Territory, where the case shall be tried *de novo* and the judgment for damages rendered by the court shall be final and conclusive. When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company. [30 Stat. L. 991.]

SEC. 4. [Effect of dilatoriness in construction, etc.] That if any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned *ipso facto* as to that portion of the road not then constructed and in operation: *Provided*, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built. [30 Stat. L. 991.]

SEC. 5. [Railroad through Indian Territory — annual charge — rates — transportation of mails.] That where a railroad is constructed under the provisions of this Act through the Indian Territory there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular nation or tribe through whose lands the road may be located, such an annual charge as may be prescribed by the Secretary of the Interior, not less than fifteen dollars for each mile of road, the same to be paid so long as said land shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise required herein. And within the Indian Territory upon any railroad constructed under the provisions of this Act the rates and charges for passenger and freight service, if not otherwise prescribed by law, may be prescribed by the Secretary of the Interior from time to time, and the grants herein are made upon condition that the companies shall transport mails whenever required to do so by the Post-Office Department. [30 Stat. L. 991.]

SEC. 6. [Railroad rights on public lands.] That the provisions of section two of the Act of March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," are hereby extended and made applicable to rights of way granted under this Act and to railroad companies obtaining such rights of way. [30 Stat. L. 991.]

For the Act of March 3, 1875, ch. 152, § 2, 18 Stat. L. 482, to which the text refers, see the title PUBLIC LANDS.

SEC. 7. [Regulations.] That the Secretary of the Interior shall make all needful rules and regulations, not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this Act. [30 Stat. L. 991.]

SEC. 8. [Repeal.] That Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof. [30 Stat. L. 991.]

SEC. 3. [Construction of telegraph and telephone lines through Indian lands.] That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities. * * * [31 Stat. L. 1083.]

The provisions of the text, and those of the following section 4, are from the Indian Appropriation Act of March 3, 1901, ch. 832.

A further provision of the foregoing section 3, relating to condemnation of lands allotted in severalty, is given *supra*, p. 846.

Effect of statute on local regulations.—
“When Congress, on March 3, 1901 (31 Stat. L. 1083), in the exercise of its constitutional power to regulate commerce,

saw fit to provide how franchises for the construction and maintenance of telephone lines within the Indian Territory must be obtained, such action on its

part necessarily prevailed over all local regulations on the subject, and operated to extinguish such exclusive rights to construct and maintain lines of telephone or telegraph within the territory as had theretofore been granted. No act of the Creek Nation on a subject within the lawful jurisdiction of the federal government

can be given the effect of nullifying or interfering to any extent with legislation by the Congress of the United States, when it sees fit to pass laws on the subject." *Muskogee Nat. Telephone Co. v. Hall*, (C. C. A. 1902) 118 Fed. 382, 55 C. C. A. 208, *reversing* (1901) 4 Indian Ter. 18, 64 S. W. 600.

SEC. 4. [Opening highways through Indian lands.] That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation. [31 Stat. L. 1084.]

See the notes to the preceding section 3 of this Act.

SEC. 13. [General right of way to railroads.] That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this Act. [32 Stat. L. 47.]

This and the following sections 14-23, inclusive, are from an Act of Feb. 28, 1902, ch. 134, entitled "An Act To grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes." Said sections 13-23 were, in some respects, continued in force in the state of Oklahoma by the Act of May 27, 1908, ch. 199, § 1, 35 Stat. L. 312, *supra*, p. 881.

SEC. 14. [Width — stations, etc. — yards, etc. — water supply — changes.] That the right of way of any railway company shall not exceed one hundred feet in width except where there are heavy cuts and fills, when one hundred feet additional may be taken on each side of said right of way; but lands additional and adjacent to said right of way may be taken and condemned by any railway company for station grounds, buildings, depots, side tracks, turnouts, or other railroad purposes not exceeding two hundred feet in width by a length of two thousand feet. That additional lands not exceeding forty acres at any one place may be taken by any railway company when necessary for yards, roundhouses, turntables, machine shops, water stations, and other railroad purposes. And when necessary for a good and sufficient water supply in the operation of any railroad, any

such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purposes; and any railway company shall have the right to change or straighten its line, reduce its grades or curves, and locate new stations and to take the lands and right of way necessary therefor under the provisions of this Act. [32 Stat. L. 47.]

See the notes to the preceding section 13 of this Act.

SEC. 15. [Damages — maps — appraisement by referees — work to begin on deposit of award — abandonment of right of way — appeal.] That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated: *Provided*, That correct maps of the said line of railroad in sections of twenty-five miles each, and of any lands taken under this Act, shall be filed in the Department of the Interior, and shall also be filed with the United States Indian agent for Indian Territory, and with the principal chief or governor of any tribe or nation through which the lines of railroad may be located or in which said lines are situated. In case of the failure of any railway company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or lands or improvements sought to be appropriated or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of jurisdiction in the district where such lands are situated, on application of the corporation or other person or party in interest. Such referees, before entering upon the duties of their appointment, shall each take and subscribe, before competent authority, an oath that he will faithfully and impartially discharge the duties of his appointment, which oaths, duly certified, shall be returned with the award of the referees to the clerk of the court by which they were appointed. The referees shall also find in their report the names of the person and persons, tribe, or nation to whom the damages are payable and the interest of each person, tribe, or nation in the award of damages. Before such referees shall proceed with the assessment of damages for any right of way or other lands condemned under this Act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, by publication in some newspaper in general circulation nearest said property in the district where said right of way or said lands are situated, or by ten days' personal notice to each person owning or having any interest in said lands or right of way: *Provided*, That such notice to any tribe or nation may be

served on the principal chief or governor of the tribe. If the referees can not agree, then any two of them are authorized to and shall make the award. Any party to the proceedings who is dissatisfied with the award of the referees shall have the right, within ten days after the making of the award, to appeal, by original petition, to the United States court, or other court of competent jurisdiction, sitting at the place nearest and most convenient to the property sought to be taken, where the question of the damages occasioned by the taking of the lands in controversy shall be tried *de novo*, and the judgment rendered by the court shall be final and conclusive, subject, however, to appeal as in other cases. When the award of damages is filed with the clerk of the court by the referees, the railway company shall deposit the amount of such award with the clerk of the court, to abide the judgment thereof, and shall then have the right to enter upon and take possession of the property sought to be condemned: *Provided*, That when the said railway company is not satisfied with the award, it shall have the right, before commencing construction, to abandon any portion of said right of way and adopt a new location, subject, however, as to such new location, to all the provisions of this Act. Each of the referees shall receive for his compensation the sum of four dollars per day while actually engaged in the appraisalment of the property and the hearing of any matter submitted to them under this Act. Witnesses shall receive the fees and mileage allowed by law to witness[es] in courts of record within the districts where such lands are located. Costs, including compensation of the referees, shall be made part of the award or judgment and be paid by the railway company: *Provided*, That if any party or person other than the railway company shall appeal from any award, and the judgment of the court does not award such appealing party or person more than the referees awarded, all costs occasioned by such appeal shall be paid by such appealing party or person. [32 Stat. L. 47.]

See the notes to section 13 of this Act, *supra*, p. 897.

Notice by referee.—Where, in a suit for 160 acres of land, defendant disclaimed as to all but 49 acres thereof, to which it set up title in virtue of alleged condemnation proceedings pursuant to this section, which requires notice by the referees "to all persons interested," and where the notice given was "to all persons having any claim or any interest in said described premises of whatsoever kind or nature," without naming the plaintiffs who were conceded to be the owners thereof, it was held that said notice was void and conferred no jurisdiction on the court, and that, too, although the judgment approving the report of the referees recited that they "gave notice in the manner as provided by law." *Bruner v.*

Ft. Smith, etc., R. Co., (1912) 33 Okla. 711, 127 Pac. 700.

Compensation for damages.—Under this section "before a railway company exercising the right of eminent domain thereunder may take or condemn lands, full compensation for the same and for all damages done by the construction of the road or the taking of the lands must be first made to the individual owner, occupant, or allottee of such lands or to the tribe or nation through or in which the same is situated, and where possession is taken without such payment, and the land is subsequently allotted, the allottee may maintain ejectment to secure possession." *Denver, etc., R. Co. v. Adkinson*, (1911) 28 Okla. 1, 119 Pac. 247.

SEC. 16. [Annual rental — regulation of freight and other charges — interstate transportation — mails.] That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an

annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein; and the grants herein are made upon the condition that Congress hereby reserves the right to regulate the charges for freight and passengers on said railways and messages on all telegraph and telephone lines until a State government or governments shall exist in said Territory within the limits of which any railway shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by such railways; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railways whenever such transportation shall extend from one State into another, or shall extend into more than one State; and that the railway companies shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation. [32 Stat. L. 49.]

See the notes to section 13 of this Act, *supra*, p. 897.

SEC. 17. [Crossings, etc.—referees—condemnation proceedings—limitations—appeal—deposit of compensation—bond for damages—forfeiture.] That any railway company authorized to construct, own, or operate a railroad in said Territory desiring to cross or unite its tracks with any other railroad upon the grounds of such other railway company shall, after fifteen days' notice in writing to such other railroad company, make application in writing to the judge of the United States court for the district in which it is proposed to make such crossing or connection for the appointment of three disinterested referees to determine the necessity, place, manner, and time of such crossing or connection. The provisions of section three of this Act with respect to the condemnation of right of way through tribal or individual lands shall, except as in this section otherwise provided, apply to proceedings to acquire the right to cross or connect with another railroad. Upon the hearing of any such application to cross or connect with any other railroad, either party or the referees may call and examine witnesses in regard to the matter, and said referees shall have the same power to administer oaths to witnesses that is now possessed by United States commissioners in said Territory, and said referees shall, after such hearing and a personal examination of the locality where a crossing or connection is desired, determine whether there is a necessity for such crossing or not, and if so, the place thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects the manner of such crossing and the terms upon which the same shall be made and maintained: *Provided*, That no crossing shall be made through the yards or over the switches or side tracks of any existing railroad if a crossing can be effected at any other place that is practicable. If either party shall be dissatisfied with the terms of the order made by said referees it may appeal to the United States court of the Indian Territory for the district wherein such crossing or connection is sought to be made in the same manner as appeals are allowed from a judgment of a United States commissioner to said court, and said appeal and all subsequent proceedings shall only affect the amount of compensation, if any,

and other terms of crossing fixed by said referees, but shall not delay the making of said crossing or connection: *Provided*, That the corporation desiring such crossing or connection shall deposit with the clerk of the court the amount of compensation, if any is fixed by said referees, and shall execute and file with said clerk a bond of sufficient security, to be approved by the court or a judge thereof in vacation, to pay all damages and comply with all terms that may be adjudged by the court. Any railway company which shall violate or evade any of the provisions of this section shall forfeit for every such offense, to the person, company, or corporation injured thereby, three times the actual damages sustained by the party aggrieved. [32 Stat. L. 49.]

See the notes to section 13 of this Act, *supra*, p. 897.

SEC. 18. [Automatic signals at crossings — approval by Interstate Commerce Commissioners — common grade crossing.] That when in any case two or more railroads crossing each other at a common grade shall, by a system of interlocking or automatic signals, or by any works or fixtures to be erected by them, render it safe for engines and trains to pass over such crossing without stopping, and such interlocking or automatic signals or works or fixtures shall be approved by the Interstate Commerce Commissioners, then, in that case, it is hereby made lawful for the engines and trains of such railroad or railroads to pass over such crossing without stopping, any law or the provision of any law to the contrary notwithstanding; and when two or more railroads cross each other at a common grade, either of such roads may apply to the Interstate Commerce Commissioners for permission to introduce upon both of said railroads some system of interlocking or automatic signals or works or fixtures rendering it safe for engines and trains to pass over such crossings without stopping, and it shall be the duty of said Interstate Commerce Commissioners, if the system of works and fixtures which it is proposed to erect by said company are, in the opinion of the Commission, sufficient and proper, to grant such permission. [32 Stat. L. 49.]

See the notes to section 13 of this Act, *supra*, p. 897.

SEC. 19. [Notice of intent to use signals at crossings — division of cost.] That any railroad company which has obtained permission to introduce a system of interlocking or automatic signals at its crossing at a common grade with any other railroad, as provided in the last section, may, after thirty days' notice, in writing, to such other railroad company, introduce and erect such interlocking or automatic signals or fixtures; and if such railroad company, after such notification, refuses to join with the railroad company giving such notice in the construction of such works or fixtures, it shall be lawful for said company to enter upon the right of way and tracks of such second company, in such manner as to not unnecessarily impede the operation of such road, and erect such works and fixtures, and may recover in any action at law from such second company one-half of the total cost of erecting and maintaining such interlocking or automatic signals or works or fixtures on both of said roads. [32 Stat. L. 50.]

See the notes to section 13 of this Act, *supra*, p. 897.

SEC. 20. [Mortgages.] That all mortgages executed by any railway company conveying any portion of its railway, with its franchises, that may be constructed in said Indian Territory, shall be recorded in the Department of the Interior, and the record thereof shall be evidence and notice of their execution, and shall convey all rights, franchises, and property of said company as therein expressed. [32 Stat. L. 50.]

See the notes to section 13 of this Act, *supra*, p. 897.

SEC. 21. [Amendment.] That Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof. [32 Stat. L. 50.]

See the notes to section 13 of this Act, *supra*, p. 897.

SEC. 22. [General extension of privileges — extension of time.] That any railway company which has heretofore acquired, or may hereafter acquire, under any other Act of Congress, a railroad right of way in Indian Territory may, in the manner herein prescribed, obtain any or all of the benefits and advantages of this Act, and in such event shall become subject to all the requirements and responsibilities imposed by this Act upon railroad companies acquiring a right of way hereunder. And where the time for the completion of a railroad in Indian Territory under any Act granting a right of way therefor has expired, or shall hereafter expire, in advance of the construction of such railroad, or of any part thereof, the Secretary of the Interior may, upon good cause shown, extend the time for the completion of such railroad, or of any part thereof, for a time not exceeding two years from the date of such extension. [32 Stat. L. 50.]

See the notes to section 13 of this Act, *supra*, p. 897.

SEC. 23. [Repeals — application of act.] That an Act entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes," approved March second, eighteen hundred and ninety-nine, so far as it applies to the Indian Territory and Oklahoma Territory, and all other Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided*, That such repeal shall not affect any railroad company whose railroad is now actually being constructed, or any rights which have already accrued; but such railroads may be completed and such rights enforced in the manner provided by the laws under which such construction was commenced or under which such rights accrued: *And provided further*, That the provisions of this Act shall apply also to the Osages' Reservation and other Indian reservations and allotted Indian lands in the Territory of Oklahoma, and all judicial proceedings herein authorized, may be commenced and prosecuted in the courts of said Oklahoma Territory which may now or hereafter exercise jurisdiction within said reservations or allotted lands. [32 Stat. L. 50.]

See the notes to section 13 of this Act, *supra*, p. 897.

The Act of March 2, 1899, ch. 374, mentioned in the text, is given *supra*, p. 893 et seq.

An Act Authorizing the Secretary of the Interior to grant right of way for pipe lines through Indian lands.

[*Act of March 11, 1904, ch. 505, 33 Stat. L. 65.*]

[SEC. 1.] **[Right of way through Indian lands for pipe lines.]** That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company; *Provided further*, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements can not be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not

to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. [33 Stat. L. 65.]

Constitutionality.—This section in so far as it authorizes the Secretary of the Interior to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through lands which have been allotted in severalty to any individual Indian

under any law or treaty, but which has not been conveyed to the allottee with full power of alienation, is not subject to the objection that it is in violation of the Fifth Amendment to the Federal Constitution. *Texas Co. v. Henry*, (1912) 34 Okla. 342, 126 Pac. 224.

SEC. 2. [Amendment or repeal.] The right to alter, amend, or repeal this Act is expressly reserved. [33 Stat. L. 65.]

[SEC. 1.] **Grant of lands to railroads in Indian reservations for reservoirs, etc. — conveyance of lands — restriction — land for tree planting — use of proceeds.]** * * * That when, in the judgment of the Secretary of the Interior, it is necessary for any railway company owning or operating a line of railway in any Indian reservation to acquire lands in such Indian reservation for reservoirs, material, or ballast pits for the construction, repair, and maintenance of its railway, or for the purpose of planting and growing thereon trees to protect its line of railway, the said Secretary be, and he is hereby, authorized to grant such lands to any such railway company under such terms and conditions and such rules and regulations as may be prescribed by the said Secretary.

That when any railway company desiring to secure the benefits of this provision shall file with the Secretary of the Interior an application describing the lands which it desires to purchase, and upon the payment of the price agreed upon the said Secretary shall cause such lands to be conveyed to the railway company applying therefor upon such terms and conditions as he may deem proper: *Provided*, That no lands shall be acquired under the terms of this provision in greater quantities than forty acres for any one reservoir, and one hundred and sixty acres for any material or ballast pit, to the extent of not more than one reservoir and one material or gravel pit in any one section of ten miles of any such railway in any Indian reservation: *And provided further*, That the lands acquired for tree planting shall be taken only at such places along the line of the railway company applying therefor as in the judgment of the said Secretary may be necessary, and shall be taken in strips adjoining and parallel with the right of way of the railway company taking the same, and shall not exceed one hundred and fifty feet in width.

That all moneys paid for such lands shall be deposited in the Treasury of the United States to the credit of the tribe or tribes, and the moneys received by said Secretary as damages sustained by individual members of the Indian tribe, which damages shall be ascertained by the Secretary of the Interior and paid by the railway company taking such lands, shall be paid by said Secretary to the Indian or Indians sustaining such damages. [35 Stat. L. 781.]

This is from the Indian Appropriation Act of March 3, 1909, ch. 263.

These provisions were extended by the Act of May 6, 1910, ch. 204, next following.

An Act Granting lands for reservoirs, and so forth.*[Act of May 6, 1910, ch. 204, 36 Stat. L. 239.]*

[Acquisition by railways for reservoirs, etc., of lands allotted to Indians in severalty.] That the provisions of the Act entitled "An Act making appropriation for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and ten," approved March third, nineteen hundred and nine, which authorized the Secretary of the Interior to grant to railway companies lands in Indian reservations for reservoirs, material or ballast pits, or for the purpose of planting and growing trees to protect their lines of railway, be, and the same are hereby, extended and made applicable to any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation; that the damages and compensation to be paid to any Indian allottee shall be ascertained and fixed in such manner as the Secretary of the Interior may direct and shall be paid by the railway company to said Secretary; that the damages and compensation paid to the Secretary of the Interior by the railway company taking any such land shall be paid by said Secretary to the allottee sustaining such damages. *[36 Stat. L. 349.]*

The provisions of the Act of March 3, 1909, ch. 263, mentioned in the text, are given in the section preceding this Act.

VIII. INSTRUCTION OF INDIANS

Sec. 2071. [President may employ instructors for Indians.] The President may, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties. A report of the proceedings adopted in the execution of this provision shall be annually laid before Congress. *[R. S.]*

Act of March 3, 1819, ch. 85, 3 Stat. L. 516.

Compulsory attendance at school.—This section, considered in connection with the treaty with the Blackfeet tribe, has been held to give the United States no right to the possession, custody, and care of the children of such tribe nor the power to compel such children to attend school. *U. S. v. Imoda, (1881) 4 Mont. 38, 1 Pac. 721.*

Purpose of Act of 1819.—"This Act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists." *Worcester v. Georgia, (1832) 6 Pet. 515, 8 U. S. (L. ed.) 483, per Marshall, C. J.*

Sec. 2072. [When tribes may direct the employment of blacksmiths, etc.] Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths,

mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe. [R. S.]

Act of June 30, 1834, ch. 162, 4 Stat. L. 737.

SEC. 7. [Detail of Army officer for Indian education.] That the Secretary of War shall be authorized to detail an officer of the Army, not above the rank of captain, for special duty with reference to Indian education. [21 Stat. L. 35.]

This section is from the Indian Appropriation Act of June 23, 1879, ch. 35. See also the Act immediately following.

An Act to provide additional industrial training-schools for Indian youth, and authorizing the use of unoccupied military barracks for such purposes.

[Act of July 31, 1882, ch. 363, 22 Stat. L. 181.]

[Barracks for Indian training-schools — money appropriated for education among Indians may be expended there.] That the Secretary of War be, and he is hereby, authorized to set aside, for use in the establishment of normal and industrial training-schools for Indian youth from the nomadic tribes having educational treaty claims upon the United States, any vacant posts or barracks, so long as they may not be required for military occupation, and to detail one or more officers of the Army for duty in connection with Indian education, under the direction of the Secretary of the Interior, at each such school so established: *Provided*, That moneys appropriated or to be appropriated for general purposes of education among the Indians may be expended, under the direction of the Secretary of the Interior, for the education of Indian youth at such posts, institutions, and schools as he may consider advantageous, or as Congress from time to time may authorize and provide. [22 Stat. L. 181.]

This Act superseded R. S. sec. 2099, noted under R. S. sec. 2098, *supra*, p. 775.

The provision in the preceding section 7 of the text, that a detailed officer shall not be above the rank of captain, would seem to qualify the above provision also. See as to construction of statutes in *pari materia*, article on "Statutes and Statutory Construction," vol. 1, p. 84.

SEC. 9. [Indian agents to submit census in annual reports.] That hereafter each Indian agent be required, in his annual report, to submit a census of the Indians at his agency or upon the reservation under his charge, the number of males above eighteen years of age, the number of females above fourteen years of age, the number of school children between the ages of six and sixteen years, the number of school-houses at his agency, the number of schools in operation and the attendance at each, and the names of teachers employed and salaries paid such teachers. [23 Stat. L. 98.]

This is from the Indian Appropriation Act of July 4, 1884, ch. 180.

[SEC. 1.] [Annual report of expenditure of education fund.] For support of schools. * * * That the Secretary of the Interior shall report annually, on or before the first Monday of December of each year, in what manner and for what purposes the general education fund for the preceding fiscal year has been expended; and said report shall embrace the number and kind of school-houses erected, and their cost, as well as cost of repairs, names of every teacher employed, and compensation allowed, the location of each school, and the average attendance at each school: * * * [24 Stat. L. 465.]

This is from the Indian Appropriation Act of March 2, 1887, ch. 320. Similar provisions were contained in prior Appropriation Acts.

SEC. 10. [Superintendent of Indian schools — appointment — duties.] * * * That there shall be appointed by the President, by and with the advice and consent of the Senate, a person of knowledge and experience in the management, training, and practical education of children, to be Superintendent of Indian Schools, whose duty it shall be to visit and inspect the schools in which Indians are taught in whole or in part from appropriations from the United States Treasury, and report to the Commissioner of Indian Affairs what, in his judgment, are the defects, if any, in any of them, in system, in administration, or in means for the most effective advancement of the pupils therein toward civilization and self-support, and what changes are needed to remedy such defects as may exist, and to perform such other duties in connection with Indian schools as may be prescribed by the Secretary of the Interior. * * * [25 Stat. L. 1003.]

This section is from the Indian Appropriation Act of March 2, 1889, ch. 412.

This Act fixes no salary, and current appropriations are merely for the support of Indian schools; see the Act of Aug. 1, 1914, ch. 222, 38 Stat. L. 584. Superintendents of schools may act as Indian agents by order of the commissioner of Indian affairs with the approval of the Secretary of the Interior; see the Act of March 1, 1907, ch. 2285, § 1, *supra*, p. 850.

The concluding part of the section given in the text expressly repealed section 8 of the Act of June 29, 1888, ch. 503, 25 Stat. L. 238, which read as follows: "That there shall be appointed by the President, by and with the advice and consent of the Senate, a person of knowledge and experience in the management, training, and practical education of children, to be superintendent of Indian schools, who shall, from time to time, and as often as the nature of his duties will permit, visit the schools where Indians are taught, in whole or in part, by appropriations from the United States Treasury, and shall, from time to time, report to the Secretary of the Interior, what, in his judgment, are the defects, if any, in any of them in system, in administration, or in means for the most effective advancement of the children in them toward civilization and self-support; and what changes are needed to remedy such defects as may exist; and shall, subject to the approval of the Secretary of the Interior, employ and discharge superintendents, teachers, and any other person connected with schools wholly supported by the Government, and with like approval make such rules and regulations for the conduct of such schools as in his judgment their good may require. The Secretary of the Interior shall cause to be detailed from the employees of his Department such assistants and shall furnish such facilities as shall be necessary to carry out the foregoing provisions respecting said Indian schools."

Not to affect existing appointments.— This section had no effect on existing appointments, and the incumbents of the various positions connected with the Indian schools, supported and controlled by the government, were lawfully in the public service after the Act of June 29,

1888, became operative, without an order of the Secretary of the Interior of that date, and such incumbents having rendered service since the beginning of the current fiscal year should be paid accordingly. (1889) 19 Op. Atty-Gen. 252.

[Rules to secure attendance at schools.] * * * That hereafter the Commissioner of Indian Affairs, subject to the direction of the Secretary of the Interior, is hereby authorized and directed to make and enforce by proper means such rules and regulations as will secure the attendance of Indian children of suitable age and health at schools established and maintained for their benefit. [27 Stat. L. 143.]

This is from the Indian Appropriation Act of July 13, 1892, ch. 164.

The same provision without the word "hereafter" appears in the Indian Appropriation Act of March 3, 1891, ch. 543, 26 Stat. L. 1014. The introduction of the "hereafter" in the provision given in the text determines its character as general and permanent legislation. *Compilers' note, 2 Supp. R. S. 33.*

[Sec. 1.] [Rations, etc., may be withheld for nonattendance at school—subsistence withheld to be credited to tribe.] * * * The Secretary of the Interior may in his discretion, establish such regulations as will prevent the issuing of rations or the furnishing of subsistence either in money or in kind to the head of any Indian family for [or] on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year in accordance with such regulations. This provision shall not apply to reservations or part of reservations where sufficient school facilities have not been furnished nor until full notice of such regulations shall have been given to the Indians to be affected thereby. The amount and value of subsistence so withheld shall be credited to the tribe or tribes from whom the same is withheld, to be issued and paid when in the judgment of the Secretary of the Interior they shall have fully complied with such regulations. * * * Hereafter the Secretary of the Interior may in his discretion withhold rations, clothing and other annuities from Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school a reasonable portion of each year. [27 Stat. L. 628, 635.]

This is from the Indian Appropriation Act of March 3, 1893, ch. 209.

Somewhat similar provisions were made by the Act of June 30, 1913, ch. 4, § 18, *infra*, p. 912.

Attendance at schools outside reservation.—Attendance of children at schools not within the limits of the reservation cannot be compelled under this section

construed in connection with the Act of March 2, 1895, ch. 188, *infra*, p. 909. *See* *Lelah-puc-ka-chee*, 98 Fed. 429.

[Sec. 1.] [Equal education to those taking lands in severalty.] * * * That hereafter in the expenditure of money appropriated for any of the purposes of education of Indian children, those children of Indians who have taken or may hereafter take lands in severalty under any existing law shall not, by reason thereof, be excluded from the benefits of such appropriation. [28 Stat. L. 311.]

This is from the Indian Appropriation Act of Aug. 15, 1894, ch. 290. The same provision, including the word "hereafter," appears in the Indian Appropriation Act of July 13, 1892, ch. 164, 27 Stat. L. 143, and without the word "hereafter" in the Indian Appropriation Act of March 3, 1893, ch. 209, 27 Stat. L. 638. The word "hereafter" in the provision given in the text determines its character as general and permanent legislation. *Compilers' note, 2 Supp. R. S. 33.*

[SEC. 1.] [Consent of parent to send child out of State, etc.] That hereafter no Indian child shall be sent from any Indian reservation to a school beyond the State or Territory in which said reservation is situated without the voluntary consent of the father or mother of such child if either of them are living, and if neither of them are living without the voluntary consent of the next of kin of such child. Such consent shall be made before the agent of the reservation, and he shall send to the Commissioner of Indian Affairs his certificate that such consent has been voluntarily given before such child shall be removed from such reservation. And it shall be unlawful for any Indian agent or other employee of the Government to induce, or seek to induce, by withholding rations or by other improper means, the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation. [28 Stat. L. 906.]

This is from the Indian Appropriation Act of March 2, 1895, ch. 188. See further provision in the next paragraph of the text.

The same provision without the word "hereafter" appears in the Indian Appropriation Act of Aug. 15, 1894, ch. 290, § 11, 28 Stat. L. 313. The addition of the word "hereafter" indicates an intention to make the provision permanent. *Compilers' note*, 2 Supp. R. S. 428.

Attendance at school outside reservation.—"The agent and school superintendent at the Tama county reservation cannot by force or compulsion take the Indian children from the reservation

proper and keep them at the Indian training school, without the consent of the parents or those who may stand in that relation to them." *In re Lelah-puc-kachee*, 98 Fed. 429.

[SEC. 1.] [Written consent of parent to take pupil to another State.] That hereafter no Indian child shall be taken from any school in any State or Territory to a school in any other State against its will or without the written consent of its parents. [29 Stat. L. 348.]

This is from the Indian Appropriation Act of June 10, 1896, ch. 398. As to the effect of the word "hereafter," see the note to the preceding paragraph of the text.

The Indian Appropriation Act of March 3, 1909, ch. 263, 35 Stat. L. 783, provided: "That no Indian pupil under the age of fourteen years shall be transported at Government expense to any Indian school beyond the limits of the State or Territory in which the parents of such child reside or of the adjoining State or Territory."

[SEC. 1.] [No appropriation hereafter for sectarian schools.] * * * And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school: [30 Stat. L. 79.]

This and the following paragraph of the text are from the Indian Appropriation Act of June 7, 1897, ch. 3. Provisions similar to those of the text appear in the Indian Appropriation Act of June 10, 1896, ch. 398, 29 Stat. L. 345.

The provisions of the text would seem to supersede that part of the Act of June 29, 1883, ch. 503, § 10, 25 Stat. L. 239, reading as follows: "SEC. 10. That at day or industrial schools sustained wholly or in part by appropriations contained in this Act, and at which schools church organizations are assisting in the educational work, the christian bible may be taught in the native language of the Indians, if in the judgment of the persons in charge of the schools it may be deemed conducive to the moral welfare and instruction of the pupils in such schools;" as well as a provision of the Act of March 2, 1895, ch. 188, 28 Stat. L. 904, that "the Government shall, as early as practicable, make provision for the education of Indian children in Government schools."

The declaration of policy that the government shall make "no appropriation whatever for education in any sectarian school," contained in the various Indian Appropriation Acts, has reference only to gratuitous appropriations of public moneys, and has no application to appropriations made to fulfill obligations under the Sioux treaty of April 29, 1868, 15

Stat. L. 635, 637, or to expenditures of the income of the trust fund set apart by the Act of March 2, 1889, 25 Stat. L. 888, 894, 895, ch. 405, § 17, for the use of the Sioux Nation, in part consideration of cessions of lands to the United States. *Quick Bear v. Leupp*, (1907) 30 App. Cas. (D. C.) 151, *affirmed* (1908) 210 U. S. 50, 28 S. Ct. 690, 52 U. S. (L. ed.) 954.

[Indians to be employed as assistant matrons, farmers, etc.] * * *

That hereafter the Commissioner of Indian Affairs shall employ Indian girls as assistant matrons and Indian boys as farmers and industrial teachers in all Indian schools when it is practicable to do so. [30 Stat. L. 83.]

See the note to preceding paragraph of the text.

The same provision without the word "hereafter" appears in Indian Appropriation Acts of March 2, 1895, ch. 188, 28 Stat. L. 906, and June 10, 1896, ch. 398, 29 Stat. L. 348. The use of the word "hereafter" indicates a purpose to make the provision permanent. *Compilers' note*, 2 *Supp. R. S.* 629.

See also article on "Statutes and Statutory Construction," vol. 1, p. 14.

[SEC. 1.] [White children in Indian schools.] * * * That hereafter white children may, under rules prescribed by the Commissioner of Indian Affairs, be admitted to Indian boarding schools on the payment of tuition fees at a rate to be fixed in said rules: *Provided further*, That all tuition fees paid for white children so enrolled shall be deposited in the United States Treasury to reimburse the fund out of which the school is supported. [35 Stat. L. 783.]

This is from the Indian Appropriation Act of March 3, 1903, ch. 263.

See further the Act of March 1, 1907, ch. 2285, § 1, *infra*, p. 911.

[SEC. 1.] [Discontinuance of schools, etc.] * * * That the Commissioner of Indian Affairs, may, when in his judgment the good of the service will be promoted thereby, suspend or discontinue any reservation Indian school, and, with the approval of the Secretary of the Interior, may sell any reservation school building or plant, that is no longer desirable as an Indian school upon any reservation and invest the proceeds in other school buildings and plants, as the needs of the service may demand, under such rules and regulations as he may, with the approval of the Secretary of the Interior prescribe. [33 Stat. L. 211.]

This is from the Indian Appropriation Act of April 21, 1904, ch. 1402.

[SEC. 1.] [Rations to mission schools on Indian reservations.] * * * Mission schools on an Indian reservation may, under rules and regulations prescribed by the Commissioner of Indian Affairs, receive for such Indian children duly enrolled therein, the rations of food and clothing to which

said children would be entitled under treaty stipulations if such children were living with their parents. [34 Stat. L. 326.]

This is from the Indian Appropriation Act of June 21, 1906, ch. 3504.

[SEC. 1.] **[Admission of white children to Indian schools — tuition fees — deposit of fees.]** * * * That hereafter white children may, under rules and regulations prescribed by the Commissioner of Indian Affairs, be admitted to any Indian day school: *Provided*, That the tuition fees charged for such children shall in no case exceed the tuition fees allowed or charged by the State or county in which such school is situated for the children admitted in the common schools of such State or county: *And provided further*, That all tuition fees paid for white children enrolled in Indian day schools shall be deposited in the United States Treasury to reimburse the funds out of which the schools last mentioned are maintained. [34 Stat. L. 1018.]

This is from the Indian Appropriation Act of March 1, 1907, ch. 2285.
See further the Act of March 3, 1903, ch. 263, § 1, *supra*, p. 910.

[SEC. 1.] **[Appropriations — expenditure of — limitation per capita.]**
* * * That all expenditure of money herein or hereafter appropriated for school purposes among the Indians, shall be at all times under the supervision and direction of the Commissioner of Indian Affairs, and in all respects in conformity with such conditions, rules, and regulations as to the conduct and methods of instruction and expenditure of money as may be from time to time prescribed by him, subject to the supervision of the Secretary of the Interior: *Provided*, That, except for pay of superintendents, not more than one hundred and sixty-seven dollars shall be expended for the annual support and education of any one pupil in any school herein specifically provided for, except when, by reason of epidemic, accident, or other sufficient cause, the attendance is so reduced or cost of maintenance so high that a larger expenditure is absolutely necessary, when the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may allow a larger per capita expenditure: *Provided further*, That the total amount appropriated for the support of such school shall not be exceeded: *Provided further*, That the number of pupils in any school entitled to the per capita allowance hereby provided for shall be determined by taking the average enrollment for the entire fiscal year and not any fractional part thereof. [35 Stat. L. 72.]

This is from the Indian Appropriation Act of April 30, 1908, ch. 153.

The appropriations for Indian schools contain varying provisions from year to year. The current appropriations were made by the Act of Aug. 1, 1914, ch. 222, § 1, 38 Stat. L. 584, which provided, as did similar Acts for previous years, "That no part of this appropriation, or any other appropriation provided for herein, except appropriations made pursuant to treaties, shall be used to educate children of less than one-fourth Indian blood whose parents are citizens of the United States and of the State wherein they live and where there are adequate free school facilities provided and the facilities of the Indian schools are needed for pupils of more than one-fourth Indian blood."

[SEC. 1.] **[Report of expenditures at schools, etc.]** * * * For construction, lease, purchase, repairs, and improvements of school and agency buildings, and for sewerage, water supply, and lighting plants, and for purchase of school sites, four hundred and twenty-five thousand dollars: *Provided*, That the Secretary of the Interior shall report annually to Congress the amount expended at each school and agency for the purposes herein authorized: [36 Stat. L. 1060.]

This and the following paragraph of the text are from the Indian Appropriation Act of March 3, 1911, ch. 210.

[Reports of expenditures for agricultural experiments.] * * * To conduct experiments on Indian school or agency farms designed to test the possibilities of soil and climate in the cultivation of trees, grains, vegetables, and fruits, for the purposes of preserving living and growing timber on Indian reservations and allotments, and to advise the Indians as to the proper care of forests: * * * *Provided still further*, That hereafter the Secretary of the Interior shall transmit to Congress annually on the first Monday in December a cost account for the preceding fiscal year relating to the use of appropriations made for the purposes herein provided for. [36 Stat. L. 1060.]

See the note to the preceding paragraph of the text.

[SEC. 1.] **[Educational leaves to employees of Indian schools.]** * * * That hereafter employees of Indian schools may be allowed, in addition to annual leave, educational leave not to exceed fifteen days per calendar year for attendance at educational gatherings, conventions, institutions, or training schools, if the interests of the service require, and under such regulations as the Secretary of the Interior may prescribe, and no additional salary or expense on account of this leave of absence shall be incurred. [37 Stat. L. 519.]

This is from the Indian Appropriation Act of Aug. 24, 1912, ch. 388.

SEC. 18. **[Osage Indians — payments to be withheld if children not placed in school.]** * * * That hereafter the Commissioner of Indian Affairs is authorized in his discretion to withhold any annuities or other payments due to Osage Indian minors, above six years of age, whose parents fail, neglect, or refuse to place such minors in some established school for a reasonable portion of each year and to keep such children in regular attendance thereof. The Commissioner of Indian Affairs is authorized to make such rules and regulations as may be necessary to put this provision into force and effect. [38 Stat. L. 96.]

This is from the Indian Appropriation Act of June 30, 1913, ch. 4.
See further the Act of March 3, 1893, ch. 209, § 1, *supra*, p. 908.

IX. TRAFFIC IN INTOXICATING LIQUORS

Sec. 2139. [Penalty for selling intoxicating liquors in Indian country — complaints, where and how made.] No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense. [R. S.] •

R. S. sec. 2139, as originally enacted, read as follows:

"Sec. 2139. No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person, except an Indian, in the Indian country, who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department." Act of July 9, 1832, ch. 174, 4 Stat. L. 564; Act of March 15, 1864, ch. 33, 13 Stat. L. 29.

It was amended by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244, which struck out of the second sentence the words "except an Indian, in the Indian country."

It was again amended to read as given in the text by an Act of July 23, 1892, ch. 234, 27 Stat. L. 260.

Part of this Act is substantially repeated in the first section of the Act of Jan. 30, 1897, ch. 109, set forth *infra*, p. 919. See also the note to the second section of the last-mentioned Act *infra*, p. 923.

For R. S. sec. 1014 mentioned in the text see the title CRIMINAL LAW.

See R. S. sec. 2087 *supra*, p. 772.

To what Indians applicable.—This section is applicable to all Indians who are, in any degree, under the control or charge

of an Indian agent. Therefore, the fact that an Indian has taken the oath of allegiance, has become an elector of the

state and the United States, and is living upon land allotted to him, does not take him out of the inhibition contained in this section, provided he is still under the supervision or control of the Indian agent. *Renfrow v. U. S.*, (1895) 3 Okla. 161, 41 Pac. 88.

Actual charge and immediate personal superintendence over the individual Indian by the agent, at the time the liquor is sold, are not essential, provided the tribe to which the Indian belongs is regularly under the charge of the agent. *U. S. v. Flynn*, 1 Dill. 451, (1870) 25 Fed. Cas. No. 15,124.

In *U. S. v. Osborn*, (1880) 2 Fed. 58, it was held that an Indian who had abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, did not thereby become a citizen of the United States, and was within the purview of this section.

An Indian who enlists in the United States army is only partially removed from the charge of the officers of Indian affairs and is within the purview of this section. *U. S. v. Hurshman*, (1892) 53 Fed. 543.

An Indian who separated from his tribe before the government took cognizance of it as such by treaty or otherwise, and does not return thereto, or claim or enjoy at the hands of the government any right or privilege as a member of such tribe, is not under the charge of an agent, within the meaning of this section. But where he does return and claims the privilege of the reservation, he is thereby under the charge of the agent, and cannot thereafter, by absenting himself, dissolve his tribal relation or cease to be under the charge of the agent within the meaning of this section. *U. S. v. Earl*, (1883) 17 Fed. 75.

"Indian country."—It is settled law that when the Indian title to lands is extinguished, such lands are no longer "Indian country," that thereafter the general statute prohibiting introduction of intoxicants into the "Indian country" no longer proprio vigore applies to such lands, and that if the treaties or statutes by virtue of which the Indian title to such lands is extinguished do not prohibit introduction of intoxicants thereon, or do not continue the application of the general statute, it is lawful to introduce intoxicants there. *U. S. v. Twelve Bottles of Whiskey*, (D. C. Mont. 1912) 201 Fed. 191.

The criterion to determine what is "Indian country" is that all the country which was declared to be Indian country by the Act of June 30, 1834, ch. 161, § 4 Stat. 729, remains Indian country as long as the Indians retain their original title, and in the absence of a different provision by treaty or by Act of Congress ceases to be Indian country whenever that title is extinguished. *Evans v. Victor*, (C. C. A.

8th Cir. 1913) 204 Fed. 361, 122 C. C. A. 531.

The words "Indian country," as used in this section, do not, standing alone, embrace territory in which, at the time the Indian title had been extinguished, and over which, with its inhabitants, the jurisdiction of the state for all purposes of government is full and complete. *Dick v. U. S.*, (1908) 208 U. S. 340, 28 S. Ct. 399, 52 U. S. (L. ed.) 520.

Villages upon Indian reservations within a state over which the laws of such state cannot be considered Indian country within the meaning of this section. *Benson v. U. S.*, (1890) 44 Fed. 178.

Mining claims within a reservation, the location of which was authorized by an Act of Congress, are not Indian country within the meaning of this section. *U. S. v. Four Bottles Sour-Mash Whiskey*, (1898) 90 Fed. 720.

Alaska is Indian country within the meaning of this section. *In re Carr*, (1875) 3 Sawy. 316, 5 Fed. Cas. No. 2,432. See also note to R. S. sec. 2127, *supra*, p. 805.

Former Cass Lake reservation.—The introduction of intoxicating liquors within the former Cass Lake Indian reservation, though sold by a white man upon lands purchased from the heirs of a deceased allottee, is a violation of article 7 of the treaty of Feb. 22, 1855, 10 Stat. L. 1165, with the Chippewa Indians, and of section 2139, R. S., as amended. (1905) 25 Op. Atty-Gen. 416.

That portion of Oklahoma formerly the Indian Territory is still governed by this section. *U. S. Exp. Co. v. Friedman*, (C. C. A. 8th Cir. 1911) 191 Fed. 673, 112 C. C. A. 219; *Evans v. Victor*, (E. D. Okla. 1912) 199 Fed. 504; *Arthard v. U. S.*, (C. C. A. 8th Cir. 1914) 212 Fed. 146, 129 C. C. A. 83; *Buffo v. U. S.*, (C. C. A. 8th Cir. 1914) 213 Fed. 222, 129 C. C. A. 566.

Effect of Oklahoma Enabling Act as repealing section.—Section 3 of the Oklahoma Enabling Act (Act June 16, 1906, ch. 3335, title STATES) did not repeal this section either as to interstate or intrastate shipments of liquor. *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705, *affirming* (C. C. A. 8th Cir. 1914) 213 Fed. 926, 131 C. C. A. 160, Ann. Cas. 1916C 470.

Introduction into Indian country.—Liquor in the possession of persons passing through an Indian reservation, for legitimate personal use and not intended for sale or other disposition among Indians, is not an introduction of liquor into the Indian country within the meaning of this section. *U. S. v. Taddish*, (D. C. Ariz. 1913) 211 Fed. 490. See further the historical note under R. S. sec. 2140, *infra*, p. 915.

Transportation of liquors across Indian country.—This section was not intended to interfere with the commerce in spirituous liquors between the sections of a country not Indian, nor to authorize the seizure of spirituous liquors found upon an Indian reservation in the course of transportation across the same. U. S. v. Twenty-nine Gallons Whiskey, (1891) 45 Fed. 847.

Authority of War Department exclusive.—The introduction of spirituous liquors into the Indian country is prohibited wherever it is not done by authority of the War Department, and hence the authority of that department touching the matter would seem to be exclusive. (1873) 14 Op. Atty.-Gen. 290; (1874) 14 Op. Atty.-Gen. 401.

Manner of proceeding.—In case of violation of this section, proceedings may be taken under the section as amended, and under R. S. sec. 2140 following. (1905) 25 Op. Atty.-Gen. 416.

Sufficiency of indictment.—In U. S. v. Winslow, (1875) 3 Sawy. 337, 28 Fed. Cas. No. 16,742, it was held that under this section as originally enacted and before amendment, it was necessary to allege in an indictment that the defendant was not an "Indian in the Indian country," such words applying not to the offense, but to the person committing it.

But compare U. S. v. Downing, 25 Fed. Cas. No. 14,991.

Conspiracy to commit offense.—For a sufficient indictment, see Joplin Mercantile Co. v. U. S., (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705, *affirming* (C. C. A. 8th Cir. 1914) 213 Fed. 926, 131 C. C. A. 160, Ann. Cas. 1916E 470.

Evidence.—For evidence held sufficient to convict under this section upon a charge of introducing liquor into Indian country, see Archard v. U. S., (C. C. A. 8th Cir. 1914) 212 Fed. 146, 129 C. C. A. 83.

"Beer" as a spirituous liquor.—The amendment by the Act of July 23, 1892, ch. 234, indicates that Congress regarded the Act as it previously stood as not including ale and beer in its terms. Sarlls v. U. S., (1894) 152 U. S. 570, 14 S. Ct. 720, 38 U. S. (L. ed.) 556.

The amendment of 1892 was held not to operate retroactively so as to make void a contract for the purchase of beer to be sold in the Indian country. Anheuser-Busch Brewing Assoc. v. Bond, (1895) 66 Fed. 653. See also *In re Boyd*, (1892) 49 Fed. 48; *In re McDonough*, (D. C. Mont. 1892) 49 Fed. 360; U. S. v. Ellis, (1892) 51 Fed. 808. See further the historical note under R. S. sec. 2140, *infra*, this page.

Sec. 2140. [Power of superintendents, etc., to search for concealed liquors.] If any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, sub-agent, or commanding officer, may cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall moreover be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. In all cases arising under this and the preceding section Indians shall be competent witnesses. [R. S.]

Act of March 15, 1864, ch. 33, 13 Stat. L. 29.

As to the abolition of superintendencies see the notes to R. S. secs. 2040-2051, noted *supra*, p. 753.

See the Act of July 4, 1884, ch. 180, § 1, *infra*, p. 917, and the Act of Jan. 30, 1897, ch. 109, § 1, *infra*, p. 919.

The Act of July 23, 1892, ch. 234, 27 Stat. L. 260, by its title purported to amend R. S. secs. 2139, 2140 and 2141, but its provisions amended the preceding R. S. sec. 2139 only.

By the Indian Appropriation Act of May 18, 1916 (see Pamph. Supp. No. 7, Fed. Stat. Ann. 5; 1918 Supp. Fed. Stat. Ann.), it was provided that the provisions of R. S. secs. 2140 and 2141 should also apply to beer and other intoxicating liquors named in the Act of Jan. 30, 1897, ch. 109, *infra*, p. 919, and the possession by a person of intoxicating liquors in the country where the introduction is prohibited by treaty or federal statute should be *prima facie* evidence of unlawful introduction.

Construction.—This statute is highly penal and is not in aid of the revenues, hence it must be strictly construed, doubts resolved in favor of those against whom it is invoked, no person or case held within it unless clearly within its letter, and all not to defeat but to effectuate the legislative intent. *U. S. v. Two Gallons of Whiskey*, (D. C. Mont. 1914) 213 Fed. 986.

Seizure must be within Indian country.—Within this section, liquor must be seized upon an Indian reservation or the seizure is unauthorized, there being no "Indian country" unless it consists of the Indian reservations. *Forty-three Gallons Cognac Brandy*, (1882) 11 Fed. 47.

A military officer who seizes liquors not actually within the Indian country is liable in an action for trespass, although he acted in good faith and supposed that the place where the same were seized was Indian country. *Bates v. Clark*, (1877) 95 U. S. 204, 24 U. S. (L. ed.) 471. In *Fehrenbach Wine, etc., Co. v. Atchison*, etc., R. Co., (1914) 182 Mo. App. 1, 167 S. W. 631, the court said: "Any and all authority conferred by section 2140 of the United States statutes is confined to acts performed in the Indian country. The Act of Congress in question does not authorize a federal officer to seize and destroy spirituous liquors in the state of Kansas, however near it may be to the prohibited line of the Indian country. The officer's jurisdiction in this respect is territorial and confined to the Indian country. Such is the ruling of the United States Circuit Court of Appeals for this circuit in the case of *Evans v. Victor*, [C. C. A. 8th Cir. 1913] 204 Fed. 361, 122 C. C. A. 531, where the court, in ruling that the land in the original town of Muskogee, Okla., is not part of the Indian country, said: 'It is conceded by counsel for defendants, and is settled by repeated decisions of the Supreme Court, that the power of the officers of the Interior Department, and of the officers of the army, to cause such searches and seizures is limited, by the terms and the true construction of section 20 of the Act of 1834, and of sections 2139 and 2140 of the Revised Statutes, to searches and seizures in the Indian country, and that they are without authority to cause such searches and seizures outside the Indian country. . . . The result is that the defendants had no authority to make the search which they made, and those they threaten to make, unless the land in the city of Muskogee on which the plaintiff's drug store was located was in the Indian country.' In *Bates v. Clark*, [1877] 95

U. S. 204, 24 U. S. (L. ed.) 471, where the seizure of liquors at a place not in the Indian country was sought to be justified under this Act of Congress, the court ruled: 'The plaintiffs below violated no law in having the whiskey for sale at the place where it was seized; and the twentieth section of the Act of 1834, as amended by the Act of 1864, conferred no authority whatever on the defendants, to seize the property.' See, also, *Clairmont v. U. S.*, [1912] 225 U. S. 551, 32 S. Ct. 787, 56 U. S. (L. ed.) 1201."

Forfeiture.—In *U. S. v. Two Gallons of Whiskey*, (D. C. Mont. 1914) 213 Fed. 986, holding that the statute did not impose a forfeiture of certain property within the facts of that case, the court, referring to the statute, said: "Noting that it forfeits the liquor introduced and found, regardless of ownership and introducer, the statute directs search of the introducer's conveyances, if he is a white person or Indian, and seizure, libel, and forfeiture of the *introducer's* conveyances and goods. This restrictive language, in view of its absence in the matter of the liquor, and in view of the nature of the statute and in view of the language of analogous statutes, is significant of congressional intent to limit the forfeiture to the property owned by him who is guilty of the prohibited act. Otherwise the stage, steamer, or other conveyance of a common carrier in the Indian country would be forfeited for the secret introduction of liquor by a passenger in or by the driver of any such conveyance, though the owner was in ignorance thereof; so, likewise, the goods of shippers aboard such conveyances. And if not the goods of others in the introducer's custody, why the conveyances of others in his custody? It is true that in the proceedings of this character the thing involved, and not its owner, is the offender and is proceeded against, but it is the thing made liable by the statute. In some cases the thing is so made the offender regardless of ownership, and therein ignorance and innocence of the owner is no barrier to forfeiture. If those to whom he intrusted his property for honest purposes divert it to dishonest uses, his only remedy is to pursue the delinquent party. In other cases the thing is not made the offender, nor proceeded against unless owned by the person whose act in connection therewith invokes forfeiture, or unless the owner knowingly permitted the thing to be used therein by said person. In still other cases, the statute imposes forfeiture upon some things, some interests, some

properties, and not upon others. Forfeitures are odious, and to be declared only when clearly imposed by statute. When they are claimed against those whose only offense is that they lawfully intrusted their property to others who betrayed the trust and diverted the property to unlawful uses, it must be very

clear indeed that the owners are within both the letter and spirit of the statute, or the claim must be disallowed.

"Indian country" includes that portion of the state of Oklahoma which formerly comprised the Indian Territory. *Evans v. Victor*, (E. D. Okla. 1912) 199 Fed. 504.

Sec. 2141. [Penalty for setting up distillery in Indian country.]

Every person who shall, within the Indian country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same. [R. S.]

Act of June 30, 1834, ch. 161, 4 Stat. L. 732.

As to the abolition of superintendencies see the notes to R. S. secs. 2046-2051, noted *supra*, p. 753.

By the Indian Appropriation Act of May 18, 1916 (see Pamph. Supp. No. 7, Fed. Stat. Ann. 5, 1918 Supp. Fed. Stat. Ann.) it was provided that the provisions of R. S. secs. 2140 and 2141 should also apply to beer and other intoxicating liquors named in the Act of Jan. 30, 1897, ch. 109, *infra*, p. 919, and the possession by a person of intoxicating liquors in the country where the introduction is prohibited by treaty or federal statute should be *prima facie* evidence of unlawful introduction.

The Indian Territory was ruled by the Attorney-General to be within the provisions of this section. (1898) 22 Op.

Atty.-Gen. 232. See also notes to R. S. sec. 2127 *supra*, p. 805.

[Sec. 1.] [Persons in army prohibited from furnishing liquors, etc.]

* * * And no part of section twenty-one hundred and thirty-nine or of section twenty-one hundred and forty of the Revised Statutes shall be a bar to the prosecution of any officer, soldier, sutler or storekeeper, attache, or employe of the Army of the United States who shall barter, donate, or furnish in any manner whatsoever liquors, wines, beer, or any intoxicating beverage whatsoever to any Indian. [23 Stat. L. 94.]

This is from the Indian Appropriation Act of July 4, 1884, ch. 180.

Sec. 8. [Punishment for sale, etc., of liquors.] That any person, whether an Indian or otherwise, who shall, in said Territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years. [28 Stat. L. 697.]

This was from an Act of March 1, 1895, ch. 145, entitled "An Act to provide for the appointment of additional judges of the United States Court in the Indian territory,

and for other purposes." The other portions of this Act may be regarded as superseded by the admission of the state of Oklahoma to the Union (see *STATES*), but this section has been held in recent cases, given in the following notes, to be still in force.

The constitutionality of this section was affirmed in *U. S. v. Cohn*, (1899) 2 Indian Ter. 474, 52 S. W. 38.

Effect of Act of Jan. 30, 1897.—This section was not impliedly repealed by the Act of Congress of Jan. 30, 1897, 29 Stat. L. 506, ch. 109, *infra*, p. 919. *U. S. v. Buckles*, (1906) 6 Indian Ter. 319, 97 S. W. 1022.

Act still in force.—Generally speaking, the control of the liquor traffic is within the police powers of the state; but the shipping and traffic in intoxicating liquors, from state to state is interstate commerce, and as such is clearly within the control of Congress. Congress has by this Act prohibited the shipment of intoxicating liquors into that part of Oklahoma formerly known as the Indian Territory. This Act has never been repealed, and is yet in full force and effect. *State v. Eighty-nine Casks of Beer*, (1912) 36 Okla. 151, 128 Pac. 267. See also *Burch v. U. S.*, (1907) 7 Indian Ter. 284, 104 S. W. 619.

Territory affected by Act.—This section has to do with the introduction of liquor into the Indian Territory as a whole irrespective of whether it or any particular part of it remains "Indian country." On the other hand the Act of Jan. 30, 1897, ch. 109, 29 Stat. L. 506, *infra*, p. 919, has to do with the introduction of liquor into "Indian country." *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705.

Effect of Oklahoma Enabling Act on section.—Section 3 of the Oklahoma Enabling Act (Act June 16, 1906; title *STATES*) does not expressly repeal this section, but pending the continuance of state prohibition it has the effect of rendering it unenforceable as to intrastate shipments of liquor into that part of Oklahoma which was formerly Indian Territory. *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705, *affirming* (C. C. A. 8th Cir. 1914) 213 Fed. 926, 131 C. C. A. 160, Ann. Cas. 1916C 470.

The Oklahoma Enabling Act was no repeal, express or implied, of this section so far as pertains to the carrying of liquor from without the new state into that part of it which was the Indian Territory (saving as to liquor brought in by the state for the use of state agencies established under the provisions of the Enabling Act). *Eo p. Webb*, (1912) 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248.

Gist of the offense.—The gist of the offense denounced by this section is the carrying of liquor into the Indian Territory from without the state of Oklahoma. The mere possession of whiskey by any

person within that part of the state known formerly as Indian Territory, without any proof of where it came from, or when it was brought into that territory, constitutes no federal offense and is wholly insufficient to justify conviction under this Act. *Collier v. U. S.*, (C. C. A. 8th Cir. 1915) 221 Fed. 64, 137 C. C. A. 86. See also *Lewellen v. U. S.*, (C. C. A. 8th Cir. 1915) 223 Fed. 18, 138 C. C. A. 432, wherein the court said: "The introduction of liquor into the Indian country, as defined by Act June 30, 1834, ch. 161 (4 Stat. 729), and as construed in *Bates v. Clark*, [1877] 95 U. S. 204, 24 U. S. (L. ed.) 471; *Clairmont v. U. S.*, [1912] 225 U. S. 551, 32 S. Ct. 787, 56 U. S. (L. ed.) 1201, and *Evans v. Victor*, [C. C. A. 8th Cir. 1913] 122 C. C. A. 531, 204 Fed. 361, constitutes one offense (Act Jan. 30, 1897, ch. 109, 29 Stat. 506, *infra*, p. 919; and the carrying of liquor into the Indian Territory from without the state of Oklahoma constitutes another and different offense (Act March 1, 1895, ch. 145, 28 Stat. 693, 697). See *Eo p. Webb*, [1912] 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248; *U. S. v. Wright*, [1913] 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1160; *Chambliss v. U. S.*, [C. C. A. 8th Cir. 1914] 218 Fed. 154, [132] C. C. A. [112]. The offense denounced by the Act of 1897 is complete if liquor is introduced into 'Indian country,' whether it came from outside of the state of Oklahoma or not; but the offense denounced by the Act of 1895 must involve the element of carrying the liquor from without the state of Oklahoma into some part of what before statehood constituted the Indian Territory. *Joplin Mercantile Co. v. U. S.*, [1915] 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705. In fact, the gist of the offense denounced by the Act of 1895 is its interstate feature, namely, the carrying of liquor into the Indian Territory from without the state of Oklahoma."

The sale of nonintoxicating malt liquor is a violation of this section. *U. S. v. Cohn*, (1899) 2 Indian Ter. 474, 52 S. W. 38, where it was so held notwithstanding the use of the word "other" before the words "intoxicating drinks." But see as to the effect of the word "other" in such a connection, the preliminary article on "Statutes and Statutory Construction," vol. 1, p. 116.

Sale by agent.—Where an agent solicited orders in Indian Territory for the sale of intoxicating liquors, and forwarded the order to his principal, a non-resident, who shipped the liquors pursuant to the orders to the buyers therein named, the agent, whether he collected

the purchase price or not, violated the statute. *Taylor v. U. S.*, (1906) 6 Indian Ter. 350, 98 S. W. 123.

The establishment of a distillery on lands in the Indian Territory is unlawful even though the Indian title may have been extinguished or the Indians may have been removed. (1898) 22 Op. Atty.-Gen. 232, where Attorney-General Griggs, pointing out the difference between the "Indian Territory" and "Indian country" in general, said: "Although the Indian title had become extinct as to every foot of land in the territory, and although there was no longer an Indian there, still the laws applicable to that territory would continue in force as before until repealed or changed, except, of course, those relating to the Indians."

Presumptions.—On a prosecution for introducing liquor into Indian Territory, an instruction that the possession of liquor in the territory was *prima facie* evidence of the introduction of the same by the party in whose possession it was found was held to be error. The court should have instructed that if the jury found beyond a reasonable doubt that defendant was in possession of liquor within the territory the law presumed him guilty of having introduced it, unless he could show otherwise by a reasonable, truthful explanation. *Ellis v. U. S.*, (1906) 6 Indian Ter. 291, 97 S. W. 1013.

Indictment.—An indictment alleged that accused "did . . . introduce" from

without the limits of the Indian Territory intoxicating liquors. It was held that the indictment charged the offense denounced by this section, and not the offense denounced by the Act of Congress of Jan. 30, 1897, 29 Stat. L. 506, ch. 109 (given below), making it an offense for a person to "introduce or attempt to introduce" any intoxicating liquors into the Indian country, for the word "introduce" in the indictment is synonymous with the words used in the Act of 1895. *U. S. v. Buckles*, (1906) 6 Indian Ter. 319, 97 S. W. 1022.

An indictment charging in one count that the accused sold intoxicating liquors within the Indian Territory to a person named, and in a second count that he furnished intoxicating liquor to the person named, is not bad as charging two distinct offenses. *Taylor v. U. S.*, (1906) 6 Indian Ter. 350, 98 S. W. 123.

Duplicity.—An offense under this section is a separate and distinct offense from one committed under section 1 of the Act of Jan. 30, 1897 (given below). *Chambliss v. U. S.*, (C. C. A. 8th Cir. 1914) 218 Fed. 154, 132 C. C. A. 112, wherein the court said that an indictment which in a single count charged an offense under both of these sections would probably be held void for duplicity if the question were raised by demurrer. See to the same effect *Ammerman v. U. S.*, (C. C. A. 8th Cir. 1914) 216 Fed. 326, 132 C. C. A. 470.

An Act To prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes.

[*Act of Jan. 30, 1897, ch. 109, 29 Stat. L. 506.*]

[SEC. 1.] **Sale, etc., of intoxicating liquors further prohibited — commitment on conviction.** That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall

be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided however*, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department. [29 Stat. L. 506.]

The provisions of the text superseded in part R. S. sec. 2139, *supra*, p. 913. See the notes to said section.

By the Indian Appropriation Act of May 18, 1916 (see Pamph. Supp. No. 7, Fed. Stat. Ann. 5, 1918 Supp. Fed. Stat. Ann.) it was provided that the provisions of R. S. secs. 2140 and 2141 should also apply to beer and other intoxicating liquors named in the Act of Jan. 30, 1897, ch. 109, given in the text, and the possession by a person of intoxicating liquors in the country where the introduction is prohibited by treaty or federal statute should be *prima facie* evidence of unlawful introduction.

Constitutionality.—The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a state, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and in part from the recognized relation of tribal Indians to the federal government. This power to protect the government's Indian wards against the evils of intemperance, of which they are easy victims, is sufficiently comprehensive to enable Congress, when securing the cession of part of an Indian reservation within a state, to prohibit the sale of intoxicants upon the ceded lands, if in its judgment that is reasonably essential to the protection of the Indians residing upon the unceded lands. *Perrin v. U. S.*, (1914) 232 U. S. 478, 34 S. Ct. 387, 58 U. S. (L. ed.) 691.

The above Act prohibiting the sale of liquor to Indian allottees or patentees while the United States holds the title to their lands in trust for them, is constitutional and valid, the privilege of buying whiskey at all times and all places not being one of the rights, privileges, or immunities of citizenship, within the meaning of the Constitution of the United States. *Mulligan v. U. S.*, (1903) 120 Fed. 98; *Farrell v. U. S.*, (1901) 110 Fed. 942.

In *Matter of Heff*, (1905) 197 U. S. 488, 25 S. Ct. 506, 49 U. S. (L. ed.) 848, it was held that a conviction could not be had under this statute for selling liquor to an Indian, the sale not being on a reservation, and the Indian having been made a citizen and subject to the civil and criminal laws of the state.

But in *Hallowell v. U. S.*, (1911) 221 U. S. 317, 31 S. Ct. 587, 55 U. S. (L. ed.) 750, it was held that a conviction of an Indian of the offense of introducing intoxicating liquor into the Indian country and into an Indian allotment while the title to the same is held in trust by the government may be had under this Act, although the defendant Indian is a citizen of the United States and entitled, under the Acts of Aug. 7, 1882, 22 Stat. L. 341, ch. 434, § 7, and Feb. 8, 1887, 24 Stat. L. 388, ch. 119, § 6, *supra*, p. 830, to the rights, privileges, and immunities of such citizens, and to the benefit of the laws, civil and criminal, of the state in which his allotment is situated, and upon which the offense is alleged to have been committed. And in *U. S. v. Sutton*, (1909) 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200, *reversing* (1908) 165 Fed. 253, the Supreme Court held that Congress could enact so much of this section as makes criminal the introduction of intoxicating liquor upon an allotment within the limits of the Yakima Indian reservation, in the state of Washington, made and patented to the Indian allottees under the Act of Feb. 8, 1887, 24 Stat. L. 388, ch. 119, *supra*, p. 821, by which the title is held in trust by the government, and is not alienable by the allottee without the consent of the United States, since, under the provisions with respect to Washington of the Enabling Act of Feb. 22, 1889, 25 Stat. L. 677, ch. 180, § 4 (title STATES), jurisdiction and control of Indian lands remain in the United States. See also *U. S. v. Boss*, (1906) 160 Fed. 132; *U. S. v. Hall*, (1900) 171 Fed. 214; *Gearlds v. Johnson*, (1911) 183 Fed. 61.

The provision of article 9 of the agreement made May 1, 1893, with the Nez Perce tribe of Indians, confirmed by Act Aug. 15, 1894, 28 Stat. L. 330, ch. 290, that allottees of such tribe, whether under the care of an Indian agent or not, shall

be subject for a period of twenty-five years "to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians," can apply only to Indians who received their allotments and acquired their rights of citizenship pursuant to such agreement, and cannot affect the status of one who had previously acquired such rights and had become subject to state laws, so as to give force and validity as to him to the unconstitutional Act of Jan. 30, 1897, 29 Stat. L. 506, ch. 109, making it a crime to sell liquor to Indian allottees. *Ex p. Viles*, (1905) 139 Fed. 68.

Section not repealed.—Section 3 of the Oklahoma Enabling Act (Act June 16, 1906, title STATES) did not repeal this section either as to intrastate or interstate shipments of liquors. *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705, *affirming* (C. C. A. 8th Cir. 1914) 213 Fed. 926, 131 C. C. A. 160, Ann. Cas. 1916C 470.

This section has been contrasted with Act of March 1, 1895, ch. 145, § 8, *supra*, p. 917, and it has been held that the Acts of 1895 and 1897 create distinct offenses, punishable differently, and necessitating evidence of a different character to justify a conviction. The Act of 1897 prohibits the introduction of intoxicating liquors into the Indian country, and expressly defines what shall be Indian country within the meaning of the Act. On the other hand, the Act of 1895 prohibits the introduction of liquors into the Indian Territory as it then existed, and which Act, it has been authoritatively held, is still in force, in that part of the state of Oklahoma which, before the state was admitted into the Union, constituted the Indian Territory. Therefore an indictment which charges a violation of both statutes is void for duplicity. *Ammerman v. U. S.*, (C. C. A. 8th Cir. 1914) 216 Fed. 326, 132 C. C. A. 470. See also *Chamblias v. U. S.*, (C. C. A. 8th Cir. 1914) 218 Fed. 154, 132 C. C. A. 112.

Osage Indian ward.—In *Mosier v. U. S.*, (C. C. A. 8th Cir. 1912) 198 Fed. 54, 117 C. C. A. 162, a person was convicted under this Act for selling liquor to an Osage Indian who was under the charge of an Indian superintendent.

The Pueblo Indians of New Mexico are affected by this section. *U. S. v. Sandoval*, (1913) 231 U. S. 28, 34 S. Ct. 1, 58 U. S. (L. ed.) 107.

In *U. S. v. Mares*, (1907) 14 N. M. 1, 88 Pac. 1128, it was held that the Pueblo Indians of New Mexico are not wards of the government, nor are they in charge of an Indian superintendent or agent, nor are they Indians over whom the government through its department exercises guardianship, within the meaning of this section penalizing the sale or gift of intoxicants to such Indians.

Puyallup Indians.—The Act does not comprehend a Puyallup Indian who holds lands under patent, the title of the government in which consists in a mere right to restrict alienation thereof. Such an Indian has all the rights, privileges, and immunities of other citizens, and is not under the guardianship of the United States government, nor under the charge of any Indian superintendent or agent. *U. S. v. Kopp*, (1901) 110 Fed. 160.

Territory affected by Act.—This Act has to do with the introduction of liquor into "Indian country" as contradistinguished from Indian territory as a whole, the latter being governed by section 8 of the Act of March 1, 1895, ch. 145, 28 Stat. L. 693. *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705, *affirming* (C. C. A. 8th Cir. 1914) 213 Fed. 926, 131 C. C. A. 160, Ann. Cas. 1916C 470.

"Indian country."—It must be assumed that, in the Act of 1897, Congress used the words "Indian country" in the accepted sense. *Clairman v. U. S.*, (1912) 225 U. S. 551, 32 S. Ct. 787, 56 U. S. (L. ed.) 1201.

Since the allotment of lands in severalty to all of the Indians on the Uintah Indian reservation in Utah, subject to the provisions of Act Feb. 8, 1887, ch. 119, 24 Stat. L. 388, *supra*, p. 821, and the restoration of the remainder of the lands of the reservation to the public domain, no part of such lands is "Indian country," within the meaning of the Act Jan. 30, 1897, ch. 109, 29 Stat. L. 506; and a prosecution cannot be maintained thereunder for introducing intoxicating liquor thereon, even on a portion which was subsequently reserved by executive order for agency and school purposes. *U. S. v. Boss*, (1906) 160 Fed. 132.

Indian country includes Indian country within a state and includes an Indian reservation. *Pronovost v. U. S.*, (1914) 232 U. S. 487, 34 S. Ct. 391, 58 U. S. (L. ed.) 696.

The determination of what is and what is not Indian country, as that term is employed in the Act, depends upon the fact as to whether the Indian title under which the land was formerly held has or has not been completely extinguished by subsequent grants. *Royal Brewing Co. v. Missouri, etc., R. Co.*, (D. C. Kan. 1914) 217 Fed. 146. It has been held that a railroad right of way across the Flat-head Indian reservation in Montana is not a part of said reservation in contemplation of this Act prohibiting the introduction of intoxicating liquors into the Indian country, for the reason that the Indian title to said right of way had been extinguished prior to the adoption of the Act. *State v. Tilden*, (1915) 27 Idaho 262, 147 Pac. 1056.

"Any person" includes an Indian who commits the offense specified in the

statute, as it is evidence that Congress purposely left out the words "except an Indian in the Indian country," which occurred in the original R. S. sec. 2139, *supra*, p. 913. U. S. v. Miller, (1901) 105 Fed. 944.

Offense committed off reservation.—An Indian living in tribal relations is under the charge of an Indian superintendent or agent, within the meaning of these words as used in the above Act, and the fact that when liquor was given to him he was off his reservation constitutes no defense to a prosecution under the Act. U. S. v. Miller, (1901) 105 Fed. 944.

Carlisle students.—This section extends to Indian students at the Carlisle school, which is maintained at the expense of the government under the direction of the Interior Department. U. S. v. Belt, (1904) 128 Fed. 168.

Conspiracy to commit offense.—For a sufficient indictment see *Joplin Mercantile Co. v. U. S.*, (1915) 236 U. S. 531, 35 S. Ct. 291, 59 U. S. (L. ed.) 705.

Appeal by government.—The decision of a federal District Court sustaining a demurrer to an indictment for introducing liquor into the Indian country is reviewable in the federal Supreme Court by writ of error, under the Act of March 2, 1907, 34 Stat. L. 1246, ch. 2564 (see title JUDICIARY), where the question whether the indictment charges any offense against the United States involves the validity of this section as applied to the facts stated. U. S. v. Sutton, (1909) 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200, *reversing* (1908) 165 Fed. 253.

Knowledge or intent.—It is no defense to a prosecution for a violation of this section for the defendant to assert that he did not know that the person to whom he sold was an Indian. U. S. v. Stofello, (1904) 8 Ariz. 461, 76 Pac. 611.

But in U. S. v. Healy, (D. C. Mont. 1913) 202 Fed. 349, a verdict against one charged with an unlawful sale of intoxicating liquor to an Indian in violation of this section, was set aside by the court on its own motion. The court said: "In this case the court, of its own motion, vacates the sentence and judgment, sets aside the verdict, and discharges the defendant. The conviction was for a felony, an unlawful sale of intoxicating liquor to an Indian contrary to Act Jan. 30, 1897, ch. 109, 29 Stat. 506. The evidence was that the sale was solicited from defendant, in the ordinary course of his trade of retail liquor dealer in the city of Butte by said Indian, who therein was in the service of government officers as a decoy. It was claimed that there was suspicion that defendant was making like unlawful sales, and it was sought to entrap him. In this instance defendant was ignorant that the purchaser was an Indian, and nothing in the latter's dress,

manner, speech, or appearance served to put him on inquiry therein; the Indian approximating those not Indians. The court instructed the jury that in view of the evidence its duty was to convict, and the jury returned a verdict accordingly. After further consideration, I am persuaded a conviction under such circumstances is unjust and contrary to public policy. Hence, the conviction having been at this term, the judgment being 'in the breast of the court,' and the court having full power over it, the order vacating the same. See *Ex p. Lange*, 18 Wall. 167, 21 U. S. (L. ed.) 872. Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is not excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end ignorance of act stamps the act as involuntary, and excuses, or at least estops the government from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the government's invitation, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. If, however, the decoy is one whose appearance, or otherwise, conveys knowledge of his disability, or is sufficient to put the seller on inquiry, any sale made is voluntary, establishes guilt, and warrants conviction. For in such case the seller is either of guilty intent, or negligent ignorance or recklessness, which relieves the government's participation of any taint of fraudulent concealment or deceit. It will be observed the case at bar is not of those where the actor knows his act violates the law. Of the latter is he who, on solicitation, sells or passes money known to him to be counterfeit, or he who thus mails prohibited matter, or he who thus sells intoxicants without a license or in 'dry' territory. These latter acts are criminal, let the status of the solicitor be what it may; and hence that he is a decoy does not neutralize the criminal quality of the act. In the case at bar the act is innocent but for the status of the solicitor, and because he is a decoy of concealed disability the act is blameless, and there is estoppel against conviction. Were it otherwise, honest men could easily be made felons. Many of the government's Indian wards are not distinguishable from Caucasians. Any purveyor of

liquors, and any one moved by hospitality to share thereof with guests, ignorant of their status, would unhesitatingly sell or give to them. As decoys in the service of government officers, what instruments of oppression they might be to men devoted to law, but ignorant of their disability. That the seller is suspected of voluntary like sales does not justify entrapping as here; for thereby a lawabiding person may as easily be ensnared. And the result proves nothing but overzeal, to put it mildly, of government officers. The practice cannot be tolerated, and a conviction for an offense so procured cannot stand."

Repeal as to Oklahoma.—Since by the Enabling Act by which Oklahoma was admitted into the Union, Act Cong. June 16, 1906, ch. 3335, 34 Stat. L. 267 (title STATES), the state was left with jurisdiction of the introduction of intoxicating

liquors from Oklahoma into that part of the state known as Indian Territory, and was authorized to control the sale of liquor through its own courts, this section was no longer in force in that part of Oklahoma formerly known as Indian Territory after its admission as a state so as to prevent the introduction therein of liquor from Arkansas in the interstate commerce. *U. S. v. U. S. Express Co.*, (1910) 180 Fed. 1006.

But in *U. S. v. Wright*, (1913) 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1160, it was held that in Oklahoma this statute is still in force, at least with respect to the introduction of liquor into Indian country from points outside the state, notwithstanding the Oklahoma Enabling Act which authorized the state to legislate on the subject of the use of intoxicating liquors by the Indians therein.

SEC. 2. [Inconsistent provisions repealed.] That so much of the Act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this Act is hereby repealed. [29 Stat. L. 507.]

R. S. sec. 2139 is re-enacted with amendments by Act of July 23, 1892, ch. 234, [set forth *supra*, p. 913, as "sec. 2139"]. The Act here given enlarges the provisions of said Act of 1892 by amplifying the definitions of the forbidden liquors and providing more specifically the classes of Indians affected. The latter portion of the first section of this Act is substantially repeated from said Act of 1892. The former Act contains provisions in regard to the procedure, which are apparently not affected by this Act. *Compilers' note*, 2 *Supp. R. S.* 544.

[SEC. 1.] [Suppression of liquor traffic — powers of officers.] * * *
the powers conferred by section twenty-one hundred and forty of the Revised Statutes upon Indian agents, and subagents, and commanding officers of military posts are hereby conferred upon the special agent of the Indian Bureau for the suppression of the liquor traffic among Indians and in the Indian country and duly authorized deputies working under his supervision. [34 Stat. L. 1017.]

This is from the Indian Appropriation Act of March 1, 1907, ch. 2285.
R. S. sec. 2140 mentioned in the text is given *supra*, p. 915.

[SEC. 1.] [Sacramental wines in Indian country — powers of officers.] * * *
That hereafter it shall not be unlawful to introduce and use wines solely for sacramental purposes, under church authority, at any place within the Indian country or any Indian reservation, including the Pueblo Reservations in New Mexico: *Provided, also*, That the powers conferred by section seven hundred and eighty-eight of the Revised Statutes upon marshals

and their deputies are hereby conferred upon the chief special officer for the suppression of the liquor traffic among Indians and duly authorized officers working under his supervision whose appointments are made or affirmed by the Commissioner of Indian Affairs or the Secretary of the Interior. [37 Stat. L. 519.]

This is from the Indian Appropriation Act of Aug. 24, 1912, ch. 388.
For R. S. sec. 788 mentioned in the text see the title JUDICIAL OFFICERS.

INDICTMENTS AND INFORMATION

See CRIMINAL LAW, and consult the General Index.

INDUSTRIAL PEACE FOUNDATION

Act of March 2, 1907, ch. 2558, 925.

Sec. 1. Foundation for the Promotion of Industrial Peace Established — Board of Trustees — Vacancies, 925.

2. Duties of Trustees — Industrial Peace Committee — Selection, Service, etc., 926.

3. Meetings and Conferences at Washington, 926.

4. Expenditures, 927.

5. Property Holdings — Limit, 927.

6. Principal Office, etc., 927.

7. Co-operation with Other Societies, 927.

8. Effect, 927.

An Act To establish the Foundation for the Promotion of Industrial Peace.

[Act of March 2, 1907, ch. 2558, 34 Stat. L. 1241.]

[SEC. 1.] **[Foundation for the promotion of industrial peace established — board of trustees — vacancies.]** That the Chief Justice of the United States, the Secretary of Agriculture, and the Secretary of Commerce and Labor, and their successors in office, together with a representative of labor and a representative of capital and two persons to represent the general public, to be appointed by the President of the United States, are hereby created trustees of an establishment by the name of the Foundation for the Promotion of Industrial Peace, with authority to receive the Nobel peace prize awarded to the President and by him devoted to this foundation, and to administer it in accordance with the purposes herein defined. Any vacancies occurring in the number of trustees shall be filled in like manner by appointment by the President of the United States. [34 Stat. L. 1241.]

The foregoing section 1 was preceded by the following preamble:

"Whereas Alfred Bernard Nobel, of the city of Stockholm, in the Kingdom of Sweden, having by his last will and testament provided that the residue of his estate shall constitute a fund the income from which shall be annually awarded in prizes to those persons who have during the year contributed most materially to benefit mankind, and having further provided that one share of said income shall be awarded to the person who shall have most or best promoted the fraternity of nations and the abolishment or diminution of standing armies and the formation and increase of peace congresses; and

"Whereas the Norwegian Parliament having, under the terms of said foundation, elected a committee for the distribution of the peace prize, and this committee having in the year nineteen hundred and six awarded the aforesaid prize to Theodore Roosevelt, President of the United States, for his services in behalf of the peace of the world; and

"Whereas the President desiring that this award shall form the nucleus of a fund the income of which shall be expended for bringing together in conference at the city of Washington, especially during the sessions of Congress, representatives of labor and capital for the purpose of discussing industrial problems, with the view of arriving at a better understanding between employers and employees, and thus promoting industrial peace: Therefore"

SEC. 2. [Duties of trustees — Industrial Peace Committee — selection, service, etc.] That it shall be the duty of the trustees herein mentioned to invest and reinvest the principal of this foundation, to receive any additions which may come to it by gift, bequest, or devise, and to invest and reinvest the same; and to pay over the income from the Foundation and its additions, or such part thereof as they may from time to time apportion, to a committee of sixteen persons, to be known as the "Industrial Peace Committee;" said committee to consist of the seven trustees and nine other persons to be selected by the trustees, three of whom shall serve as members of the committee for the period of one year, three as members for the period of two years, and three as members for the period of three years, three of the nine members thus selected by the trustees to be representatives of labor, three to be representatives of capital, each chosen for distinguished services in the industrial world in promoting righteous industrial peace, and three members to represent the general public. Any vacancies which may occur in this committee shall be filled by the selection and appointment in the manner prescribed for the original appointment of the committee, and when the committee has first been fully selected and appointed each member thereafter appointed shall serve for the period of three years or for the unexpired portion of such term. [34 Stat. L. 1242, as amended by 35 Stat. L. 637.]

This section was amended to read as above given by section 1 of the Act of Feb. 18, 1909, ch. 148, 35 Stat. L. 637. Formerly section 2 was as follows:

"SEC. 2. That it shall be the duty of the trustees herein mentioned to invest and reinvest the principal of this foundation, to receive any additions which may come to it by gift, bequest, or devise, and to invest and reinvest the same; and to pay over the income from the foundation and its additions, or such part thereof as they may from time to time apportion, to a committee of nine persons, to be known as 'The industrial peace committee,' to be selected by the trustees, three members of which committee shall serve for the period of one year, three members for the period of two years, and three members for the period of three years; three members of this committee to be representatives of labor, three to be representatives of capital, each chosen for distinguished services in the industrial world in promoting righteous industrial peace, and three members to represent the general public. Any vacancies which may occur in this committee shall be filled by selection and appointment in the manner prescribed for the original appointment of the committee, and when the committee has first been fully selected and appointed each member thereafter appointed shall serve for a period of three years or the unexpired portion of such term." [34 Stat. L. 1242.]

SEC. 3. [Meetings and conferences at Washington.] That the Industrial Peace Committee herein constituted shall arrange for such meetings and conferences in the city of Washington, District of Columbia, as it may deem advisable, of representatives of labor and capital for the purpose of discussing industrial problems with the view of arriving at a better understanding between employers and employees. It shall call such conferences in case of great industrial crises and take such other steps as in its discretion will promote the general purposes of the Foundation, subject, however, to such rules and regulations as may be prescribed by the trustees. The committee shall receive suggestions for the subjects to be discussed at the meetings and conferences, and be charged with the conduct of the proceedings at such meetings and conferences, and shall also arrange for the publication of the results of such meetings and conferences. [34 Stat. L. 1242, as amended by 35 Stat. L. 637.]

This section was amended to read as here given by section 2 of the Act of Feb. 18, 1909, ch. 148, 35 Stat. L. 637. Originally this section read as follows:

"SEC. 3. That the industrial peace committee herein constituted shall arrange for an annual conference in the city of Washington, District of Columbia, of representatives of labor and capital for the purpose of discussing industrial problems, with the view of arriving at a better understanding between employers and employees; it shall call special conferences in case of great industrial crises and at such other times as may be deemed advisable, and take such other steps as in its discretion will promote the general purposes of the foundation; subject, however, to such rules and regulations as may be prescribed by the trustees. The committee shall receive suggestions for the subjects to be discussed at the annual or other conferences and be charged with the conduct of the proceedings at such conferences. The committee shall also arrange for the publication of the results of the annual and special conferences." [34 Stat. L. 1242.]

SEC. 4. [Expenditures.] That all expenditures authorized by the trustees shall be paid exclusively from the accrued income and not from the principal of the foundation. [34 Stat. L. 1243.]

SEC. 5. [Property holdings—limit.] That the trustees herein named are authorized to hold real and personal estate in the District of Columbia to an amount not exceeding three million dollars, and to use and dispose of the same for the purposes of this foundation. [34 Stat. L. 1243.]

SEC. 6. [Principal office, etc.] That the principal office of the foundation shall be located in the District of Columbia, but offices may be maintained and meetings of the trustees and committees may be held in other places, to be provided for in by-laws to be adopted from time to time by the trustees, for the proper execution of the purposes of the foundation. [34 Stat. L. 1243.]

SEC. 7. [Co-operation with other societies.] That the Foundation for the Promotion of Industrial Peace is hereby authorized and empowered, at its discretion, to cooperate with any institutions or societies having similar or like purposes. [34 Stat. L. 1243.]

SEC. 8. [Effect.] That this Act shall take effect immediately on its passage. [34 Stat. L. 1243.]

INDUSTRIAL RELATIONS

See LABOR

INFRINGEMENT

See COPYRIGHT; PATENTS; TRADEMARKS

INSANE PERSONS

See ALASKA; HOSPITALS AND ASYLUMS

INSECTICIDE ACT

See AGRICULTURE

INSOLVENCY

See BANKRUPTCY

INSPECTION

Agricultural Products, see AGRICULTURE.

Food Products, see ANIMALS; FOOD AND DRUGS.

Locomotive Equipment, see RAILROADS.

Steam Vessels, see STEAM VESSELS.

Consult also the General Index.

INSURRECTION

- R. S. 5297. *Insurrection against a State Government*, 929.
R. S. 5298. *Insurrection against the Government of the United States*, 930.
R. S. 5299. *Power to Suppress Insurrection in Violation of Civil Rights*, 930.
R. S. 5300. *Proclamation to Insurgents to Disperse*, 931.
R. S. 5301. *Suspension of Commercial Interchange*, 931.
R. S. 5302. *In Loyal States*, 933.
R. S. 5303. *To Whom Prohibition Shall Extend*, 933.
R. S. 5304. *Commercial Interchange — to What Extent Permitted*, 934.
R. S. 5305. *Appointment and Compensation of Officers*, 935.
R. S. 5306. *Trading without License, etc.*, 935.
R. S. 5307. *Investigations to Detect Frauds*, 936.
R. S. 5308. *Confiscation of Property Employed in Aid of Insurrection*, 936.
R. S. 5309. *Proceedings, Where Had*, 938.
R. S. 5310. *Property Taken on Inland Waters*, 938.
R. S. 5311. *How Proceedings Shall Be Instituted*, 938.
R. S. 5312. *Prohibition upon Transportation of Goods to Aid Insurrection*, 939.
R. S. 5313. *Prohibition upon Trade in Captured or Abandoned Property*, 940.
R. S. 5314. *Change of Port of Entry in Case of Insurrection*, 940.
R. S. 5315. *Removal of Custom House*, 940.
R. S. 5316. *Enforcement of Preceding Sections*, 941.
R. S. 5317. *Entire District Closed to Entry*, 941.
R. S. 5319. *Forfeiture of Vessels Belonging to Citizens of Insurrectionary States*, 941.
R. S. 5320. *Refusal of Clearance to Vessels Laden with Suspected Merchandise*, 942.
R. S. 5321. *Bond upon Clearance*, 942.
R. S. 5322. *Liens upon Condemned Vessels*, 942.

CROSS-REFERENCES

Insurrection of Citizens of the United States against Foreign Countries, see **DIPLOMATIC AND CONSULAR OFFICERS.**

See generally **CIVIL RIGHTS; JUDICIARY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.**

Sec. 5297. [Insurrection against a State government.] In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary. [R. S.]

Act of Feb. 28, 1795, ch. 36, 1 Stat. L. 424; Act of March 3, 1807, ch. 39, 2 Stat. L. 443.

Sections 5297-5322 constitute title LXIX, "Insurrection," of the Revised Statutes.

In execution of the powers conferred by the Constitution, art. 1, § 8, clause 15, Congress passed this statute vesting in the President, under the terms set forth in the statute, discretionary power over the militia in cases enumerated in such clause. *U. S. v. The Tropic Wind*, (1861) 2 Hayw. & H. (D. C.) 374, 28 Fed. Cas. No. 16,541a. See also *U. S. v. Smith*, (1806) 3 Wheel. Crim. (N. Y.) 100, 27 Fed. Cas. No. 16,342.

Authority of President.—In *Luther v. Borden*, (1849) 7 How. 1, 12 U. S. (L. ed.) 581, a case arising out of the conflicts between the Rhode Island Charter Government and the so-called People's Constitutional Government, the court said: "By this act [Feb. 28, 1795] the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the Act of Congress." After the President has acted and called out the militia, a Circuit Court [now District Court] of the United States has no au-

thority to inquire whether his decision was right. See also *Martin v. Mott*, (1827) 12 Wheat. 19, 6 U. S. (L. ed.) 537; *U. S. v. One Hundred and Twenty-nine Packages*, (1862) 2 Am. L. Reg. N. S. 419, 27 Fed. Cas. No. 15,941; (1866) 8 Atty.-Gen. 13; (1854) 8 Op. Atty.-Gen. 445; (1861) 10 Op. Atty.-Gen. 74; (1874) 14 Op. Atty.-Gen. 391.

The Acts of 1795 and 1807 authorize the President to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a state or the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. *Prize Cases*, (1862) 2 Black 635, 17 U. S. (L. ed.) 459.

The statute does not, by expression, empower the President to call for the militia of the state in which the insurrection exists, but only, upon the application of such state, to call forth the militia of some other state or states. It presumes that, when occasion arises, the militia of the particular state will be brought into action by its own executive and legislative authority. (1856) 8 Op. Atty.-Gen. 8.

The President is only to be moved to action by the "legislature" of the state in which the insurrection exists, or of the executive of such state when the legislature cannot be convened. (1856) 8 Op. Atty.-Gen. 8.

District of Columbia.—This statute applies to the states and not to the District of Columbia. *U. S. v. Stewart*, (1857) 2

Hayw. & H. (D. C.) 280, 27 Fed. Cas. No. 16,401a.

The term "land forces" in the last clause of the section cannot be understood as used synonymously with "militia in service." *Ex p. Henderson*, (1878) 11 Fed. Cas. No. 6,349.

The power to furnish arms alone may be comprehended in the power to employ all the land and naval "force" of the United States. (1856) 8 Op. Atty.-Gen. 8.

Formal muster of Pennsylvania reserve regiments into the service of the United States. See (1861) 10 Op. Atty.-Gen. 100.

Sec. 5298. [Insurrection against the Government of the United States.]

Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed. [R. S.]

Act of July 29, 1861, ch. 25, 12 Stat. L. 281.

Authority of the President.—While, under the Act of June 18, 1878, sec. 15 (title WAR DEPARTMENT AND MILITARY ESTABLISHMENT), the United States marshal cannot be aided by the military forces of the United States as a posse comitatus in the execution of his process, yet, when the facts justify him in so doing, the President may issue his proclamation commanding insurgents to disperse and retire peaceably to their respec-

tive abodes within a limited time, and, if they shall fail to do so, it will then be lawful for him to employ such parts of the land forces of the United States as he may deem necessary to enforce the laws of the United States. (1878) 16 Op. Atty.-Gen. 162. See also (1881) 17 Op. Atty.-Gen. 242; (1882) 17 Op. Atty.-Gen. 333; (1889) 19 Op. Atty.-Gen. 293; (1890) 19 Op. Atty.-Gen. 570.

Sec. 5299. [Power to suppress insurrection in violation of civil rights.]

Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy, opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations. [R. S.]

Act of April 20, 1871, ch. 22, 17 Stat. L. 14.

For further provisions relating to the protection of persons in the enjoyment of equal rights under the law see the title CIVIL RIGHTS.

Sec. 5300. [Proclamation to insurgents to disperse.] Whenever, in the judgment of the President, it becomes necessary to use the military forces under this Title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time. [R. S.]

Act of July 29, 1861, ch. 25, 12 Stat. L. 282.

Sec. 5301. [Suspension of commercial intercourse.] Whenever the President, in pursuance of the provisions of this Title, has called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when the insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which such combination exists, and such insurrection is not suppressed by such State or States, or whenever the inhabitants of any State or part thereof are at any time found by the President to be in insurrection against the United States, the President may, by proclamation, declare that the inhabitants of such State, or of any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from such State or section into the other parts of the United States, or proceeding from other parts of the United States to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States. [R. S.]

Act of July 13, 1861, ch. 3, 12 Stat. L. 257; Act of July 31, 1861, ch. 32, 12 Stat. L. 284.

Purpose and effect of the statute.—The Act of July 13, 1861, was manifestly passed in view of the state of the country then existing and in view of the President's proclamation recognizing a state of war by announcing a blockade. Under the authority of this Act the President did issue a proclamation on the 16th day of August, 1861. Both the Act and the proclamation exhibit a clear implication that before the first was enacted and the second was issued, commercial intercourse was not unlawful; that it had been permitted. The enactment that it should not be permitted after a day then in the future must be considered an implied affirmation that up to that day it was lawful; and certainly Congress had the power to relax any of the ordinary rules of war. *Matthews v. McStea*, (1875) 91 U. S. 7, 23 U. S. (L. ed.) 188. See further *Dow v. Johnson*, (1879) 100 U. S. 158, 25 U. S. (L. ed.) 632; *Burbank v. Conrad*, (1877) 96 U. S. 291, 24 U. S. (L. ed.) 731; *Charge to Grand Jury*, (1861) 5 Blatchf. 549, 30 Fed. Cas. No.

18,271; *U. S. v. The William Arthur*, (1861) 3 Ware 276, 28 Fed. Cas. No. 16,702; *Chesapeake, etc., R. Co. v. U. S.*, (1885) 20 Ct. Cl. 49.

Civil war.—The conflict between the states had a status of a civil war, and the government at Washington had a right to treat as enemies the inhabitants of the states which claimed to have seceded, and to exercise in reference to them those belligerent rights which belong to parties in a public war. *U. S. v. The F. W. Johnson*, (1861) 18 Leg. Int. (Pa.) 334, 25 Fed. Cas. No. 15,179. See also *Hamilton v. Dillin*, (1874) 21 Wall. 73, 22 U. S. (L. ed.) 528; *Caldwell v. Southern Express Co.*, (1866) 1 Flipp. 85, 4 Fed. Cas. No. 2,303; *Green's Case*, (1874) 10 Ct. Cl. 470.

A proclamation by the President has no retroactive effect. (1861) 10 Op. Atty-Gen. 152.

The military occupation and control which may, under a presidential proclamation, work an exception to the prohibition of commercial intercourse, must be

actual, substantial, complete, and permanent, and not illusory, imperfect, and transient. *The Venice*, (1864) 2 Wall. 258, 17 U. S. (L. ed.) 866; *Cartwright's Case*, (1872) 8 Ct. Cl. 468.

Commercial intercourse across the military lines was not permitted by the statute nor the Treasury regulations. *U. S. v. Lane*, (1868) 8 Wall. 185, 19 U. S. (L. ed.) 445; *Millar's Case*, (1872) 8 Ct. Cl. 411.

A person residing within the United States military lines, within the insurrectionary district, could neither trade across the lines with persons in other disloyal territory, nor within the lines with persons in the loyal states. *Cutner v. U. S.*, (1873) 17 Wall. 517, 21 U. S. (L. ed.) 656; *Ensley's Case*, (1870) 6 Ct. Cl. 282. See *Furman's Case*, (1869) 5 Ct. Cl. 579; *Shacklett v. Polk*, (1875) 51 Miss. 378.

Contracts.—A contract between an alien resident of a loyal state and a citizen of a hostile state was forbidden. *Habricht v. Alexander*, (1867) 1 Woods 413, 11 Fed. Cas. No. 5,886. See *Mitchell v. U. S.*, (1874) 21 Wall. 350, 22 U. S. (L. ed.) 584.

Purchase of cotton in hostile territory by one whose residence was within territory under permanent military occupation of the United States was illegal. *Desmare v. U. S.*, (1876) 93 U. S. 605, 23 U. S. (L. ed.) 959.

A contract between citizens of a loyal state, for the sale of growing cotton, and crops to be grown, on a plantation within hostile territory, was not forbidden by the statute. *Briggs v. U. S.*, (1892) 143 U. S. 346, 12 S. Ct. 391, 36 U. S. (L. ed.) 180.

A mere message through the lines from a creditor to his debtor to invest money, already within hostile territory, in cotton, and hold it till the war was over, was illegal. *U. S. v. Grossmayer*, (1869) 9 Wall. 72, 19 U. S. (L. ed.) 627.

A contract of insurance was suspended, not dissolved. *Jackson Ins. Co. v. Stewart*, (1866) 1 Hughes 310, 13 Fed. Cas. No. 7,152; *Hamilton v. Mutual Life Ins. Co.*, (1871) 9 Blatchf. 234, 11 Fed. Cas. No. 5,986.

A partnership between residents of loyal and disloyal states was dissolved by the war, but this dissolution had no regard to things past, but only to things future. *Douglas's Case*, (1878) 14 Ct. Cl. 10. See *Dunham v. Presby*, (1876) 120 Mass. 285; *Small v. Lumpkin*, (1877) 28 Grat. (Va.) 832.

Drafts, checks, or bills of exchange, drawn by persons doing business in Mississippi, on persons doing business in New Orleans, were held void. *Britton v. Butler*, (1872) 9 Blatchf. 456, 4 Fed. Cas. No. 1,903. See *U. S. v. Virginia Bonds*, (1862) 9 Pittsb. Leg. J. (Pa.) 377, 28 Fed. Cas. No. 16,626.

A lease by a resident of a hostile state of a plantation within that state to a

citizen of a loyal state was not unlawful. *Kershaw v. Kelsey*, (1868) 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142.

Making a mortgage in hostile territory to a loyal citizen did not necessarily imply unlawful intercourse contrary to the statute and presidential proclamation. *Carson v. Dunham*, (1887) 121 U. S. 421, 7 S. Ct. 1030, 30 U. S. (L. ed.) 992.

A conveyance by a resident of a loyal state of property located in hostile territory to a person residing therein was unlawful. *Dillon's Case*, (1869) 5 Ct. Cl. 586. See *Mitchell v. Nodaway County*, (1883) 80 Mo. 257.

A conveyance of land situated within the United States lines, to loyal citizens, by the attorney of the grantor, while the grantor was within the rebel lines, was a contract between enemies, and void. *Filor's Case*, (1867) 3 Ct. Cl. 25.

Partition of land by order of a state court in a hostile state, where one of the tenants in common was engaged in the service of the United States, was void. *Cuyler v. Ferrill*, (1867) 1 Abb. 169, 6 Fed. Cas. No. 3,523.

Acts of agents.—A resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, who may have charge of the property and business of his principal, but in such a case the agency must have been created before the war began, as there is no power to appoint an agent for any purpose after hostilities have actually commenced. *U. S. v. Grossmayer*, (1869) 9 Wall. 72, 19 U. S. (L. ed.) 627. See *Mayer's Case*, (1867) 3 Ct. Cl. 249; *Montgomery's Case*, (1869) 5 Ct. Cl. 660, *affirmed* (1872) 15 Wall. 395, 21 U. S. (L. ed.) 97; *Stoddart's Case*, (1870) 6 Ct. Cl. 340.

A native of a hostile state removed therefrom to loyal territory, where he remained until the end of the war. An agent left by him in charge of his business invested in cotton the money collected. The United States was liable for the cotton captured by the military forces. *U. S. v. Quigley*, (1880) 103 U. S. 595, 26 U. S. (L. ed.) 524. But see *Cutner v. U. S.*, (1873) 17 Wall. 517, 21 U. S. (L. ed.) 656.

A resident of Georgia, on moving North in 1862, left Georgia state money with an agent for investment there, and the agent invested the money in county bonds issued to support the poor families of soldiers in the Confederate army. Such investment was not a violation of this statute. The whole reason and spirit and policy of the statute "was to prevent Northern goods from coming South so as to add to the material resources of the Confederacy, and to prohibit Southern produce from going North to pay for these goods; but it cannot be construed to apply to a case where a Northern man, resident here, returned home, and leaving local funds here,

which would have been wholly useless and would have perished North, directed their investment in something, and his agent put them in these charitable bonds." *Bartow County v. Newell*, (1880) 64 Ga. 699. See *Faulkner's Case*, (1869) 5 Ct. Cl. 612.

A partnership established in loyal territory by its agent, a disloyal person, appointed during the war, purchased cotton in a disloyal state. Such a purchase was trading with the enemy, forbidden by the statute. *Cramer's Case*, (1870) 6 Ct. Cl. 381.

Property subject to forfeiture.—Gold coin, in package, carried from one person to another, and not used for traveling expenses, when intended for an insurrectionary district, was within the prohibition of the statute. *Gay's Gold*, (1871) 13 Wall. 358, 20 U. S. (L. ed.) 606. See also *U. S. v. Canoe*, (1867) 5 Hughes, 490, 25 Fed. Cas. No. 14,718; *U. S. v. Four Thousand American Gold Coin*, (1868) Woolw. 217, 24 Fed. Cas. No. 14,439.

Goods are liable to forfeiture only while in transit. *U. S. v. The Francis Hatch*, (1864) 4 Am. L. Reg. N. S. 289, 25 Fed. Cas. No. 15,158.

A vessel is not forfeited unless an unlawful cargo is on board. *U. S. v. The Francis Hatch*, (1864) 4 Am. L. Reg. N. S. 289, 25 Fed. Cas. No. 15,158.

Temporary residence in hostile territory.—"A citizen temporarily residing in the enemy's country at the breaking out of the war was entitled to a reasonable time to collect his effects and convert them into available and manageable funds, so as to enable him to withdraw them from the country." *The John Gilpin*, (1863) Blatchf. Prize Cas. 661, 13 Fed. Cas. No. 7,344.

A purchase of property, made by a person who was involuntarily detained within the rebel territory, was not illegal. *Ealer's Case*, (1869) 5 Ct. Cl. 708. See also *Foster's Case* (1869) 5 Ct. Cl. 412.

A person voluntarily entering hostile territory cannot set up the defense that

he was involuntarily detained there. *Gearing's Case*, (1867) 3 Ct. Cl. 165.

A nonresident alien is not within the prohibition of the statute. "The laws of Congress have . . . no extraterritorial effect, and these acts on their face purport to interdict no other trade than that between the habitants of loyal and disloyal states." *La Plante's Case*, (1870) 6 Ct. Cl. 320. See *U. S. v. One Hundred and Fifty Six Packages Tea*, (1865) 2 Int. Rev. Rec. 22, 27 Fed. Cas. No. 15,933. But see *Collie's Case*, (1876) 12 Ct. Cl. 648.

Law of prize.—This statute has no reference to cases of condemnation as prize *jure belli*. *The Hampton*, (1866) 5 Wall. 372, 18 U. S. (L. ed.) 659.

Limitation of actions.—Time of war is not included in computing the twelve months' contractual limitation in a suit on a fire insurance policy. *Semmes v. Hartford Fire Ins. Co.*, (1871) 13 Wall. 158, 20 U. S. (L. ed.) 490.

Right to sue is suspended until the restoration of peace and lawful intercourse, and the period of hostilities is not to be counted as a part of the statutory limitation. *Chappelle v. Olney*, (1870) 1 Sawy. 401, 5 Fed. Cas. No. 2,613. See also *Britton v. Butler*, (1872) 9 Blatchf. 456, 4 Fed. Cas. No. 1,903; *Brown v. Hiatt*, (1870) 1 Dill. 372, 4 Fed. Cas. No. 2,011.

The Act of July 13, 1861, was held in 1865 not to be a temporary act but a general law. *The Reform*, (1865) 3 Wall. 617, 18 U. S. (L. ed.) 105. See also *U. S. v. Stevenson*, (1869) 3 Ben. 119, 27 Fed. Cas. No. 16,396; *Winchester's Case*, (1878) 14 Ct. Cl. 43.

Jurisdiction dependent on seizure.—A seizure of the property is necessary to give jurisdiction of a proceeding for a forfeiture. *U. S. v. Stevenson*, (1869) 3 Ben. 119, 27 Fed. Cas. No. 16,396.

Right to sue.—Inhabitants of a state or parts of states in rebellion are public enemies and not entitled to sue in the federal courts. *Currie v. The Josiah Harthorn*, (1862) 6 Fed. Cas. No. 3,491a.

Sec. 5302. [In loyal States.] Whenever any part of a State not declared to be in insurrection is under the control of insurgents, or is in dangerous proximity to places under their control, all commercial intercourse therein and therewith shall be subject to the prohibitions and conditions of the preceding section for such time and to such extent as shall become necessary to protect the public interests, and be directed by the Secretary of the Treasury, with the approval of the President. [R. S.]

Act of July 2, 1864, ch. 225, 13 Stat. L. 376.

Purpose of the Act of July 2, 1864. See *Pargoud's Case*, (1868) 4 Ct. Cl. 337.

Sec. 5303. [To whom prohibition shall extend.] The provisions of this Title in relation to commercial intercourse shall apply to all commercial

intercourse by and between persons residing or being within districts within the lines of national military occupation in the States or parts of States declared in insurrection, whether with each other or with persons residing or being within districts declared in insurrection and not within those lines; and all persons within the United States, not native or naturalized citizens thereof, shall be subject to the same prohibitions, in all commercial intercourse with inhabitants of States or parts of States declared in insurrection, as citizens of States not declared to be in insurrection. [R. S.]

Act of July 2, 1864, ch. 225, 13 Stat. L. 376.

Declaratory of international law.—The national law. *Stabricht v. Alexander*, Act of July 2, 1864, was only declaratory (1867) 1 Woods 413, 11 Fed. Cas. No. of a well-recognized principle of inter- 5,886.

Sec. 5304. [Commercial intercourse — to what extent permitted.] The President may, in his discretion, license and permit commercial intercourse with any part of such State or section, the inhabitants of which are so declared in a state of insurrection, so far as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States, within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied; and, also, so far as may be necessary to authorize persons residing within such lines to bring or send to market in the loyal States any products which they shall have produced with their own labor or the labor of freedmen, or others employed and paid by them, pursuant to rules relating thereto, which may be established under proper authority. And no goods, wares, or merchandise shall be taken into a State declared in insurrection, or transported therein, except to and from such places and to such monthly amounts as shall have been previously agreed upon, in writing, by the commanding general of the department in which such places are situated, and an officer designated by the Secretary of the Treasury for that purpose. Such commercial intercourse shall be in such articles and for such time and by such persons as the President, in his discretion, may think most conducive to the public interest; and, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury. [R. S.]

Act of July 13, 1861, ch. 3, 12 Stat. L. 257; Act of July 2, 1864, ch. 225, 13 Stat. L. 377.

The purpose of the law was to remedy evils existing at the time of its enactment. "The mischiefs attending private trading with the enemy, even in those parts of the insurrectionary districts which were for the time within our military lines, had been seriously felt in the conduct of the war and the best interests of the country required that it should cease. It was deemed important, however, to still maintain some species of commercial intercourse with the insurgents, for it is well known that the government desired to have, if it did not interfere with military operations, the products of the South and particularly

cotton brought within our lines. . . . This was done by withdrawing from the citizen the privilege of trading with the enemy and allowing the Secretary of the Treasury, with the approval of the President, to purchase through agents, for the United States, any products of states declared in insurrection." *U. S. v. Lane*, (1868) 8 Wall. 185, 19 U. S. (L. ed.) 445.

Authority of President.—The President has no authority to license or permit trade by private citizens within the military lines of an enemy. *U. S. v. Lane*, (1868) 8 Wall. 185, 19 U. S. (L. ed.) 445. See further *Walker's Case*,

(1876) 12 Ct. Cl. 408, (1882) 106 U. S. 413, 1 S. Ct. 300, 27 U. S. (L. ed.) 166; (1865) 11 Op. Atty.-Gen. 219, 269.

Scope and validity of Treasury regulations.—See *U. S. v. Weed*, (1866) 5 Wall. 62, 18 U. S. (L. ed.) 531; *Coppell v. Hall*, (1868) 7 Wall. 542, 19 U. S. (L. ed.) 244; *McKee v. U. S.*, (1868) 8 Wall. 163, 19 U. S. (L. ed.) 329; *U. S. v. Lane*, (1868) 8 Wall. 185, 19 U. S. (L. ed.) 445; *Hamilton v. Dillin*, (1874) 21 Wall. 73, 22 U. S. (L. ed.) 528; *U. S. v. The Henry C. Homeyer*, (1868) 2 Bond 217, 26 Fed. Cas. No. 15,353; *U. S. v. The Schooner Francis Hatch*, (1864) 4 Am. L. Reg. N. S. 289, 25 Fed. Cas. No. 15,158; *U. S. v. Four Thousand American Gold Coin*, (1868) Woolw. 217, 24 Fed. Cas. No. 14,439; *Chicago, etc., R. Co. v. Atty.-Gen.*, (1875) 2 Cent. L. J. 335, 5 Fed. Cas. No. 2,666; *Folsom's Case*, (1868) 4 Ct. Cl. 366; *Snell v. Dwight*, (1876) 120 Mass. 9.

Validity and scope of license.—In so far as business intercourse with an enemy during war was licensed, it was to be conducted in accordance with the regulations prescribed by the Secretary of the Treasury. *McKee v. U. S.*, (1868) 8 Wall. 163, 19 U. S. (L. ed.) 329. See also *The David E. Wolf*, (1867) 7 Int. Rev. Rec. 194, 7 Fed. Cas. No. 3,594; *U. S. v. One Hundred Barrels Cement*, (1862) 3 Am. L. Reg. N. S. 735, 27 Fed. Cas. No. 15,945; *Rubey's Case*, (1867) 5 Ct. Cl. 59.

Authority of purchasing agents.—See *Snell v. Dwight*, (1876) 120 Mass. 9.

A Treasury agent could not lawfully contract with a citizen of a state not in rebellion, to purchase from him cotton in the country of the enemy, which he did not own or control but must procure after he got there. *U. S. v. Lane*, (1868) 8 Wall. 185, 19 U. S. (L. ed.) 445. See *The Sea Lion*, (1866) 5 Wall. 630, 18 U. S. (L. ed.) 618; *Maddox's Case*, (1869) 5 Ct. Cl. 372.

Military authorities had no authority to grant license to trade.—*The Quachita Cotton*, (1867) 6 Wall. 521, 18 U. S. (L. ed.) 935; *Coppell v. Hall*, (1868) 7 Wall. 542, 19 U. S. (L. ed.) 244; *McKee v. U. S.*, (1868) 8 Wall. 163, 19 U. S. (L. ed.) 329; *Blakeley's Case*, 2 Ct. Cl. 323; *Snell v. Dwight*, (1876) 120 Mass. 9. But see *The Venice*, (1864) 2 Wall. 258, 17 U. S. (L. ed.) 866, as to the effect of General Butler's proclamation on the military occupation of the city of New Orleans. See also *Desmare's Case*, (1874) 10 Ct. Cl. 388, 12 Ct. Cl. 34.

A liberal construction was given to the Act of July 13, 1861, such as, according to its scope and object, would effect the end designed. *U. S. v. One Hundred and Twenty Nine Packages*, (1862) 2 Am. L. Reg. N. S. 419, 27 Fed. Cas. No. 15,941. See also *U. S. v. The Josie*, (1864) 26 Fed. Cas. No. 15,498a.

Sec. 5305. [Appointment and compensation of officers.] The Secretary of the Treasury may appoint such officers at places where officers of the customs are not now authorized by law as may be needed to carry into effect such licenses, rules, and regulations. In all cases where officers of the customs, or other salaried officers, are appointed by him to carry into effect such licenses, rules, and regulations, such officer shall be entitled to receive one thousand dollars a year for his services, in addition to his salary or compensation under any other law. But the aggregate compensation of any such officer shall not exceed the sum of five thousand dollars in any one year. [*R. S.*]

Act of July 13, 1861, ch. 3, 12 Stat. L. 257; Act of June 30, 1864, ch. 171, 13 Stat. L. 218.

Sec. 5306. [Trading without license, etc.] Every officer of the United States, civil, military, or naval, and every sutler, soldier, marine, or other person, who takes, or causes to be taken into a State declared to be in insurrection, or to any other point to be thence taken into such State, or who transports or sells, or otherwise disposes of therein, any goods, wares, or merchandise whatsoever, except in pursuance of license and authority of the President, as provided in this Title, or who makes any false statement or representation upon which license and authority is granted for such transportation, sale, or other disposition, or who, under any license or authority obtained, willfully and knowingly transports, sells, or otherwise disposes of any other goods, wares, or merchandise than such as are in good

faith so licensed and authorized, or who willfully and knowingly transports, sells, or disposes of the same, or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the Secretary of the Treasury concerning the same, or who is guilty of any act of embezzlement, of willful misappropriation of public or private money or property, of keeping false accounts, or of willfully making any false returns, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same. [R. S.]

Act of July 2, 1864, ch. 225, 13 Stat. L. 377.

Sec. 5307. [Investigations to detect frauds.] It shall be the duty of the Secretary of the Treasury, from time to time, to institute such investigations as may be necessary to detect and prevent frauds and abuses in any trade or transactions which may be licensed between inhabitants of loyal States and of States in insurrection. And the agents making such investigations shall have power to compel the attendance of witnesses, and to make examinations on oath. [R. S.]

Act of July 2, 1864, ch. 225, 13 Stat. L. 377.

Sec. 5308. [Confiscation of property employed in aid of insurrection.] Whenever during any insurrection against the Government of the United States, after the President shall have declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person, or his agent, attorney, or employé, purchases or acquires, sells or gives, any property of whatsoever kind or description, with intent to use or employ the same, or suffers the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawful subject of prize and capture wherever found; and it shall be the duty of the President to cause the same to be seized, confiscated, and condemned. [R. S.]

Act of Aug. 6, 1861, ch. 60, 12 Stat. L. 319.

The statute is constitutional.—Miller v. U. S., (1870) 11 Wall. 268, 20 U. S. (L. ed.) 135; Tyler v. Defrees, (1870) 11 Wall. 331, 20 U. S. (L. ed.) 161; Semple v. U. S., (1868) Chase 259, 21 Fed. Cas. No. 12,661.

Purpose of the statute.—The Act of 1861, from which this and the two following sections are taken, was passed by Congress in the exercise of its power under the Constitution "to make rules concerning captures on land and water," and was aimed exclusively at the seizure and confiscation of property used in aid of the Rebellion, not to punish the owner for any crime, but to weaken the insur-

rection; but the Act of July 17, 1862, proceeded upon the entirely different principle of confiscating property, without regard to its use, by way of punishing the owner for being engaged in rebellion and not returning to his allegiance. Oakes v. U. S., (1899) 174 U. S. 778, 19 S. Ct. 864, 43 U. S. (L. ed.) 1169. See also Kirk v. Lynd, (1882) 106 U. S. 315, 1 S. Ct. 296, 27 U. S. (L. ed.) 193.

Statutory provisions are exclusive as to the authority to confiscate private property and as to the mode of procedure as to its condemnation. "No authority was given to a military commandant,

as such, to effect any confiscation." *Planters' Bank v. Union Bank*, (1872) 16 Wall. 483, 21 U. S. (L. ed.) 473.

Knowledge and consent of owner.—"To justify a judicial sentence of condemnation, the consent of the owner to the hostile use of his property must be proven; but if it be proven, condemnation is decreed, not because the owner has subjected himself to punishment, but because the property has been devoted to the insurrection and must suffer the consequences. The property is the offending thing, and condemnation is decreed because its owner has voluntarily allowed it to become involved in the offense." *Kirk v. Lynd*, (1882) 106 U. S. 315, 1 S. Ct. 296, 27 U. S. (L. ed.) 193. See also *Mrs. Alexander's Cotton*, (1864) 2 Wall. 404, 17 U. S. (L. ed.) 915; *Armstrong's Foundry*, (1867) 6 Wall. 766, 18 U. S. (L. ed.) 882; *Morris's Cotton*, (1869) 8 Wall. 507, 19 U. S. (L. ed.) 481; *The Shark*, (1862) Blatchf. Prize Cas. 215, 21 Fed. Cas. No. 12,708; *Jones v. Buckell*, (1881) 104 U. S. 554, 26 U. S. (L. ed.) 841; (1867) 12 Op. Atty-Gen. 125; (1869) 13 Op. Atty-Gen. 105.

The Act of 1861 "applied only to property acquired with intent to use or employ the same, or to suffer the same to be used or employed, in aiding or abetting the insurrection, or in resisting the laws." *Conrad v. Waples*, (1877) 96 U. S. 279, 24 U. S. (L. ed.) 721.

"This Act was directed to the confiscation of specific property used with the consent of the owner to aid the insurrection, and had no reference to the guilt of the owner, and could only apply to visible, tangible property which had been so used." *Phoenix Bank v. Risley*, (1884) 111 U. S. 125, 4 S. Ct. 322, 28 U. S. (L. ed.) 374.

This Act places the forfeiture upon the fact of the use or employment of the property in aiding, abetting, or promoting the insurrection or resistance to the laws, and the real issue is whether or not the property seized has been so used or employed with the knowledge or consent of the owner. *U. S. v. One Thousand Seven Hundred and Fifty-Six Shares*, (1865) 5 Blatchf. 231, 27 Fed. Cas. No. 15,961.

This statute provides for the seizure of property acquired or disposed of with intent to employ the same in aiding the insurrection, and property knowingly so employed. *Britton v. Butler*, (1872) 9 Blatchf. 456, 4 Fed. Cas. No. 1,903.

Property subject to seizure.—Only property used in aid of insurrection is made liable to seizure and confiscation. (1866) 12 Op. Atty-Gen. 19. See *The General C. C. Pinckney*, (1862) Blatchf. Prize Cas. 278, 10 Fed. Cas. No. 5,308; (1866) 11 Op. Atty-Gen. 480.

Real estate is embraced within the provisions of the statute as a subject of seizure. *U. S. v. Republican Banner*

Officers, (1863) 11 Pittsb. Leg. J. (Pa.) 153, 27 Fed. Cas. No. 16,148.

Bonds held by alien, purchased in good faith.—"If these bonds could be held to come within the purview of this Act it is sufficient to say that no seizure or proceeding was taken against them at any time during the Rebellion nor since the restoration of peace." (1866) 12 Op. Atty-Gen. 72.

Private property, not public, was intended by this statute; only such property of persons as requires a judicial sentence of condemnation to divest the title of its owner. *Titus v. U. S.*, (1874) 20 Wall. 475, 22 U. S. (L. ed.) 400. See also *Sprott v. U. S.*, (1874) 20 Wall. 459, 22 U. S. (L. ed.) 371.

Property of natural persons.—The statute had in view the property of natural persons who were public enemies. *Planters' Bank v. Union Bank*, (1872) 16 Wall. 483, 21 U. S. (L. ed.) 473. See *Risley v. Phenix Bank*, (1881) 83 N. Y. 318, 38 Am. Rep. 421; *Ellis v. Phenix Nat. Bank*, (1883) 12 Daly (N. Y.) 177, (1884) 96 N. Y. 630.

Land conveyed to the Confederate states government for the purpose of aiding the insurrection became the property of the United States government by right of conquest, and no proceedings were needed for confiscation or forfeiture. *U. S. v. Tract of Land*, (1871) 1 Woods 475, 28 Fed. Cas. No. 16,535. See also *U. S. v. Huckabee*, (1872) 16 Wall. 414, 21 U. S. (L. ed.) 457; *Titus v. U. S.*, (1874) 20 Wall. 475, 22 U. S. (L. ed.) 400; (1866) 12 Op. Atty-Gen. 75.

Law of prize.—Interterritorial offenses, and not captures at sea of prize of war, are the subjects of the provisions of this statute. *The Sally Magee*, (1863) Blatchf. Prize Cas. 382, 21 Fed. Cas. No. 12,260, *affirmed* (1865) 3 Wall. 451, 18 U. S. (L. ed.) 197. See also *The Amy Warwick*, (1862) 2 Sprague 123, 1 Fed. Cas. No. 341.

A "full pardon and amnesty" frees the offender from the forfeitures to which the law had subjected his property. *U. S. v. The Athens Armory*, (1868) 2 Abb. 129, 24 Fed. Cas. No. 14,473. See also *Armstrong's Foundry*, (1867) 6 Wall. (U. S.) 766, 18 U. S. (L. ed.) 882; *Osborn v. U. S.*, (1875) 91 U. S. 474, 23 U. S. (L. ed.) 388. And see *Kirk v. Lewis*, (1881) 9 Fed. 645; (1866) 11 Op. Atty-Gen. 480.

As to the liability of the United States to pay rent for property held over by the United States after the termination of the war, see *Bishop's Case*, (1868) 4 Ct. Cl. 448; *Dyke's Case*, (1880) 16 Ct. Cl. 289. **Jurisdiction of proceedings for the condemnation of property taken as a prize in pursuance of this section**, see *U. S. v. Sayward*, (1895) 160 U. S. 493, 16 S. Ct. 371, 40 U. S. (L. ed.) 508.

R. S. secs. 5308-5311, cited generally in *The Manila Prize Cases*, (1902) 188 U. S. 254, 23 S. Ct. 415, 47 U. S. (L. ed.) 463.

Sec. 5309. [Proceedings, where had.] Such prizes and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted. [R. S.]

Act of Aug. 6, 1861, ch. 60, 12 Stat. L. 319.

The word "may" following the word "same" was added by the amendatory Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 253.

The Circuit Courts were abolished and their powers and duties conferred on the District Courts by the Judicial Code of March 3, 1911, ch. 13, §§ 289-291, 36 Stat. L. 1167. See the title JUDICIARY.

Conformity to practice in admiralty.—The proceedings in condemnation do not necessarily constitute a cause in admiralty, as, when instituted for condemnation of property on land, they have relation exclusively to matters which in their nature are not of admiralty cognizance. But Congress may authorize the exercise of this statutory jurisdiction in the form and modes analogous to those used in admiralty. *Union Ins. Co. v. U. S.*, (1867) 6 Wall. 759, 18 U. S. (L. ed.) 879. See also *Miller v. U. S.*, (1870) 11 Wall. 268, 20 U. S. (L. ed.) 135; *Oakes v. U. S.*, (1899) 174 U. S. 778, 19 S. Ct. 864; *The Falcon*, (1861) Blatchf. Prize Cas. 52, 8 Fed. Cas. No. 4,616; *The Hiawatha*, (1861) Blatchf. Prize Cas. 1, 12 Fed. Cas. No. 6,451; *The Sarah Starr*, (1861) Blatchf. Prize Cas. 69, 21 Fed. Cas. No. 12,352. But see *Armstrong's Foundry*, (1867) 6 Wall. 766, 18 U. S. (L. ed.) 882; *Morris v. U. S.*, (1868) 7 Wall. 578, 19 U. S. (L. ed.) 281; *Morris's Cotton*, (1869) 8 Wall. 507, 19 U. S. (L. ed.) 481; *U. S. v. Winchester*, (1878) 99 U. S. 372, 25 U. S. (L. ed.) 479; *Semple v. U. S.*, (1868) Chase 259, 21 Fed. Cas. No. 12,661; *U. S. v. One Thousand Seven Hundred and Fifty-six Shares*, (1865) 5 Blatchf. 231, 27 Fed. Cas. No.

15,961; *U. S. v. Republican Banner Officers*, (1863) 11 Pittsb. Leg. J. (Pa.) 153, 27 Fed. Cas. No. 16,148; *Pasteur v. Lewis*, (1887) 39 La. Ann. 5, 1 So. 307.

The words "prizes and captures" ordinarily refer to captures on water as maritime prize, but in this statute they plainly refer to property taken on land as well as on water. *Union Ins. Co. v. U. S.*, (1867) 6 Wall. 759, 18 U. S. (L. ed.) 879. See also *U. S. v. The Athens Armory*, (1868) 2 Abb. 129, 24 Fed. Cas. No. 14,473; *U. S. v. Republican Banner Officers*, (1863) 11 Pittsb. Leg. J. (Pa.) 153, 27 Fed. Cas. No. 16,148.

Jurisdiction.—Prior to the abolition of the Circuit Courts as noted above the word "or" was construed conjunctively, giving to both the Circuit and District Courts jurisdiction according to the amount "and" in admiralty. *Union Ins. Co. v. U. S.*, (1867) 6 Wall. 759, 18 U. S. (L. ed.) 879.

In a proceeding in rem for the confiscation of shares of stock in a corporation, it was held that the stock could be seized only in the district in which the corporation was situated. *U. S. v. One Thousand Seven Hundred and Fifty-six Shares*, (1865) 5 Blatchf. 231, 27 Fed. Cas. No. 15,961.

Sec. 5310. [Property taken on inland waters.] No property seized or taken upon any of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts. [R. S.]

Act of July 2, 1864, ch. 225, 13 Stat. L. 377.

"The term 'inland' as here used was evidently intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the sea-coast." *Porter v. U. S.*,

(1882) 106 U. S. 607, 1 S. Ct. 539, 27 U. S. (L. ed.) 286. See *The Cotton Plant*, (1870) 10 Wall. 577, 19 U. S. (L. ed.) 983.

Sec. 5311. [How proceedings shall be instituted.] The Attorney-General, or the attorney of the United States for any judicial district in which such property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the

United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts. [R. S.]

Act of Aug. 6, 1861, ch. 60, 12 Stat. L. 319.

A seizure is necessary to give the court jurisdiction when the proceeding is *in rem*. *Miller v. U. S.*, (1870) 11 Wall. 268, 20 U. S. (L. ed.) 135. See also *U. S. v. Stevenson*, (1869) 3 Ben. 119, 27 Fed. Cas. No. 16,396.

An information under this statute is in the nature of a criminal proceeding, and the allegations must conform strictly to the statute. *U. S. v. Huckabee*, (1872) 16 Wall. 414, 21 U. S. (L. ed.) 457.

An informer has no such vested interest in the property seized, before final condemnation, as will prevent the Attorney-General from dismissing the suits. *Confiscation Cases*, (1868) 7 Wall. 454, 19 U. S. (L. ed.) 196.

He cannot intrude himself on the record after the case is prepared, when the proceeding has been instituted by the Attorney-General for the sole use of the

government. *Francis v. U. S.*, (1866) 5 Wall. 338, 18 U. S. (L. ed.) 603.

To entitle him to the statutory reward for his service, an informer must inform against property which is the subject of judicial condemnation. Land owned by the Confederate States government became the property of the United States government by right of conquest, and no proceedings were needed for confiscation. *Titus v. U. S.*, (1874) 20 Wall. 475, 22 U. S. (L. ed.) 400. See also *U. S. v. Tract of Land*, (1871) 1 Woods 475, 28 Fed. Cas. No. 16,535.

Prize jurisdiction.—It appears to have been the intention of Congress to destroy the prize jurisdiction of the courts of the United States in all cases of the capture by naval vessels of property on the inland waters. (1866) 11 Op. Atty.-Gen. 416.

Sec. 5312. [Prohibition upon transportation of goods to aid insurrection.] The Secretary of the Treasury is authorized to prohibit and prevent the transportation in any vessel, or upon any railroad, turnpike, or other road or means of transportation within the United States, of any property, whatever may be the ostensible destination of the same, in all cases where there are satisfactory reasons to believe that such property is intended for any place in the possession or under the control of insurgents against the United States, or that there is imminent danger that such property will fall into the possession or under the control of such insurgents; and he is further authorized, in all cases where he deems it expedient so to do, to require reasonable security to be given that property shall not be transported to any place under insurrectionary control, and shall not, in any way, be used to give aid or comfort to such insurgents; and he may establish all such general or special regulations as may be necessary or proper to carry into effect the purposes of this section; and if any property is transported in violation of this act, or of any regulation of the Secretary of the Treasury, established in pursuance thereof, or if any attempt shall be made so to transport any, it shall be forfeited. [R. S.]

Act of May 20, 1862, ch. 81, 12 Stat. L. 404.

A seizure of the property is necessary to give jurisdiction of a proceeding for a forfeiture. *U. S. v. Stevenson*, (1869) 3 Ben. 119, 27 Fed. Cas. No. 16,396.

Gold coin, in package, carried from one person to another, and not used for traveling expenses, when intended for an insurrectionary district, was within the prohibition of the statute. *Gay's Gold*, (1871) 13 Wall. 358, 20 U. S. (L. ed.) 606. See also *U. S. v. Canoe*, (1867) 5 Hughes 490, 25 Fed. Cas. No. 14,718.

Fraudulent permit.—An attempt to transport merchandise on a fraudulent

permit obtained under R. S. sec. 5504 (embodied in Penal Laws, sec. 99, and repealed by sec. 341 thereof; see PENAL LAWS) will render the merchandise subject to forfeiture. *U. S. v. One Hundred and Twenty-nine Packages*, (1862) 2 Am. L. Reg. (N. S.) 419, 27 Fed. Cas. No. 15,941. See also *U. S. v. One Hundred Barrels Cement*, (1862) 3 Am. L. Reg. (N. S.) 735, 27 Fed. Cas. No. 15,945.

Validity of Treasury regulations.—See *U. S. v. Mora*, (1878) 97 U. S. 413, 24 U. S. (L. ed.) 1013.

Sec. 5313. [Prohibition upon trade in captured or abandoned property.] All persons in the military or naval service of the United States are prohibited from buying or selling, trading, or in any way dealing in captured or abandoned property, whereby they shall receive or expect any profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this Title, and to turn the same over to such agent without delay. Any officer of the United States, civil, military, or naval, or any sutler, soldier, or marine, or other person who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same. [R. S.]

Act of July 2, 1864, ch. 225, 13 Stat. L. 377.

Sec. 5314. [Change of port of entry in case of insurrection.] Whenever the President shall deem it impracticable, by reason of unlawful combinations of persons in opposition to the laws of the United States, to collect the duties on imports in the ordinary way, at any port of entry in any collection-district, he may cause such duties to be collected at any port of delivery in the district until such obstruction ceases; in such case the surveyor at such port of delivery shall have the powers and be subject to all the obligations of a collector at a port of entry. The Secretary of the Treasury, with the approval of the President, shall also appoint such weighers, gaugers, measurers, inspectors, appraisers, and clerks, as he may deem necessary, for the faithful execution of the revenue laws at such port of delivery, and shall establish the limits within which such port of delivery is constituted a port of entry. And all the provisions of law regulating the issue of marine papers, the coasting-trade, the warehousing of imports, and the collection of duties, shall apply to the ports of entry thus constituted, in the same manner as they do to ports of entry established by law. [R. S.]

Act of July 13, 1861, ch. 3, 12 Stat. L. 255.

As to the ports of entry and the customs officials, see the title CUSTOMS DUTIES.

Sec. 5315. [Removal of custom-house.] Whenever, at any port of entry, the duties on imports cannot, in the judgment of the President, be collected in the ordinary way, or by the course provided in the preceding section, by reason of the cause mentioned therein, he may direct that the custom-house for the district be established in any secure place within the district, either on land or on board any vessel in the district, or at sea near the coast; and in such case the collector shall reside at such place, or on shipboard, as the case may be, and there detain all vessels and cargoes arriving within or approaching the district, until the duties imposed by law on such vessels and their cargoes are paid in cash. But if the owner or consignee of the cargo on board any vessel thus detained, or the master of the vessel, desires to enter a port of entry in any other district where no

such obstructions to the execution of the laws exist, the master may be permitted so to change the destination of the vessel and cargo in his manifest; whereupon the collector shall deliver him a written permit to proceed to the port so designated. And the Secretary of the Treasury, with the approval of the President, shall make proper regulations for the enforcement on shipboard of such provisions of the laws regulating the assessment and collection of duties as in his judgment may be necessary and practicable. [R. S.]

Act of July 13, 1861, ch. 3, 12 Stat. L. 256.

Sec. 5316. [Enforcement of preceding sections.] It shall be unlawful to take any vessel or cargo detained under the preceding section from the custody of the proper officers of the customs, unless by process of some court of the United States; and in case of any attempt otherwise to take such vessel or cargo by any force, or combination, or assemblage of persons, too great to be overcome by the officers of the customs, the President, or such person as he shall have empowered for that purpose, may employ such part of the Army or Navy, or militia of the United States, or such force of citizen volunteers as may be necessary, to prevent the removal of such vessel or cargo, and to protect the officers of the customs in retaining the custody thereof. [R. S.]

Act of July 12, 1861, ch. 3, 12 Stat. L. 256.

Sec. 5317. [Entire district closed to entry.] Whenever, in any collection-district, the duties on imports cannot, in the judgment of the President, be collected in the ordinary way, nor in the manner provided by the three preceding sections, by reason of the cause mentioned in section fifty-three hundred and fourteen, the President may close the port of entry in that district; and shall in such case give notice thereof by proclamation. And thereupon all right of importation, warehousing, and other privileges incident to ports of entry shall cease and be discontinued at such port so closed until it is opened by the order of the President on the cessation of such obstructions. Every vessel from beyond the United States, or having on board any merchandise liable to duty, which attempts to enter any port which has been closed under this section, shall, with her tackle, apparel, furniture, and cargo, be forfeited. [R. S.]

Act of July 12, 1861, ch. 3, 12 Stat. L. 256.

R. S. sec. 5318 relating to the employment of vessels in addition to revenue cutters in the execution of laws providing for the collection of duties on imports and tonnage is given under the title COAST GUARD.

Sec. 5319. [Forfeiture of vessels belonging to citizens of insurrectionary States.] From and after fifteen days after the issuing of the proclamation, as provided in section fifty-three hundred and one, any vessel belonging in whole or in part to any citizen or inhabitant of such State or part of a State whose inhabitants are so declared in a state of insurrection, found at sea, or in any port of the rest of the United States, shall be forfeited. [R. S.]

Act of July 12, 1861, ch. 3, 12 Stat. L. 256.

A vessel belonging to an alien.—An alien woman, temporarily residing in Louisiana, in no way engaged in mercantile or other business, but merely visiting relatives and settling matters of account, and intending to return to her own country, was held not such a

citizen or inhabitant as would subject a vessel owned by her to forfeiture, when the vessel was obtained by her as a neutral creditor in payment of a debt due to her. *The D. F. Keeling*, (1861) Blatchf. Prize Cas. 92, 7 Fed. Cas. No. 3,873.

Sec. 5320. [Refusal of clearance to vessels laden with suspected merchandise.] The Secretary of the Treasury is authorized to refuse a clearance to any vessel or other vehicle laden with merchandise, destined for a foreign or domestic port, whenever he shall have satisfactory reason to believe that such merchandise, or any part thereof, whatever may be its ostensible destination, is intended for ports in possession or under control of insurgents against the United States; and if any vessel for which a clearance or permit has been refused by the Secretary of the Treasury, or by his order, shall depart or attempt to depart for a foreign or domestic port without being duly cleared or permitted, such vessel, with her tackle, apparel, furniture, and cargo, shall be forfeited. [*R. S.*]

Act of May 20, 1862, ch. 81, 12 Stat. L. 404.

Foreign ship detained in violation of treaty.—See *Diekelman's Case*, (1872) 8 Ct. Cl. 371.

Sec. 5321. [Bond upon clearance.] Whenever a permit or clearance is granted for either a foreign or domestic port, it shall be lawful for the collector of the customs granting the same, if he deems it necessary, under the circumstances of the case, to require a bond to be executed by the master or the owner of the vessel, in a penalty equal to the value of the cargo, and with sureties to the satisfaction of such collector, that the cargo shall be delivered at the destination for which it is cleared or permitted, and that no part thereof shall be used in affording aid or comfort to any person or parties in insurrection against the authority of the United States. [*R. S.*]

Act of May 20, 1862, ch. 81, 12 Stat. L. 404.

Validity of bond.—See *U. S. v. Mora*, (1878) 97 U. S. 419, 24 U. S. (L. ed.) 1013.

Sec. 5322. [Liens upon condemned vessels.] In all cases wherein any vessel, or other property, is condemned in any proceeding by virtue of any laws relating to insurrection or rebellion, the court rendering judgment of condemnation shall, notwithstanding such condemnation, and before awarding such vessel, or other property, or the proceeds thereof, to the United States, or to any informer, first provide for the payment, out of the proceeds of such vessel, or other property, of any bona-fide claims which shall be filed by any loyal citizen of the United States, or of any foreign state or power at peace and amity with the United States, intervening in such proceeding, and which shall be duly established by evidence as a valid claim against such vessel, or other property, under the laws of the United States or of any State thereof not declared to be in insurrection. No such claim shall be allowed in any case where the claimant has knowingly

participated in the illegal use of such ship, vessel, or other property. This section shall extend to such claims only as might have been enforced specifically against such vessel, or other property, in any State not declared to be in insurrection, wherein such claim arose. [R. S.]

Act of March 3, 1863, ch. 90, 12 Stat. L. 762.

Law of prize.—This statute has no reference to cases of condemnation as prize *jure belli*, nor does it modify the law of prize in any respect. *The Hampton*, (1866) 5 Wall. 372, 18 U. S. (L. ed.)

659. See *The Sally Magee*, (1865) 3 Wall. 451, 18 U. S. (L. ed.) 197; *V. S. v. The Sally Magee*, (1866) 4 Int. Rev. Rec. 134, 27 Fed. Cas. No. 16,216.

INTERIOR DEPARTMENT

R. S. 437. *Establishment of Department of the Interior, 944.*

R. S. 438. *Assistant Secretary of the Interior, 945.*

R. S. 439. *His duties, 945.*

R. S. 440. *Clerks and Employees, 945.*

R. S. 441. *Duties of Secretary, 947.*

R. S. 442. *Powers of Secretary, 950.*

R. S. 444. *Expenditures of the Department, 950.*

Res. of Feb. 1, 1884, No. 4, 950.

*House Committees on Pensions and Invalid Pensions to Have
Detail of Clerks from Interior Department, 950.*

Act of March 3, 1885, ch. 360, 951.

Sec. 1. First Assistant Secretary, 951.

Act of Aug. 24, 1912, ch. 370, 951.

*Sec. 1. Copies of Records to be Furnished — Fees — Verification — No
Charge for Official Use — Authenticated Copies of Rules, etc.,
951.*

2. Inspection of Records, 951.

3. Acceptance as Evidence, 951.

4. Use of Seal, 951.

*5. Authority to Recorders of Land Office Repealed — Laws Not
Changed — Indian Service Records — Fee for Certificate of
Official Character, 952.*

6. Deposit of Receipts, 952.

Act of Aug. 17, 1912, ch. 301, 952.

Sec. 1. Disbursing Clerk for Payment of Pensions, 952.

Estimates for Employees in Office of Disbursing Clerk, 953.

5. Acting Disbursing Clerk — Clerks to Sign Checks — Bond, 953.

Act of Aug. 16, 1914, ch. 141, 953.

Sec. 1. Solicitor for Department, 953.

CROSS-REFERENCES

*Clerks and Employees, Compensation, Vacancies in Office, etc., see CIVIL
SERVICE; EXECUTIVE DEPARTMENTS.*

Prosecution of Claims in, see CLAIMS.

Hours of Business, see EXECUTIVE DEPARTMENTS.

Returns Office, see PUBLIC CONTRACTS.

*For Various Bureaus and Departments under the Interior Department, see
EDUCATION; GEOLOGICAL SURVEY; INDIANS; INTERNAL
REVENUE; MINERAL LANDS; MINES AND MINING; PAT-
ENTS; PENSIONS; PUBLIC DOCUMENTS; PUBLIC LANDS;
PUBLIC PARKS; PUBLIC PRINTING.*

Sec. 437. [Establishment of Department of the Interior.] There shall
be at the seat of Government an Executive Department to be known as the

Department of the Interior, and a Secretary of the Interior, who shall be the head thereof. [R. S.]

Act of March 3, 1849, ch. 108, 9 Stat. L. 395.

R. S. secs. 437-440 constitute chapter 1, "The Department," of title XI, "The Department of the Interior," of the Revised Statutes.

The Department of the Interior is one of the executive departments of the government established by the Act of March 3, 1849, ch. 108, 9 Stat. L. 395. It is specially charged with the supervision of certain executive bureaus, and its present jurisdiction is defined by R. S. sec. 441, *infra*, p. 947. U. S. v. Allison, (1875) 91 U. S. 303, 23 U. S. (L. ed.) 372; Butterworth v. Hill, (1885) 114 U. S. 128, 5 S. Ct. 796, 29 U. S. (L. ed.) 119.

"The Secretary of the Interior has authority to disbar for misconduct attorneys practicing before his department. This authority is not given by statute, but seems to have been exercised heretofore by heads of departments for the protection of the government." (1880) 16 Op. Atty-Gen. 488; (1869) 13 Op. Atty-Gen. 150.

Sec. 438. [Assistant Secretary of the Interior.] There shall be in the Department of the Interior an Assistant Secretary of the Interior, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of six thousand dollars a year, to be paid monthly. [R. S.]

Act of March 14, 1862, ch. 41, 12 Stat. L. 369; Act of March 3, 1873, ch. 226, 17 Stat. L. 486.

By the Act of Jan. 20, 1874, ch. 11, 18 Stat. L. 4, the salary of the Assistant Secretary was reduced to \$3,500.

Subsequent appropriations have, however, increased this amount. The Legislative Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1029 provided for a First Assistant Secretary, \$5,000; Assistant Secretary, \$4,500.

Cited generally in *Turner v. Seep*, (E. D. Okla. 1909) 167 Fed. 646, *modified* (C. C. A. 8th Cir. 1910) 179 Fed. 74, 102 C. C. A. 368.

Sec. 439. [His duties.] The Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law. [R. S.]

Act of March 14, 1862, ch. 41, 12 Stat. L. 369.

The consideration and determination of appeals to the secretary from the action of the commissioner of the general land office may be made by the assistant secretary if the secretary shall by regulation prescribe the performance of such duty. (1888) 19 Op. Atty-Gen. 133.

When the assistant acts at a time when the Secretary is not absent or sick, under a regulation made by the secretary prescribing his powers, he should sign with his own proper official designation. When the secretary is absent or sick, if the assistant is in charge of the department, in pursuance of R. S. secs. 177 or 179,

(title EXECUTIVE DEPARTMENTS) he should sign as acting secretary. (1888) 19 Op. Atty-Gen. 133. See also (1886) 18 Op. Atty-Gen. 432.

Authority to approve leases of Indian lands.—Under this section the Secretary of the Interior may delegate to the assistant secretary authority to approve leases of Indian lands and assignments thereof, and so long as such authority remains unrevoked the approval of the assistant secretary is equivalent to that of the secretary. *Turner v. Seep*, (1909) 167 Fed. 646, *modified on another point* (1910) 179 Fed. 74, 102 C. C. A. 368.

Sec. 440. [Clerks and employees.] There shall also be in the Department of the Interior:

One chief clerk, at a salary of two thousand two hundred dollars a year.
A superintendent of the building, to be designated from the fourth-class clerks, who shall be paid two hundred dollars a year additional.

Three disbursing clerks.

The Secretary may, if he deem it necessary and proper, pay two hundred dollars a year additional to any four clerks of the fourth class.

Three messengers, at a salary of nine hundred dollars a year each.

One engineer, at a salary of one thousand four hundred dollars a year.

One captain of the watch, at one thousand two hundred dollars a year.

Twenty-eight watchmen for the general service of the Department building and all the bureaus therein, to be allotted to day or night service, as the Secretary may direct.

Public Documents: One superintendent, at a salary of two thousand five hundred dollars a year.

In the General Land-Office:

One chief clerk, at a salary of two thousand dollars a year.

One principal clerk, on account of military bounty-lands, at a salary of two thousand dollars a year.

One draughtsman, at a salary of one thousand six hundred dollars a year.

One assistant draughtsman, at a salary of one thousand four hundred dollars a year.

Two packers, at a salary of seven hundred and twenty dollars a year each.

In the office of the Commissioner of Indian Affairs:

One chief clerk, at a salary of two thousand dollars a year.

In the office of the Commissioner of Pensions:

One chief clerk, at a salary of two thousand dollars a year.

One engineer, at one thousand four hundred dollars a year.

One assistant engineer, at one thousand dollars a year.

In the Patent-Office:

One chief clerk, who shall be qualified to act as a principal examiner.

One librarian, who shall be qualified to act as an assistant examiner.

Five law examiners.

One examiner of classification.

One examiner of interferences.

One examiner of trade-marks and designs.

One first assistant examiner of trade-marks and designs.

Six assistant examiners of trade-marks and designs.

Forty-three principal examiners.

Eighty-six first assistant examiners.

Eighty-six second assistant examiners.

Eighty-six third assistant examiners.

Eighty-six fourth assistant examiners; and such other examiners and assistant examiners in the various grades as the Congress shall from time to time provide for.

In the Office of Education:

One chief clerk, at a salary of two thousand dollars a year.

One statistician, at a salary of eighteen hundred dollars a year.

One translator, at a salary of one thousand six hundred dollars a year.

[R. S.]

Act of March 3, 1849, ch. 108, 9 Stat. L. 395, 396; Act of April 25, 1812, ch. 68, 2 Stat. L. 716; Act of July 4, 1836, ch. 352, 5 Stat. L. 107, 111; Act of March 3, 1853, ch. 97, 10 Stat. L. 189, 209; Act of March 2, 1867, ch. 158, 14 Stat. L. 434; Act of March 3, 1873, ch. 226, 17 Stat. L. 502, 503, 504; Act of July 8, 1870, ch. 230, 16 Stat. L. 198.

So much of the foregoing section as related to the superintendent of public documents was superseded by the Printing and Binding Act of Jan. 12, 1895, ch. 23, §§ 61, 64, 28 Stat. L. 610, 611, which abolished the office of superintendent of documents in the Department of the Interior and provided for the appointment of a superintendent by the Public Printer. See the title PUBLIC DOCUMENTS.

So much of the text as follows the words "In the Patent Office" and refers to said office was amended to read as here given by an Act of Feb. 15, 1916 (see Pamph. Supp. No. 6, Fed. Stat. Ann. 2; 1918 Supp. Fed. Stat. Ann.). Prior to its amendment it provided for a chief clerk, one examiner in charge of interferences, one examiner in charge of trade-marks, twenty-four principal examiners, twenty-four first assistant, twenty-four second assistant, and twenty-four third assistant examiners, one librarian, one machinist, three skilled draughtsmen, thirty-five copyists of drawings, one messenger and purchasing clerk, one skilled laborer, and sixteen attendants in the model room, fixing the salaries of each employee.

The number and compensation of the various officers and employees depend on the Annual Appropriation Acts. Provisions for the fiscal year ending June 30, 1916, were made by the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1029.

Authority of chief clerk.—Where, during the temporary absence of the secretary and the assistant secretaries, the chief clerk of the Department of the Interior, by authority of the secretary,

signed a communication as "chief clerk and chief executive officer," designating a special disbursing agent, the designation thus made was valid. (1911) 29 Op. Atty.-Gen. 273.

Sec. 441. [Duties of Secretary.] The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

- First. The census; when directed by law.
- Second. The public lands, including mines.
- Third. The Indians.
- Fourth. Pensions and bounty-lands.
- Fifth. Patents for inventions.
- Sixth. The custody and distribution of publications.
- Seventh. Education.
- Eighth. Government Hospital for the Insane.
- Ninth. Columbia Asylum for the Deaf and Dumb. [R. S.]

Act of March 3, 1849, ch. 108, 9 Stat. L. 395; Act of July 8, 1870, ch. 230, 16 Stat. L. 198; Act of Feb. 5, 1859, ch. 22, 11 Stat. L. 379; Act of July 20, 1868, ch. 176, 15 Stat. L. 92, 106.

Sections 441–445 constitute chapter 2 of title XI of the Revised Statutes, "The Secretary of the Interior."

The first subdivision of this section, relating to the census, was superseded by the transfer of the census office to the Department of Commerce and Labor (which was subsequently designated the Department of Commerce) by the Act of Feb. 14, 1903, ch. 552, § 4, given under the title COMMERCE DEPARTMENT.

The sixth subdivision, relating to the distribution of publications, was superseded by the Act of Jan. 12, 1895, ch. 23, secs. 61, 64. See the note to the preceding R. S. sec. 440.

Administrative and not legislative power is conferred by this section. *U. S. v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

The phrase "when directed by law" is applied only to that subdivision which relates to the census. (1899) 22 Op. Atty.-Gen. 413.

The government printing office has not been placed under the jurisdiction of the Department of the Interior. *U. S. v. Allison*, (1875) 91 U. S. 303, 23 U. S. (L. ed.) 372.

Supervision relating to public lands.—

The Land Department is one of the working subdivisions of the Department of the Interior and the Secretary of the Interior is charged with the general supervision of public business relating to public lands. *Johanson v. Washington*, (1902) 190 U. S. 179, 23 S. Ct. 825, 47 U. S. (L. ed.) 1008; *Pengra v. Munz*, (C. C. Ore. 1887) 29 Fed. 830; *U. S. v. Winona, etc.*, R. Co., (C. C. A. 8th Cir. 1895) 67 Fed. 948, 32 U. S. App. 272, 15 C. C. A. 96, *affirmed* (1897) 165 U. S. 463, 17 S. Ct. 368, 41 U. S. (L. ed.) 789; *U. S. v. Schlierholz*, (E. D. Mo. 1904) 133 Fed. 333; *Neff v. U. S.*, (C. C.

A. 8th Cir. 1908) 165 Fed. 273, 91 C. C. A. 241.

"It is obvious that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated and which are therefore not provided for by express statute, may sometimes arise, and therefore the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice." *Williams v. U. S.*, (1891) 138 U. S. 514, 11 S. Ct. 457, 34 U. S. (L. ed.) 1026.

The Land Department of the United States, including in that term the Secretary of the Interior, the commissioner of the general land office and the subordinate officers, constitutes a special tribunal, vested with the jurisdiction to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. *U. S. v. Winona, etc., R. Co.*, (C. C. A. 8th Cir. 1895) 67 Fed. 948, 32 U. S. App. 272, 15 C. C. A. 96, *affirmed* (1897) 165 U. S. 463, 17 S. Ct. 368, 41 U. S. (L. ed.) 789.

And its judgments, like those of other special tribunals vested with judicial power, are impervious to collateral attack. *New Dunderberg Min. Co. v. Old*, (C. C. A. 8th Cir. 1897) 79 Fed. 598, 49 U. S. App. 201, 25 C. C. A. 116; *King v. McAndrews*, (C. C. A. 8th Cir. 1901) 111 Fed. 860, 50 C. C. A. 29.

The Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations respecting the public domain. *Knight v. U. S. Land Ass'n*, (1891) 142 U. S. 161, 12 S. Ct. 258, 35 U. S. (L. ed.) 974. See also *Orchard v. Alexander*, (1894) 157 U. S. 372, 15 S. Ct. 635, 39 U. S. (L. ed.) 737.

The Secretary of the Interior has the power to inquire into the extent and validity of the rights claimed against the government until a patent is issued and the legal title has passed. *U. S. v. Wilson*, (E. D. Ark. 1914) 214 Fed. 630, *citing Michigan Land, etc., Co. v. Rust*, (1897) 168 U. S. 589, 18 S. Ct. 208, 42 U. S. (L. ed.) 591. See also *Love v. Flahive*, (1907) 205 U. S. 195, 27 S. Ct. 486, 51 U. S. (L. ed.) 768.

But of course the Land Department cannot arbitrarily destroy an equitable title acquired by an entryman and held by him or his assignee. Those who hold such title have a right to be notified of and

heard in any proceeding instituted in the Land Department having for its object the cancellation of the entry upon which the equitable title depends. *Hawley v. Diller*, (1900) 178 U. S. 476, 20 S. Ct. 986, 44 U. S. (L. ed.) 1157.

Jurisdiction to revise on appeal from commissioner's decision.—The statute vests the Secretary of the Interior, in matters relating to the General Land Office, with the powers of supervision and appeal and the jurisdiction to revise on appeal is necessarily co-extensive with the powers to adjudge by the commissioner. *Magwire v. Tyler*, (1861) 1 Black 195, 17 U. S. (L. ed.) 137; *Maguire v. Tyler*, (1869) 8 Wall. 650, 19 U. S. (L. ed.) 320; *Snyder v. Sickles*, (1878) 98 U. S. 203, 25 U. S. (L. ed.) 97; *Buena Vista County v. Iowa Falls, etc., R. Co.*, (1884) 112 U. S. 165, 5 S. Ct. 84, 28 U. S. (L. ed.) 680. See also *Love v. Flahive*, (1907) 205 U. S. 195, 27 S. Ct. 486, 51 U. S. (L. ed.) 768; *Hays v. Steiger*, (1888) 78 Cal. 555, 18 Pac. 670, *affirmed* (1895) 156 U. S. 387, 15 S. Ct. 412, 39 U. S. (L. ed.) 463; *German Ins. Co. v. Hayden*, (1895) 21 Colo. 127, 40 Pac. 453, 52 A. S. R. 206.

The statutes in placing the whole business of the Land Department under the supervision of the Secretary of the Interior invest him with authority to review, reverse, amend, annul or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeal. *Paine v. Foster*, (1896) 9 Okla. 213, 53 Pac. 109.

Both the Secretary of the Interior and the commissioner, in revising the acts of the subordinate officials of the Land Department exercise supervisory rather than appellate power in the sense in which the term appellate is employed in defining the powers of courts of justice. The Secretary of the Interior, in the exercise of such authority, may approve, modify or annul the acts, proceedings and decisions of the commissioners. *Hestres v. Brennan*, (1875) 50 Cal. 211.

Rules and regulations.—The Land Department has power to adopt rules and regulations for the administration of the Forest Reserve Act by virtue of the provisions of this section and R. S. secs. 453 and 2478 (title PUBLIC LANDS). *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (1903) 190 U. S. 301, 23 S. Ct. 692, 24 S. Ct. 860, 47 U. S. (L. ed.) 1064, *affirming* (C. C. A. 9th Cir. 1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230. See also *Robinson v. Lundrigan*, (C. C. A. 8th Cir. 1910) 178 Fed. 230, 101 C. C. A. 590.

Rules and regulations made by the secretary pursuant to authorization by Congress have the force of statutory enact-

ments. *U. S. v. Thurston County*, (C. C. A. 8th Cir. 1906) 143 Fed. 287, 74 C. C. A. 425; *Leonard v. Lennox*, (C. C. A. 8th Cir. 1910) 181 Fed. 760, 104 C. C. A. 296; *Clyde v. Cummings*, (1909) 35 Utah 461, 101 Pac. 106.

The courts will take judicial notice of the rules and regulations prescribed by the Department of the Interior in respect to contests before the Land Office. *Caha v. U. S.*, (1893) 152 U. S. 211, 14 S. Ct. 513, 38 U. S. (L. ed.) 415.

Indians.—The Secretary of the Interior is empowered to direct and supervise all the public business of the United States relating to the Indians. *Buster v. Wright*, (C. C. A. 8th Cir. 1905) 135 Fed. 947, 68 C. C. A. 505. See also *Lane v. U. S.*, (1916) 241 U. S. 201, 36 S. Ct. 599, 60 U. S. (L. ed.) 956, *reversing* (1915) 43 App. Cas. (D. C.) 414; *U. S. v. Odeneal*, (C. C. Ore. 1882) 10 Fed. 616.

The general functions and duties of Indian inspectors are defined in R. S. sec. 2045 (title INDIANS), but the Secretary of the Interior may assign to them other duties relating to that business in addition to those prescribed whenever the exigencies of the public service require it. (1882) 17 Op. Atty-Gen. 391.

Under this section and R. S. secs. 463, 2058, 2149 (title INDIANS), the commissioner of Indian affairs is authorized, with the approval of the Secretary of the Interior, to cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians; and this although the reservation be within a state and the Indians be the holders, under trust patents issued to them pursuant to Act Feb. 8, 1887, ch. 119, 24 Stat. L. 388 (title INDIANS), of allotments adjacent to the reservation, and therefore citizens of the United States and the state. *Rainbow v. Young*, (1908) 161 Fed. 835, 88 C. C. A. 653.

General power is given by this section and R. S. sec. 463 (title INDIANS) to the President, acting through the Secretary of the Interior and the commissioner of Indian affairs, to make regulations for the management of all Indian affairs and of all matters arising out of the Indian relations. *U. S. v. Clapox*, (D. C. Ore. 1888) 35 Fed. 575.

So under this section and R. S. sec. 463 (title INDIANS) the commissioner of Indian affairs, with the approval of the Secretary of the Interior, may exclude collectors from Indian agencies at times when payments are being made to the Indians. *Rainbow v. Young*, (C. C. A. 8th Cir. 1908) 161 Fed. 835, 88 C. C. A. 653.

In view of the long practice of the Department of the Interior, the language of this section together with R. S. sec. 463 (title INDIANS) was construed as broad

enough to warrant a regulation respecting the adoption of whites into Indian tribes. *U. S. v. Hitchcock*, (1907) 205 U. S. 80, 27 S. Ct. 423, 51 U. S. (L. ed.) 718.

But while the Interior Department has general control over the affairs of Indians, such control is not an unlimited or an arbitrary power. It is subject to judicial inquiry. So it has been held that the authority of the Secretary of the Interior of supervision over Indian allotments cannot be arbitrarily exercised to divest the interest of one who has made proofs which were accepted by the local land officers and paid his money for the land. Any attempted deprivation of such interest, lawfully acquired, will be corrected whenever the matter is presented so that the judiciary can act upon it. *Ballinger v. U. S.*, (1910) 216 U. S. 240, 30 S. Ct. 338, 54 U. S. (L. ed.) 464, *affirming* (1907) 30 App. Cas. (D. C.) 165. See also *Johnson v. Towsley*, (1871) 13 Wall. 72, 20 U. S. (L. ed.) 485; *Cornelius v. Kessel*, (1888) 128 U. S. 456, 9 S. Ct. 122, 32 U. S. (L. ed.) 482; *Orchard v. Alexander*, (1895) 157 U. S. 372, 15 S. Ct. 635, 39 U. S. (L. ed.) 737.

Power of secretary final and conclusive.—A court is without power to issue a writ of mandamus to control the conduct of the Secretary of the Interior concerning a matter within the administrative authority of that officer. *Lane v. U. S.*, (1916) 241 U. S. 201, 36 S. Ct. 599, 60 U. S. (L. ed.) 956, *reversing* (1915) 43 App. Cas. (D. C.) 414.

The final action of the department cannot be reviewed or called in question elsewhere to correct a mere error of judgment, though a court of equity, in certain cases, might correct or set aside such action for fraud or mistake. *Pengra v. Munz*, (1887) 29 Fed. 830.

The construction of the Interior Department is important, "for the regulation and decision of the Secretary of the Interior, under whose supervision an act is to be administered, while not conclusive, is entitled to great respect and ought not to be overruled without cogent and persuasive reasons." *Cathcart v. Minnesota*, etc., R. Co., (Minn. 1916) 157 N. W. 719, *citing* *La Roque v. U. S.*, (1915) 239 U. S. 62, 36 S. Ct. 22, 60 U. S. (L. ed.) 147.

Cited generally in *Nesqually v. Gibbon*, (1895) 158 U. S. 155, 15 S. Ct. 779, 39 U. S. (L. ed.) 931; *Stoneroad v. Stoneroad*, (1894) 158 U. S. 240, 15 S. Ct. 822, 39 U. S. (L. ed.) 966; *Warner Valley Stock Co. v. Smith*, (1897) 165 U. S. 28, 17 S. Ct. 225, 41 U. S. (L. ed.) 621; *Cahn v. Barnes*, (C. C. Ore. 1881) 5 Fed. 326; *Johnston v. Morris*, (C. C. A. 9th Cir. 1896) 72 Fed. 890, 44 U. S. App. 303, 19 C. C. A. 229; *James v. Germania Iron Co.*, (C. C. A. 8th Cir. 1901) 107 Fed. 597, 46 C. C. A. 476; *Leecy v. U. S.*, (C. C. A. 8th Cir. 1911) 190 Fed. 289, 111 C. C. A. 254.

Sec. 442. [Powers of Secretary.] The Secretary of the Interior shall hereafter exercise all the powers and perform all the duties in relation to the Territories of the United States that were, prior to March first, eighteen hundred and seventy-three, by law or by custom exercised and performed by the Secretary of State. [*R. S.*]

Act of March 1, 1873, ch. 217, 17 Stat. L. 484.

R. S. sec. 443 relating to the supervision of the census by the Secretary of the Interior is given under the title *CENSUS*. On this subject see the note to the preceding *R. S. sec. 441*.

Sec. 444. [Expenditures of the Department.] The Secretary of the Interior shall sign all requisitions for the advance or payment of money, out of the Treasury, upon estimates or accounts for expenditures upon business assigned by law to his Department; subject, however, to adjustment and control by the proper accounting officers of the Department of the Treasury. [*R. S.*]

Act of March 3, 1849, ch. 108, 9 Stat. L. 395.

R. S. sec. 445. This section was as follows:

"*SEC. 445. [Secretary of Interior to make annual reports.]* The Secretary of the Interior shall make annual reports to Congress as follows:

"First. A report showing the nature, character, and amount of all claims presented to him during the preceding year under laws or treaty stipulations for compensation for depredations committed by Indians, whether allowed by him or not, and the evidence upon which his action was based.

"Second. A report showing the quantity and kind of the copies of public journals, books, and documents which have been received by him for distribution on behalf of the Government, and showing, also, the time when, the place where, and the person to whom, any of the same have been distributed and delivered during the preceding year."

Act of May 29, 1872, ch. 233, 17 Stat. L. 190; Act of Feb. 5, 1859, ch. 22, 11 Stat. L. 380.

The first paragraph of this section was superseded by the Act of March 3, 1891, ch. 538, given under the title *CLAIMS*, which transferred the jurisdiction over Indian depredation claims to the Court of Claims.

The second paragraph was superseded by the Act of Jan. 12, 1895, ch. 23. See the note to *R. S. sec. 440, supra*, p. 945.

The Act of May 29, 1872, ch. 233, carried into the Revised Statutes as section 445, contemplated a report by the Secretary of the Interior of the nature, character and amount of claims presented "under laws or treaty stipulations for compensation."

The laws theretofore in force mentioned only depredations by Indians belonging to a tribe "in amity with the United States." *Leighton v. U. S.*, (1896) 161 U. S. 291, 16 S. Ct. 495, 40 U. S. (L. ed.) 703.

Joint resolution authorizing the Secretary of the Interior to detail from that department two clerks to act as assistant-clerks to certain House Committees.

[*Res. of Feb. 1, 1884, No. 4, 23 Stat. L. 266.*]

[House Committees on Pensions and Invalid Pensions to have detail of clerks from Interior Department.] That the Secretary of the Interior, be, and is hereby authorized, if in his opinion the public interests will not suffer thereby, upon the request of either of the Committees hereinafter named, to detail from that department, one clerk to act as assistant-clerk to the House Committee on Pensions, and one clerk to act as assistant-clerk to the House Committee on Invalid Pensions. [*23 Stat. L. 266.*]

[SEC. 1.] [**First Assistant Secretary.**] * * * For an additional Assistant Secretary of the Interior, who shall be known and designated as First Assistant Secretary of the Interior, four thousand five hundred dollars. [23 Stat. L. 497.]

This is from the Sundry Civil Appropriation Act of March 3, 1885, ch. 360.
The current appropriations for the first assistant secretary are \$5,000. See the note to R. S. sec. 438, *supra*, p. 945.

An Act To make uniform charges for furnishing copies of records of the Department of the Interior and of its several bureaus.

[Act of Aug. 24, 1912, ch. 370, 37 Stat. L. 497.]

[SEC. 1.] [**Copies of records to be furnished — fees — verification — no charge for official use — authenticated copies of rules, etc.**] That the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams within his custody, and charge therefor the following fees: For all written copies, at the rate of fifteen cents for each hundred words therein; for each photolithographic copy, twenty-five cents where such copies are authorized by law; for photographic copies, fifteen cents for each sheet; and for tracings or blue prints the cost of the production thereof to be determined by the officer furnishing such copies, and in addition to these fees the sum of twenty-five cents shall be charged for each certificate of verification and the seal attached to authenticated copies: *Provided*, That there shall be no charge for the making or verification of copies required for official use by the officers of any branch of the Government: *Provided further*, That only a charge of twenty-five cents shall be made for furnishing authenticated copies of any rules, regulations, or instructions printed by the Government for gratuitous distribution. [37 Stat. L. 497.]

SEC. 2. [**Inspection of records.**] That nothing in this Act shall be construed to limit or restrict in any manner the authority of the Secretary of the Interior to prescribe such rules and regulations as he may deem proper governing the inspection of the records of said department and its various bureaus by the general public, and any person having any particular interest in any of such records may be permitted to take copies of such records under such rules and regulations as may be prescribed by the Secretary of the Interior. [37 Stat. L. 498.]

SEC. 3. [**Acceptance as evidence.**] That all authenticated copies furnished under this Act shall be admitted in evidence equally with the originals thereof. [37 Stat. L. 498.]

SEC. 4. [**Use of seal.**] That all officers who furnish authenticated copies under this Act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose. [37 Stat. L. 498.]

SEC. 5. [Authority to recorders of Land Office repealed—laws not changed—Indian service records—fee for certificate of official character.] That the Act of Congress approved April nineteenth, nineteen hundred and four, chapter thirteen hundred and ninety-six, be, and the same is hereby, repealed; but nothing in this Act shall be so construed as to repeal the provisions of sections four hundred and ninety to four hundred and ninety-three, inclusive, and forty-nine hundred and thirty-four of the Revised Statutes, fixing the rates for patent fees; or the Act approved March third, eighteen hundred and ninety-one, chapter five hundred and forty-one, fixing a rate for certifying printed copies of specifications and drawings of patents; or of section fourteen of the Act of February twentieth, nineteen hundred and five, chapter five hundred and ninety-two, to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same; nor shall anything in this Act be construed to repeal any of the provisions of section eight of the Act approved April twenty-sixth, nineteen hundred and six, chapter eighteen hundred and seventy-six, authorizing the officer having charge of the custody of any records pertaining to the enrollment of members of the Five Civilized Tribes of Indians to furnish certified copies of such records and charge for that service such fees as the Secretary of the Interior may prescribe; nor shall anything herein contained prevent the Secretary of the Interior, under his general power of supervision over Indian affairs, from prescribing such charges or fees for furnishing certified copies of the records of any Indian agency or Indian school as he may deem proper; and the said Secretary is hereby authorized to charge a fee of twenty-five cents for each certified copy issued by him as to the official character of any officer of his department. [37 Stat. L. 498.]

The Act of April 19, 1904, ch. 1396, 33 Stat. L. 185, repealed by the text, provided as follows: "That copies of any patents, records, books, or papers in the general land office authenticated by the seal and certified by the recorder of such office shall be evidence equally with the originals thereof to the same force and effect as when certified by the commissioner of said office."

For R. S. secs. 490-493 and the Act of March 3, 1891, ch. 541, mentioned in the text, see the title **PATENTS**.

For the Act of Feb. 20, 1905, ch. 592, mentioned in the text, see the title **TRADE-MARKS**.

SEC. 6. [Deposit of receipts.] That all sums received under the provisions of this Act shall be deposited in the Treasury to the credit of miscellaneous receipts. [37 Stat. L. 498.]

[SEC. 1.] [Disbursing clerk for payment of pensions.] * * * For salary of one disbursing clerk for the payment of pensions, to be selected and appointed by the Secretary of the Interior, at the rate of four thousand dollars per annum, during the last five months of the fiscal year nineteen hundred and thirteen, * * * and from and after the thirty-first day of January, nineteen hundred and thirteen, there shall be one disbursing clerk

in the Bureau of Pensions to be appointed as aforesaid and who shall receive a salary at the rate of four thousand dollars per annum; [37 Stat. L. 312.]

The provisions of this and the two paragraphs of the text following were from the Pension Appropriation Act of Aug. 17, 1912, ch. 301. Other provisions of this section 1 together with other sections of this Act are given under the title PENSIONS.

[Estimates for employees in office of disbursing clerk.] That estimates in detail shall be submitted for the fiscal year nineteen hundred and fourteen and annually thereafter for clerks and others employed in the office of the disbursing clerk for the payment of pensions and the amounts to be paid to each. [37 Stat. L. 312.]

See the note to the preceding paragraph of this section.

SEC. 5. [Acting disbursing clerk — clerks to sign checks — bond.] That in case of sickness or unavoidable absence of the disbursing clerk for the payment of pensions from his office, the Commissioner of Pensions may, with the approval of the Secretary of the Interior, authorize the chief clerk of his office or some other clerk employed therein to temporarily act as such disbursing clerk for payment of pensions.

With the approval of the Commissioner of Pensions and the Secretary of the Interior, the disbursing clerk for the payment of pensions may designate and authorize the necessary number of clerks to sign the name of the disbursing clerk for the payment of pensions to official checks.

The disbursing clerk shall give bond with good and sufficient surety for such amount and in such form as the Secretary of the Interior may approve, and such bond shall be held to cover and apply to the acts of the persons authorized to act in his place. [37 Stat. L. 313.]

See the note to the first paragraph of section 1 of this Act, *supra*, this page.

[SEC. 1.] [Solicitor for Department.] * * * Solicitor for the Department of the Interior, \$5,000: *Provided*, That the title of Assistant Attorney General is hereby changed to that of Solicitor for the Department of the Interior, but this shall not affect the status of the present incumbent or require his reappointment; [38 Stat. L. 497.]

The provisions of this paragraph are from the Legislative, Executive, and Judicial Appropriation Act of July 16, 1914, ch. 141.

INTERNAL REVENUE

- I. COMMISSIONER OF INTERNAL REVENUE, 976.
 - II. OFFICERS OF INTERNAL REVENUE, 978.
 - III. OF ASSESSMENTS AND COLLECTIONS, 1002.
 - IV. SPECIAL TAXES, 1040.
 - V. DISTILLED SPIRITS (in Vol. 4).
 - VI. FERMENTED LIQUORS (in Vol. 4)
 - VII. TOBACCO AND SNUFF (in Vol. 4).
 - VIII. CIGARS AND CIGARETTES (in Vol. 4).
 - IX. OPIUM (in Vol. 4).
 - X. DAIRY PRODUCTS (in Vol. 4).
 - XI. FILLED CHEESE (in Vol. 4).
 - XII. MIXED FLOUR (in Vol. 4).
 - XIII. WHITE PHOSPHORUS MATCHES (in Vol. 4).
 - XIV. PLAYING CARDS (in Vol. 4).
 - XV. BANKS AND BANKERS (in Vol. 4).
 - XVI. LEGACIES AND SUCCESSIONS (in Vol. 4).
 - XVII. INCOMES (in Vol. 4).
 - XVIII. EXCISE TAX ON CORPORATIONS (in Vol. 4).
 - XIX. COTTON FUTURES (in Vol 4).
 - XX. STAMP TAX ON SPECIFIC OBJECTS (in Vol 4).
 - XXI. PROVISIONS COMMON TO SEVERAL OBJECTS OF TAXATION (in Vol. 4).
 - XXII. PROSECUTIONS (in Vol. 4).
-

I. Commissioner of Internal Revenue, 976.

- R. S. 319. *Commissioner of Internal Revenue*, 976.
- R. S. 320. *Chief Clerk*, 976.
- R. S. 321. *Duties of Commissioner of Internal Revenue*, 976.
- R. S. 322. *Deputy Commissioner of Internal Revenue*, 977.
- R. S. 323. *Duties of Deputy Commissioner of Internal Revenue*, 978.
- R. S. 3671. *Estimates by Commissioner of Internal Revenue for Expenses of Collection*, 978.

II. Officers of Internal Revenue, 978.

- R. S. 3140. *Definition of Words "State" and "Person,"* 978.
- R. S. 3141. *Collection Districts*, 979.
- R. S. 3142. *Collectors*, 979.
- R. S. 3143. *Collector's Bond*, 979.
- R. S. 3144. *Collectors to Be Disbursing Agents*, 981.
- R. S. 3145. *Collector's Salary and Allowances*, 981.
- R. S. 3146. *Accounts of Collectors Adjusted According to Fiscal Year*, 982.
- R. S. 3147. *Apportionment of Compensation of Collectors*, 982.

- R. S. 3148. *Deputy Collectors*, 982.
- R. S. 3149. *Disability of Collector, or Vacancy in Office*, 982.
- R. S. 3150. *Deputy Collector, When Entitled to Collector's Salary*, 983.
- R. S. 3151. *Inspectors of Tobacco and Cigars*, 984.
- R. S. 3152. *Internal Revenue Agents*, 984.
- R. S. 3153. *Store-keepers*, 985.
- R. S. 3154. *Assignment and Transfer of Store-keepers*, 985.
- R. S. 3155. *Temporary Store-keeper*, 986.
- R. S. 3156. *Gaugers*, 986.
- R. S. 3157. *Gaugers' Fees*, 986.
- R. S. 3158. *Statement under Oath of Fees, etc.— Penalty*, 986.
- R. S. 3161. *Officers in Charge of Exportations and Drawbacks*, 987.
- R. S. 3162. *Superintendents of Exports and Drawbacks May Administer Oaths*, 988.
- R. S. 3163. *Enforcement of Laws by Revenue Officers — Transfer of Officers*, 988.
- R. S. 3164. *Duty of Collectors to Report Violations of Law to District Attorney*, 989.
- R. S. 3165. *Revenue Officers Who May Administer Oaths and Take Evidence*, 989.
- R. S. 3166. *Revenue Officers Authorized to Make Seizures*, 990.
- R. S. 3167. *Disclosure by Revenue Officers of Operations, etc., Prohibited — Penalty*, 990.
- R. S. 3168. *Officers Not to Be Interested in Certain Manufactures — Penalty*, 991.
- R. S. 3169. *Extortion, Receiving Unlawful Fees, and Other Unlawful Acts of Internal Revenue Officers*, 991.
- R. S. 3170. *District Attorney or Marshal, Accepting or Demanding Anything for Compromise of Violation of Internal-Revenue Laws*, 993.
- R. S. 3171. *Officers Suffering Injuries May Maintain Suit for Damages*, 993.
- Act of Feb. 8, 1875, ch. 36, 993.*
 - Sec. 12. *Deputy Collectors — Appointment, Bonds, and Compensation — Salaries of Collectors*, 993.
 - 13. *Compensation and Allowances of Collectors*, 995.
- Act of Aug. 15, 1876, ch. 287, 996.*
 - Sec. 1. *Compensation of Storekeepers and Gaugers*, 996.
 - Storekeeper and Gauger Duties May Be United in One Officer*, 996.
 - Transfer and Suspension of Officers*, 996.
- Act of June 19, 1878, ch. 329, 997.*
 - Sec. 1. *Gauger's Pay*, 997.
- Act of March 1, 1879, ch. 125, 997.*
 - Sec. 1. *Issuing Stamps before Payment of Tax*, 997.
 - 23. *Meaning of "Revised Statutes," 997.*
- Act of June 21, 1879, ch. 34, 997.*
 - Sec. 2. *Compensation at Small Distilleries*, 997.
- Act of July 7, 1884, ch. 331, 998.*
 - Sec. 1. *Number of Agents*, 998.
- Act of March 3, 1885, ch. 343, 998.*
 - Sec. 1. *Compensation at Small Distilleries*, 998.
 - Limit of Number of Revenue Officers*, 998.

Act of Aug. 27, 1894, ch. 349, 998.

Sec. 63. Compensation of Storekeepers — Storekeeper-Gaugers and Gaugers, 998.

64. Duties of Storekeeper and Gauger — Bond, 999.

65. Transfer of Gaugers, 999.

Act of July 7, 1898, ch. 571, 999.

Sec. 1. Compensation of Gaugers of Fruit Brandy, and on Special Duty — Calculation of Fees, 999.

Act of April 17, 1900, ch. 192, 999.

Sec. 1. Transfer of Deputy Collectors — Compensation, 999.

Compensation of Agents, 1000.

Transfer of Gaugers, Storekeeper-Gaugers, and Storekeepers — Compensation, 1000.

Act of June 28, 1902, ch. 1312, 1000.

Sec. 1. Storekeeper-Gauger Authorized — Compensation, 1000.

Act of Feb. 25, 1903, ch. 755, 1001.

Sec. 1. Number of Agents, 1001.

Act of March 18, 1904, ch. 716, 1001.

Sec. 1. Number of Agents, 1001.

Act of June 30, 1906, ch. 3912, 1001.

Sec. 1. Internal Revenue Agents — Per Diem, 1001.

Act of June 23, 1910, ch. 356, 1002.

Storekeepers, etc. — Cumulative Leave of Absence Allowed — Computation — Regulations, 1002.

Act of July 16, 1914, ch. 141, 1002.

Sec. 1. Number of Districts and Collectors, 1002.

III. Of Assessments and Collections, 1002.

R. S. 3172. Canvass of Districts for Objects of Taxation, 1002.

R. S. 3173. Annual Returns of Persons Liable to Tax, 1002.

R. S. 3174. Summons, Form and Manner of Service of, 1005.

R. S. 3175. Failure to Obey Summons, Proceedings on, 1005.

R. S. 3176. Failure to Make Return — Return by Officer — Penalty, 1006.

R. S. 3177. Officers May Enter Premises Where Taxable Articles Are Kept, 1008.

R. S. 3178. Returns to Show Whether Amounts Are Valued in Coin or Currency, 1009.

R. S. 3179. Making False Return or Refusing to Produce Books — Penalty, 1009.

R. S. 3180. Taxable Property Owned by Nonresidents, 1010.

R. S. 3181. Lists, When Taken and How Denominated, 1010.

R. S. 3182. Commissioner of Internal Revenue to Make Assessments — Correction of Incomplete or Imperfect Lists, 1010.

R. S. 3183. Duty and Authority of Collectors and Deputies to Collect All Taxes, 1012.

R. S. 3184. Notice and Demand of Taxes, 1012.

R. S. 3185. Monthly Returns and Special Returns, When to Be Made, and When Tax Payable, 1013.

R. S. 3186. Unpaid Taxes a Lien on Property, 1013.

R. S. 3187. Taxes Collectible by Distraint, 1014.

R. S. 3188. Mode of Levying Distraint, 1015.

- R. S. 3189. *Delinquents Must Exhibit Evidences Relating to Property Distrained*, 1015.
- R. S. 3190. *Proceedings on Distrain*, 1016.
- R. S. 3191. *When Property Sold under Distrain Is Subject to Tax, and Tax Not Paid*, 1016.
- R. S. 3192. *When Property Sold under Distrain May Be Purchased for United States, etc.*, 1016.
- R. S. 3193. *Property Distrained to Be Restored on Payment before Sale*, 1017.
- R. S. 3194. *Effect of Certificate of Sale on Distrain*, 1017.
- R. S. 3195. *When Property Distrained Is Not Divisible*, 1017.
- R. S. 3196. *When Real Estate May Be Sold to Satisfy Taxes*, 1018.
- R. S. 3197. *Proceedings for Seizure and Sale of Real Estate for Taxes*, 1018.
- R. S. 3198. *Certificate of Purchase — Deed*, 1019.
- R. S. 3199. *Collector's Deed to Be Prima Facie Evidence, etc.*, 1020.
- R. S. 3200. *Collector May Seize Lands of Delinquent in Any District of Same State*, 1020.
- R. S. 3201. *Redemption of Land Prior to Sale*, 1020.
- R. S. 3202. *Redemption of Lands After Sale*, 1021.
- R. S. 3203. *Record of Sales*, 1021.
- R. S. 3204. *Redemptions to Be Entered on Record*, 1021.
- R. S. 3205. *Successive Seizures May Be Made, When*, 1021.
- R. S. 3206. *Fees and Charges in Seizure Cases*, 1022.
- R. S. 3207. *Proceedings in Chancery to Subject Real Estate to Payment of Tax*, 1022.
- R. S. 3208. *Commissioner to Have Charge of Real Estate Acquired by United States under Internal-Revenue Laws*, 1022.
- R. S. 3209. *List to Be Sent to District Where the Party Taxed Resides or Has Property, When*, 1023.
- R. S. 3210. *Collections to Be Paid into Treasury Daily*, 1024.
- R. S. 3211. *Depositories*, 1024.
- R. S. 3212. *Collector's Monthly Statement — Final Accounts*, 1024.
- R. S. 3213. *Suits, etc., for Fines, Penalties, and Forfeitures, and for Taxes*, 1025.
- R. S. 3214. *Suits for Taxes, etc., Not to Be Brought without Sanction of Commissioner*, 1025.
- R. S. 3215. *Regulations as to Suits for Government of Officers*, 1025.
- R. S. 3216. *Moneys Recovered by Suits to Be Paid to Collectors*, 1026.
- R. S. 3217. *Dues from Delinquent Collector to Be Collected by Distrain and Sale*, 1026.
- R. S. 3218. *Accounts of Receipts of Internal Revenue*, 1027.
- R. S. 3219. *Collectors Charged with What*, 1027.
- R. S. 3220. *Refundment of Taxes, Penalties, etc.*, 1028.
- R. S. 3221. *Taxes on Spirits Accidentally Destroyed*, 1031.
- R. S. 3222. *Retrospective Effect of Preceding Section*, 1032.
- R. S. 3223. *When Tax on Lost Spirits Is Indemnified by Insurance*, 1032.
- R. S. 3224. *Suits to Restrain Assessments or Collection of Taxes*, 1032.
- R. S. 3225. *Suits to Recover Taxes Collected under Second Assessment — Burden of Proof as to Fraud*, 1033.
- R. S. 3226. *Suits for Recovery of Taxes Wrongfully Collected*, 1034.
- R. S. 3227. *Limitation of Suits for Recovery of Taxes Wrongfully Collected*, 1037.

- R. S. 3228. *Claims for Refundment — Limitation*, 1037.
- R. S. 3229. *Compromises*, 1038.
- R. S. 3230. *Discontinuances of Criminal Prosecutions*, 1039.
- R. S. 3231. *Continuances in Criminal Proceedings*, 1039.

Act of May 27, 1908, ch. 200, 1040.

Sec. 1. Collections to Be Covered into Treasury, 1040.

Accounts to Be Rendered Quarterly, 1040.

IV. Special Taxes, 1040.

- R. S. 3232. *Trade or Business Not to Be Carried on until Tax Paid*, 1040.
- R. S. 3233. *Trade or Business to Be Registered*, 1041.
- R. S. 3234. *Persons in Partnership at Same Place Liable for Only One Tax*, 1041.
- R. S. 3235. *Payment of One Special Tax Not to Cover Several Places of Business*, 1041.
- R. S. 3236. *When More than One Pursuit Is Carried on in Same Place by Same Person at Same Time*, 1042.
- R. S. 3238. *Stamps for Special Taxes*, 1042.
- R. S. 3239. *Special-tax Stamp to Be Exhibited in Place of Business*, 1042.
- R. S. 3240. *List of Special Taxpayers to Be Exhibited in Collector's Office — Certified Copy of List*, 1043.
- R. S. 3241. *Death or Removal after Paying Tax — Business Carried on without Additional Tax*, 1044.
- R. S. 3242. *Carrying on Business without Payment of Special Tax — Penalties*, 1044.
- R. S. 3243. *Payment of Special Tax Not to Authorize Violation of State Laws, Nor Prohibit State Taxation*, 1045.
- R. S. 3244. *Special Taxes Imposed on Whom*, 1045.
 - Brewers*, 1045.
 - Manufacturers of Stills — Drawback of Tax on Stills Exported*, 1046.
 - Rectifiers*, 1046.
 - Retail and Wholesale Liquor Dealers*, 1048.
 - Retail and Wholesale Dealers in Malt Liquors*, 1048.
 - Dealers in Leaf Tobacco*, 1049.
 - Dealers in Tobacco*, 1051.
 - Peddlers of Tobacco*, 1052.
- R. S. 3245. *Balance of Distillers' Special Tax to Be Refunded*, 1052.
- R. S. 3246. *Special Tax Not Payable by Vintners, Apothecaries, Manufacturing Chemists, etc., in Certain Cases*, 1052.

Act of Feb. 8, 1875, ch. 36, 1053.

Sec. 16. Carrying on Business without Paying Special Tax, or with Intent to Defraud — Penalty and Forfeiture, 1053.

18. Retail and Wholesale Liquor Dealers — Retail and Wholesale Dealers in Malt Liquors, 1058.

Res. of May 8, 1876, No. 10, 1060.

Special-tax Stamps to Retail Dealers in Liquors and Tobacco on Railway Trains, Vessels, etc., 1060.

Act of May 28, 1880, ch. 108 ("Carlisle Act"), 1060.

Sec. 18. Manufacture of Wooden Stills by Registered Distillers for Their Own Use, 1060.

- Act of Aug. 2, 1886, ch. 840 (" Oleomargarine Act ")*, 1061.
Sec. 3. Oleomargarine — Special Taxes on Manufacturers of or Dealers in, 1061.
4. Penalty for Carrying on Business without Paying Tax, 1063.
- Act of Oct. 1, 1890, ch. 1244*, 1064.
Sec. 53. When Special Tax to Be Due — How Reckoned — Returns of Special Taxpayers, 1064.
- Act of Aug. 27, 1894, ch. 349*, 1064.
Sec. 62. Distillers Selling Product Not Liable to Special Tax, 1064.
- Act of June 6, 1896, ch. 337 (" Filled Cheese Act ")*, 1065.
Sec. 3. Filled Cheese — Special Taxes on Manufacturers of and Dealers in — Special Taxes — Wholesale Dealers — Retail Dealers, 1065.
4. Penalties for Not Paying Tax, 1066.
- Act of June 13, 1898, ch. 448*, 1066.
Sec. 36. Mixed Flour — Special Taxes on Manufacturers or Packers of, 1066.
- Act of May 9, 1902, ch. 784*, 1066.
Sec. 4. Process or Renovated Butter — Special Tax on Manufacturers of or Dealers in, 1066.
Penalties for Not Paying Tax, 1067.
- Act of Oct. 22, 1914, ch. 331 [Repealed]*, 1067.
Sec. 3. Special Taxes, 1067.
Bankers, 1067.
Brokers, 1068.
Pawnbrokers, 1068.
Commercial Brokers, 1068.
Custom-house Brokers, 1068.
Proprietors of Theaters, etc., 1068.
Proprietors of Circuses, 1068.
Proprietors of Shows, etc., 1068.
Proprietors of Bowling Alleys and Billiard Rooms, 1069.
Commission Merchants, 1069.
4. Tobacco Dealers and Manufacturers, 1069.

V. Distilled Spirits (in Vol. 4).

- R. S. 3247. *Distiller, Definition of.*
 R. S. 3248. *Distilled Spirits, Definition of.*
 R. S. 3249. *Standard of Proof Spirits — Prevention of Frauds.*
 R. S. 3250. *Gallon as Used in Sales, Definition of.*
 R. S. 3251. *Tax on Distilled Spirits.*
 R. S. 3252. *Adding Substances to Create Fictitious Proof—Penalty.*
 R. S. 3253. *Tax on Spirits Removed without Deposit in Warehouse.*
 R. S. 3254. *Products of Distillation Containing Spirits.*
 R. S. 3255. *Distillers of Fruit Brandy — Exceptions.*
 R. S. 3256. *Evading Tax — Penalty.*
 R. S. 3257. *Distiller Defrauding or Attempting to Defraud United States of Tax on Spirits.*
 R. S. 3258. *Registry of Stills, etc.*

- R. S. 3259. *Notice of Intention to Carry on Business of Distiller or Rectifier.*
- R. S. 3260. *Distiller to Give Bond.*
- R. S. 3261. *Bond Not to Be Approved until Law Complied with.*
- R. S. 3262. *Distiller to Be Owner in Fee-simple, or Have Written Consent of Owner, etc.—Bond in Lieu of Consent of Owner.*
- R. S. 3263. *Plan of Distillery.*
- R. S. 3264. *Survey of Distilleries.*
- R. S. 3265. *Notice by Manufacturer of a Still — Penalty for Setting up Still without Permit.*
- R. S. 3266. *Distilling on Certain Premises Prohibited — Penalty.*
- R. S. 3267. *Receiving-cisterns in Distilleries.*
- R. S. 3268. *Breaking Locks, Gaining Access to Cistern, etc.—Penalty.*
- R. S. 3269. *Furnaces, Tubs, Doublers, Worm-Tanks — Penalty.*
- R. S. 3270. *Apparatus and Fastenings.*
- R. S. 3271. *Distillery Warehouse.*
- R. S. 3272. *When a Warehouse Becomes Unsafe.*
- R. S. 3273. *Store-keepers Have Charge under Direction of Collector.*
- R. S. 3274. *Custody and Management of Warehouse.*
- R. S. 3275. *Distiller to Keep Distillery Accessible.*
- R. S. 3276. *Power of Revenue Officers to Enter and Examine Distilleries — Penalty for Obstructing Officer.*
- R. S. 3277. *Distillers and Rectifiers to Furnish Facilities for Examination.—Penalty for Neglect.*
- R. S. 3278. *Officers to Break Up Ground or Walls in Order to Examine.*
- R. S. 3279. *Signs to Be Put Up By Distillers and Rectifiers — Penalty for Neglect — Penalty for Using False Signs, etc.*
- R. S. 3280. *Distillers Not to Carry on Business Until the Law Is Complied with.*
- R. S. 3281. *Carrying on Distillery without Giving Bond, etc.—Penalty.*
- R. S. 3282. *Mash, Wort and Vinegar — Vinegar Manufacturers—Examinations.*
- R. S. 3283. *No Process for Distilling Between Eleven P. M. of Saturday and One A. M. of Monday.*
- R. S. 3284. *Using Material or Removing Spirits in Absence of Store-keeper — Penalty.*
- R. S. 3285. *Emptying and Filling Tubs.*
- R. S. 3286. *Drawing Off Water, Cleansing Worm-tubs, etc.*
- R. S. 3287. *Drawing Off, Gauging, Marking, and Removal of Spirits to Distillery Warehouse — Spirits Packed for Exportation.*
- R. S. 3288. *Tax-Paid Spirits Not to Remain on Distillery Premises.*
- R. S. 3289. *Forfeiture of Unstamped Packages.*
- R. S. 3290. *Gauger Employing Distiller, etc., to Use Brands or Perform His Duties — Penalty.*
- R. S. 3291. *Gauger's Returns.*
- R. S. 3292. *Fraudulent Inspection, Gauging, etc.—Penalty.*
- R. S. 3293. *Entry of Spirits Removed to Distillery Warehouse — Bonds — Excessive Loss on Spirits — Tax to Be Paid within Three Years.*

- R. S. 3294. *Withdrawal from Warehouse, Entry for.*
- R. S. 3295. *Gauging, Stamping, and Branding Spirits Removed from Warehouse.*
- R. S. 3296. *Removal, Concealment, etc., of Spirits Contrary to Law — Penalty.*
- R. S. 3297. *Alcohol Withdrawn for Scientific Purposes.*
- R. S. 3298. *Power of Officers to Detain Packages on Suspicion.*
- R. S. 3299. *Forfeiture of Spirits Unlawfully Removed from Distillery.*
- R. S. 3300. *Store-keeper Unlawfully Removing or Allowing to Be Removed, etc.*
- R. S. 3301. *Store-keepers' Warehouse Books and Returns.*
- R. S. 3302. *Store-keepers to Have Charge of Distillery and Keep Account of Materials Used, etc.*
- R. S. 3303. *Distillers' Books, Entries to Be Made.*
- R. S. 3304. *Books to Be Open to Inspection and Preserved Two Years.*
- R. S. 3305. *False Entries — Omitting to Keep or Produce Books — Penalty.*
- R. S. 3306. *Using False Weights or Measures — Using Unregistered Materials — Penalty.*
- R. S. 3307. *Distillers' Returns of Production to Collector.*
- R. S. 3308. *Distillers' Returns of the Number of Barrels Distilled.*
- R. S. 3309. *Monthly Examination of Distiller's Return — Producing Capacity — Deficiency — Assessment.*
- R. S. 3310. *When Distilling Deemed Commenced — Suspension of Work — Penalties.*
- R. S. 3311. *Reduction of Capacity — Penalty.*
- R. S. 3312. *Stamps, How Prepared and Issued.*
- R. S. 3313. *Stamps, Form of, How Used.*
- R. S. 3314. *Accounting for Tax-paid Stamps — Reports — Export Stamps.*
- R. S. 3315. *Restamping Tax-paid Goods, When Original Stamps Are Destroyed.*
- R. S. 3316. *Officer Using, Issuing, or Permitting Use of Stamps, Contrary to Law — Penalty.*
- R. S. 3317. *Rectifier's Returns — Punishment for Frauds or Aiding and Abetting Violations of Law.*
- R. S. 3318. *Books to Be Kept by Rectifiers and Wholesale Dealers — Transcripts to Be Returned — Penalty.*
- R. S. 3319. *Purchase of Quantities Greater than Twenty Gallons from One Person, etc.*
- R. S. 3320. *Inspecting, Gauging, and Stamping Rectified Spirits.*
- R. S. 3322. *Filling Blanks and Affixing and Protecting Stamps.*
- R. S. 3323. *Marking Distilled Spirits Packed by Wholesale Dealer — Returns — Penalty.*
- R. S. 3324. *Stamps and Brands to Be Effaced from Empty Casks — Penalty for Omissions — Transportation.*
- R. S. 3325. *Buying or Selling Spirit Casks Having Inspection Marks.*
- R. S. 3326. *Changing Stamps, Shifting Spirits, etc. — Penalty.*
- R. S. 3327. *Removal within Certain Hours from Distillery or Rectifier's Premises.*
- R. S. 3328. *Tax on Imitations of Wines — How Paid.*
- R. S. 3329. *Drawback or Exported Distilled Spirits.*

- R. S. 3330. *Exportation of Distilled Spirits Withdrawn from Bonded Warehouses.*
- R. S. 3331. *Release of Distillery before Judgment, in What Cases.*
- R. S. 3332. *Distillery Apparatus to Be Destroyed in Certain Cases of Seizure and Forfeiture — Procedure — Reimbursement — Liability on Official Bond.*
- R. S. 3333. *When Burden of Proof Is On Claimant of Spirits Seized.*
- R. S. 3334. *Spirits Sold under Judicial Process Subject to Tax — Low Proof Spirits of Less Value than Tax.*

Act of Jan. 8, 1874, ch. 7.

Distillery Warehouses Used by Successors in Business.

Act of June 9, 1874, ch. 259.

- Sec. 1. Withdrawal of Distilled Spirits from Bonded Warehouses for Export — Transportation Bond — Export Bond and Entry — Duty of Collector of Port.*
- 2. Expense of Stamp to Be Ten Cents.*

Act of Feb. 8, 1875, ch. 36.

Sec. 17. Affixing Imitation Stamps on Packages of Distilled Spirits — Penalty.

Act of March 3, 1877, ch. 114.

- Sec. 1. Bonded Warehouses for Grape Brandy — Control and Custody — Regulations.*
- 2. Tax to be Paid on Monthly Return, and Brandy to Be Removed to Warehouse, etc.*
- 3. Special Stamp to be Affixed before Brandy Removed from Warehouse.*
- 4. Conditions of Deposit in Warehouse — Stipulations in the Bond.*
- 5. Withdrawal from Warehouse for Transfer or Export.*
- 6. Provisions of Law Applicable to Exportation of Grape-Brandy.*
- 7. Discontinuance of Warehouse — Transfer of Spirits.*
- 8. Grape-Brandy Removed without Compliance with Act — Tax, How Assessed and Collected.*
- 9. Payment of Tax Not Extended beyond Three Years.*
- 10. Rules and Regulations under This Act.*
- 11. Penalties for Failure to Comply with Provisions.*

Act of May 3, 1878, ch. 88.

Alcohol Withdrawn for Scientific Purposes.

Act of March 1, 1879, ch. 125.

- Sec. 5. Small Distilleries Exempt from Certain Obligations.*
- 6. Assessments for Deficient Production, or on Account of Grain, etc., Found in Excess of Capacity of Distillery, May Be Remitted.*
- 8. Notice of Intention to Rectify Distilled Spirits.*
- 11. Imported Liquors to Be Placed in Public Stores, Inspected, and Stamped — Wholesale Dealers Filling Casks.*
- 12. Effacing Stamps on Emptying Packages — Penalties,*

Sec. 13. Penalty for Dealing in or Using Empty Imported Packages with Stamps Remaining Thereon, or for Having, etc., Imitation Packages.

20. Withdrawal of Distilled Spirits for Manufacture of Preparations for Export.

Act of June 14, 1879, ch. 23.

Vinegar Factories — Location and Operation.

Act of Dec. 20, 1879, ch. 1.

Sec. 1. Allowance for Leakage, etc., on Spirits Withdrawn for Exportation.

2. To Extent of Excessive Insurance, Such Tax Not to Be Remitted.

Act of May 28, 1880, ch. 108.

Sec. 15. Allowance for Leakage and Loss during Transportation from Distillery Warehouse to Manufacturing Warehouse.

Act of Oct. 18, 1888, ch. 1194.

Act for Warehousing Grape Brandy Applicable to Other Fruit Brandy.

Act of Oct. 1, 1890, ch. 1244.

Sec. 42. Use of Wine Spirits to Fortify Pure Sweet Wines.

43. Wine Spirits and Pure Sweet Wines Defined.

44. Penalty for Unlawfully Using Wine Spirits.

45. Withdrawal of Wine Spirits from Warehouse for Fortifying Sweet Wines.

46. Withdrawal of Wine — Spirits for Fortifying Wines for Exportation.

47. Re-importation of Domestic Wines Exported.

48. Penalty for Illegally Using Wine-Spirits Not Tax-paid.

49. Recovery of Wine Spirits From Fortified Wines.

Act of March 3, 1891, ch. 544.

Distilled Spirits Removed in Bond, Free of Tax, for Making Sorghum Sugar.

Act of Aug. 27, 1894, ch. 349.

Sec. 48. Tax on Distilled Spirits Increased — Stamps — Payment — Time in Bonded Warehouse.

49. Warehousing and Transportation Bonds — Period — Re-entry and Rebonding.

50. Regauging at Warehouse within Four Years — Allowance for Loss.

51. General Bonded Warehouses for Spirits Other than from Fruit.

52. Removal of Spirits to General Bonded Warehouse.

53. Stamps on Removal.

54. Bond for Deposits in General Bonded Warehouse.

55. One Withdrawal from General Bonded Warehouse to Another.

Sec. 56. General Provisions Applicable under This Law.

- 57. Transfer From Suspended Distillery or Unfit Warehouse.*
- 58. Removal Without Complying with Requirements — Excessive Loss — Recovery of Taxes.*
- 59. Failure to Deposit — Unlawful Taking from Warehouse — Penalty and Forfeiture.*
- 60. Assessments for Quantity to Be at New Rate.*
- 67. Refusal of Bond from Persons Previously Convicted.*

Act of March 3, 1897, ch. 379.

- Sec. 1. Bottling of Distilled Spirits in Bonded Warehouse — Mingling — Stamping — Branding — Trademarks.*
- 2. Regulations to Be Prescribed by Commissioner of Internal Revenue — Inspection — Accounts.*
- 3. Inspection, Sealing, etc., for Export — Drawback.*
- 4. Tax on Deficiency.*
- 5. Tax on Spirits Entered for Export if Opened, or Mark, etc., Defaced, or Loss Found.*
- 6. Re-using Stamp or Bottle, or Opening Packages, or Changing Stamps — Penalty.*
- 7. Forging Stamp — Stamp Paper — Penalty.*
- 8. Bottled Spirits Subject to State Law.*

Act of March 3, 1899, ch. 435.

- Sec. 1. Allowance for Loss.*
- 2. Loss to be Ascertained by Regauge.*

Act of Jan. 13, 1903, ch. 134.

Leakage, etc., Allowance Extended to All Distilled Spirits in Bond.

Act of June 7, 1906, ch. 3046.

- Sec. 3. Special Gaugers — Compensation.*
- 4. Fermenting Vats Permitted.*
- 5. Tax Remitted on Brandy Accidentally Destroyed.*
- 6. Unlawful Recovery of Spirits — Penalty — Blending.*

Act of June 7, 1906, ch. 3047.

- Sec. 1. Denatured Alcohol for Commercial Purposes, etc., Free of Tax.*
- 2. Punishment for Violations — Forfeiture of Property — Use of Recovered Spirits Allowed.*
- 4. Report to Congress.*

Act of March 2, 1907, ch. 2571.

- Sec. 1. Denatured Alcohol — Withdrawal of, for Manufacture of Chemicals, etc. — Rum.*
- 2. Central Denaturing Bonded Warehouses — Establishment of, Authorized — Regulations.*
- 3. Transfer of Alcohol from Distilleries to Bonded Warehouses — Payment of Tax Not Required — Bonds.*
- 5. Effect.*

Act of Feb. 4, 1909, ch. 65.

*Internal-Revenue Tax on Alcoholic Compounds from,
Porto Rico — Regulations.*

Act of Oct. 3, 1913, ch. 16 (" Underwood Act ").

Sec. IV. N. Subsec. 2. Alcohol for Denaturization.

Act of March 4, 1915, ch. 141.

Sec. 1. Gauging, etc., Distilled Spirits — by Whom to be Done.

Act of Oct. 22, 1914, ch. 331 [Repealed].

Sec. 2. Taxes on Wines — Amount — Collection — Stamps,

VI. Fermented Liquors (in Vol. 4).

R. S. 3335. *Brewer's Notice of Business.*

R. S. 3336. *Brewer's Bond.*

R. S. 3337. *Brewer's Books and Monthly Statement.*

R. S. 3338. *Monthly Verification of Entries in Books.*

R. S. 3339. *Tax on Fermented Liquors.*

R. S. 3340. *Evading Tax, Making or Procuring False Entries,
etc.— Penalty.*

R. S. 3341. *Stamps, How Supplied and Sold — Permits — Ac-
counts.*

R. S. 3342. *Brewer's Stamps, How Procured, Affixed, and Can-
celed.*

R. S. 3343. *Selling, Removing, or Buying Fermented Liquor in
Packages without Stamp, or with False Stamp, or
with Twice-used Stamp — Penalty.*

R. S. 3344. *Drawing Fermented Liquor from Package without
Stamp, or with False Stamp, or without Defacing
Stamp — Penalty.*

R. S. 3345. *Removal for Storage without Stamps.*

R. S. 3346. *Making, Selling, or Using False or Counterfeit Stamps
or Dies — Removing Stamps — Buying, Selling, or
Re-using Removed Stamps.*

R. S. 3347. *Sour Malt Liquors, Removable in Peculiar Packages,
without Stamps.*

R. S. 3348. *Brewers Selling at Retail at Brewery, to Affix Stamps
and Keep Account.*

R. S. 3349. *Name of Manufacturer, etc., to Be Marked on Packages
— Penalty for Removing Marks, etc.*

R. S. 3350. *Permit to Carry on Business at Another Place on
Account of Accident.*

R. S. 3351. *Unfermented Worts Sold to Other Brewers — How
Taxed.*

R. S. 3352. *Possession of Fermented Liquor after Removal from
Warehouse When Tax Not Paid, Cause of For-
feiture — Absence of Stamps to Be Notice and
Evidence.*

R. S. 3353. *Removal or Defacement of Stamps by Others than
the Owner — Penalty.*

R. S. 3354. *Withdrawal of Liquor by Brewer for Bottling —
Payment of Tax by Canceled Stamps.*

Act of May 13, 1876, ch. 95.

Tax Not to be Assessed on Quantity of Materials Used, etc.

Act of March 1, 1879, ch. 125.

Sec. 21. "Gallon" Defined.

Act of June 18, 1890, ch. 432.

Fermented Liquor May be Exported in Bond Free of Tax.

Act of June 13, 1898, ch. 448.

Sec. 1. Tax on Fermented Liquors.

Act of Oct. 22, 1914, ch. 331 ("War Revenue Act of 1914") [Repealed].

Sec. 1. Additional Tax on Beer, etc.—Collection—Stamps.

VII. Tobacco and Snuff (in Vol. 4).

R. S. 3355. *Manufacturer's Statement of Business—Bond and Certificate—Penalties.*

R. S. 3356. *Sign to Be Put up by Manufacturer—Penalty for Omission.*

R. S. 3357. *Record of Manufacturers to Be Kept by Collector.*

R. S. 3358. *Annual Inventory of Manufacturer—Books and Monthly Abstracts—Penalty.*

R. S. 3359. *Dealers in Leaf-Tobacco to Render Statement of Sales When Demanded.*

R. S. 3360. *Books of Dealer in Leaf-Tobacco.*

R. S. 3362. *Tobacco and Snuff—How Put Up.*

R. S. 3363. *Tobacco and Snuff to Be Sold Only in Prescribed Packages—Penalty.*

R. S. 3364. *Label and Notice on Packages of Tobacco and Snuff.*

R. S. 3366. *Purchasing Tobacco and Snuff Not Branded or Marked—Penalty.*

R. S. 3367. *Buying Tobacco or Snuff from Manufacturer Who Has Not Paid Special Tax.*

R. S. 3368. *Tax on Tobacco and Snuff.*

R. S. 3369. *Stamps, How Prepared, Furnished, and Sold.*

R. S. 3370. *Tobacco Manufactured by One Person for Another, or On Shares—Stamps, By Whom Affixed—Fraud in Such Cases.*

R. S. 3371. *Estimated Tax on Tobacco, Snuff, and Cigars Sold without Stamps.*

R. S. 3372. *Removing Unlawfully, Selling without Stamps, or Payment of Tax, or Giving Bond, Making False Entries, etc.*

R. S. 3373. *Absence of Stamp to Be Evidence of Nonpayment.*

R. S. 3374. *Removing, Except in Proper Packages, or without Stamp—Selling Unlawfully, etc.*

R. S. 3375. *Affixing False Stamps Twice Used.*

R. S. 3376. *Stamped Portion of Emptied Packages to Be Destroyed—Buying, Selling, or Using Same.*

R. S. 3377. *Imported Tobacco and Snuff.*

- R. S. 3378. *Tobacco and Snuff on Hand before July 20, 1868 — Monthly Inventories.*
- R. S. 3379. *Tobacco, Snuff, and Cigars Manufactured between July 20, 1868, and April 10, 1869.*
- R. S. 3380. *Selling Tobacco or Snuff as Made and Tax Paid before July 20, 1868 — Penalty.*
- R. S. 3381. *Peddlers of Tobacco — Notice of Business and Bond.*
- R. S. 3382. *Peddlers of Tobacco, Snuff, or Cigars Traveling with Wagon.*
- R. S. 3383. *Peddler of Tobacco to Obtain and Exhibit Certificate — Inspection by Agent.*
- R. S. 3384. *Peddling Tobacco, Snuff, or Cigars Unlawfully — Penalty.*
- R. S. 3385. *Exportation of Manufactured Tobacco, Snuff, and Cigars — Permit for Removal — Bond — Penalties.*
- R. S. 3386. *Drawback of Tax Paid on Tobacco, Snuff, and Cigars, When Same Are Exported, etc.*

Act of Feb. 8, 1875, ch. 36.

Sec. 24. Transportation Bond Given Instead of Export Bond — Duty of Collector of Port.

25. Fraudulently Claiming Drawback on Manufactured Tobacco — How Punished.

Act of March 3, 1883, ch. 121.

Sec. 5. Label and Notice.

Act of Aug. 4, 1886, ch. 896.

Sec. 1. Export of Manufactured Tobacco, Snuff, and Cigars Free of Tax — Regulations.

Act of Oct. 1, 1890, ch. 1244.

Sec. 26. Dealers in Leaf Tobacco, Manufacturers, and Peddlers Required to Register.

Act of Aug. 27, 1894, ch. 349.

Sec. 69. Tobacco Manufacturer Defined.

Act of Aug. 5, 1909, ch. 6.

Sec. 35. Leaf Tobacco Not Subject to Tax — Dealers in.

VIII. Cigars and Cigarettes (in Vol. 4).

- R. S. 3387. *Manufacturer's Statement and Bond.*
- R. S. 3388. *Manufacturer's Sign.*
- R. S. 3389. *Record of Cigar Manufacturers.*
- R. S. 3390. *Annual Inventory, Book Entries and Monthly Abstracts of Manufacturer.*
- R. S. 3391. *Dealers in Material for Cigars to Make Sworn Statement When Demanded.*
- R. S. 3392. *Cigars and Cigarettes — How Packed — Allowance to Employees.*
- R. S. 3393. *Label and Notice on Boxes of Cigars.*
- R. S. 3394. *Cigars and Cigarettes, Tax on — Contents of Packages.*

- R. S. 3395. *Stamps, How Prepared, Furnished, and Accounted for.*
- R. S. 3396. *Inspection of Cigars, Cheroots, and Cigarettes, etc.*
- R. S. 3397. *Removal without Properly Boxing, Stamping, or Branding — Using False Stamps, etc. — Exported Cigars Exempt.*
- R. S. 3398. *Absence of Stamps Evidence of Nonpayment of Tax.*
- R. S. 3399. *Cigars Manufactured on Shares, Commission, or Contract — How Stamped — Frauds.*
- R. S. 3400. *Forfeiture of Property for Selling, etc., Contrary to Law — Using False Stamps, etc.*
- R. S. 3401. *Falsely Representing Cigars to Have Been Made Prior to July 20, 1868.*
- R. S. 3402. *Imported Cigars to Pay Tax — Stamps, When and by Whom Affixed.*
- R. S. 3403. *Selling Imported Cigars Not Packed as Required by Law.*
- R. S. 3404. *Purchasing Cigars Not Branded or Stamped.*
- R. S. 3405. *Buying Cigars from a Manufacturer Who Has Not Paid a Special Tax.*
- R. S. 3406. *Stamps on Emptied Cigar-Boxes to Be Destroyed — Penalty for Neglect, etc.*

IX. Opium (in Vol. 4).

Act of Jan. 17, 1914, ch. 10 ("Opium Act of 1914").

- Sec. 1. *Manufacture of Opium — Tax on — Definition of.*
- 2. *Regulations for Conduct of Business — Bond.*
- 3. *Stamps Required.*
- 4. *Provisions Applicable to Stamps.*
- 5. *Penalty for Violation — Forfeiture.*
- 6. *Repeal.*

Act of Dec. 17, 1914, ch. 1 (Opium Act of 1914, or Harrison Act).

- Sec. 1. *Opium and Coca Leaves — Regulation of Traffic — Registration — Payment of Special Tax.*
- 2. *Sales, etc., on Written Orders — Exceptions — Order Forms — Territory Affected by Act — Duties of Revenue Officers.*
- 3. *Returns by Registered Dealers — Contents.*
- 4. *Unregistered Persons — Traffic in Aforesaid Drugs Prohibited — Exceptions.*
- 5. *Inspection of Orders and Returns — Certified Copies Furnished — Disclosure of Information Prohibited — Certified Copy of Names of Special Taxpayers.*
- 6. *Preparations Containing Limited Quantities of Opium — Not Affected by Act.*
- 7. *Collection, etc., of Special Taxes — Laws Regulating.*
- 8. *Violations of Act — Evidence — Pleading Exemptions — Burden of Proof.*
- 9. *Penalties.*
- 10. *Enforcement of Provisions — Appointment of Officers.*
- 11. *Appropriation for Enforcement of Provisions.*
- 12. *Effect as Amending or Repealing Previous Acts.*

X. Dairy Products (in Vol. 4).*Act of Aug. 2, 1886, ch. 840 (" Oleomargarine Act ").**Sec. 1. Definition of Butter.**2. Oleomargarine Defined.**5. Manufacturers to File Notices with Collector of Internal Revenue, etc.— Bond.**6. Packing and Marking Oleomargarine — Penalty.**7. Label of Manufacturer — Penalty.**8. Tax on Manufacture — Stamps.**9. Oleomargarine Sold without Stamps to be Taxed.**10. Imported Oleomargarine.**11. Purchasing or Receiving for Sale Oleomargarine Not Stamped.**12. Purchasing from Manufacturer Not Having Paid Special Tax.**13. Stamps on Emptied Packages to Be Destroyed — Penalties.**14. Chemists and Microscopists to Be Appointed — Decision as to What Articles to Be Taxed and What are Deleterious to Health.**15. Packages Forfeited if not Stamped, or if Deleterious — Penalty for Willfully Removing Stamps, etc.**16. Export Regulations.**17. Penalty on Manufacturer for Defrauding.**18. Failure to Comply with Regulations, etc.**19. Recovery of Fines, Penalties, and Forfeitures.**20. Regulations.**21. Effect — Tax of Stock on Hand.**Act of May 9, 1902, ch. 784 (" Oleomargarine Act of 1902 ").**Sec. 4. Butter Defined — Adulterated Butter — Process or Renovated Butter.**Regulations for Manufacturers — Bond.**Packages and Marking of Adulterated Butter.**Sales Must be from Original Packages — Penalty.**Label of Manufacturer — Form — Penalties.**Tax of Manufacture of Adulterated or Renovated Butter — Stamps.**Oleomargarine Rules and Penalties Applied to Adulterated Butter.**6. Inspection of Books — Penalty for Violation.**7. Effect.***XI. Filled Cheese (in Vol. 4).***Act of June 6, 1896, ch. 337 (" Filled Cheese Act ").**Sec. 1. " Cheese " Defined.**2. " Filled Cheese " Defined.**5. Regulations for Manufacturers — Bond — Punishment.**6. Packages, Marks, Stamps, and Brands — Retail Packages — Penalty.**7. Dealers' Signs — Penalty.**8. Label for Manufacturer — Form — Penalty.**9. Tax One Cent a Pound on Manufacture — Stamps.*

- Sec. 10. Tax Assessed on Filled Cheese Sold Unstamped.*
- 11. Imported Filled Cheese to Pay Additional Tax.*
- 12. Penalty for Purchasing if Not Stamped, etc.*
- 13. Penalty for Purchasing from Manufacturer Not Having Paid Special Tax.*
- 14. Destroying Stamps — Penalty for Neglect.*
- 15. Tests if Deleterious to Health — Appeals.*
- 16. Forfeiture to U. S. of Untaxed and Deleterious Filled Cheese.*
- 17. Recovery of Fines.*
- 18. Regulations.*
- 19. Effect.*

XII. Mixed Flour (in Vol. 4).

Act of June 13, 1898, ch. 448.

- Sec. 35. Tax on Mixed Flour — "Mixed Flour" Defined.*
- 37. Branding Packages — Cards Showing Contents.*
- 38. Manner of Packing — Unbranded Packages, or False Branding. — Penalty.*
- 39. Label and Notice — Penalty.*
- 40. Amount of Tax — Size of Barrel — Stamps — Branding and Labeling Packages.*
- 41. Sale or Removal of Flour without Paying Tax — Assessment of Tax.*
- 42. Imported Flour — Purchasing or Receiving Unbranded Flour — Penalty.*
- 43. Penalty for Knowingly Purchasing or Receiving Unstamped Flour.*
- 44. Flour for Export Not Taxed — Bonds — Brands.*
- 45. Stamp to Be Destroyed on Emptying Package.*
- 46. Recovery of Fines, etc.*
- 47. Commissioner of Internal Revenue to Make Regulations — to Employ Additional Clerks, etc.*
- 48. Penalty for Second Offense.*
- 49. Effect.*

XIII. White Phosphorus Matches (in Vol. 4).

Act of April 9, 1912, ch. 75 ("White Phosphorus Matches Act").

- Sec. 1. Tax on White Phosphorus Matches — Meaning of "White Phosphorus."*
- 2. Manufacturer to Register with Internal Revenue Collector — Penalty for Failure — Regulation of Business — Bond.*
- 3. Packages Required — Tax Levied — Stamps to Be Affixed — Penalty for Not Canceling Stamps.*
- 4. Punishment for Selling, etc., Unstamped Matches — Evasion of Tax.*
- 5. Punishment for Use of Insufficient Stamps.*
- 6. Penalty for Re-using Stamps, etc.*
- 7. Forfeiture of Factory, etc., for Attempts to Defraud — Unstamped Packages.*
- 8. Special Stamps to Be Issued — Sale, etc. — Counterfeiting, etc., Laws Applicable.*

- Sec. 9. Assessment of Tax on Matches Sold without Stamps.*
- 12. Marking Factory Number — Penalty for Omission — Label Required — Penalty for Neglect.*
- 13. General Penalty.*
- 14. Recovery of Fines, etc.*
- 15. Regulations.*
- 16. Internal Revenue Provisions and Penalties Made Applicable.*
- 17. Effect.*

XIV. Playing Cards (in Vol. 4).

Act of Aug. 27, 1894, ch. 349.

- Sec. 38. Stamp Tax on Playing Cards — Regulations.*
- 39. Cancellation of Stamps — Penalty.*
- 40. Manufacturers to Register.*
- 41. Stamps, How Prepared, Furnished, Sold and Accounted for.*
- 42. Forging or Counterfeiting Stamps, Dies, etc. — Removing, Re-using, and Selling Stamps — Penalty — Evidence.*
- 43. Making, Selling, or Removing Unstamped Cards — Export without Tax.*
- 44. Removing Stamps — Re-using Stamp or Wrapper — Penalty.*
- 45. Selling without Stamps — Concealing Cards — Penalty.*
- 46. Who to Pay Tax — Manufacturer Defined — Imported Cards.*

XV. Banks and Bankers (in Vol. 4).

- R. S. 3407. Definition of Words "Bank," "Banker."*
- R. S. 3408. Tax on Circulation — Repealed as to Tax on Deposits and Capital.*
- R. S. 3409. Taxes, When Payable.*
- R. S. 3410. Capital of Banks Expired or Converted into National Banks.*
- R. S. 3411. Circulation, When Exempted from Tax.*
- R. S. 3414. Banks' and Bankers' Monthly Returns.*
- R. S. 3415. In Default of Return, Commissioner to Estimate, etc.*
- R. S. 3416. State Banks Converted into National Banks — Returns, How Made.*
- R. S. 3417. Provisions for Bank Tax and Returns Not to Apply to National Banks.*

Act of Feb. 8, 1875, ch. 36.

- Sec. 19. Tax on Circulating Notes.*
- 20. Tax on Circulating Notes of Others Used and Paid Out.*
- 21. Returns of Amount of Notes so Used or Paid Out to Be Made.*

Act of March 1, 1879, ch. 125.

- Sec. 22. When Tax Not to Be Assessed on Insolvent or Bankrupt Bank.*

XVI. Legacies and Successions (in Vol. 4).*Act of April 12, 1902, ch. 500.**Sec. 8. Lien for Taxes.**Act of June 27, 1902, ch. 1160.**Sec. 1. Refunding Legacy Taxes for Religious, etc., Purposes.**3. Refund of Legacy Tax on Contingent Interests.**Act of July 27, 1912, ch. 256.**Sec. 1. Refund of Taxes.**2. Payment.***XVII. Incomes (in Vol. 4).***Act of Oct. 3, 1913, ch. 16 (Income Tax Act of 1913) [Repealed].**Sec. II. A. Subd. 1. One Per Cent Levied on Net Income of Citizens.**2. Additional Tax on Incomes — Personal Returns — Individual Share of Undistributed Profits of Companies — Condition — Statement to be Furnished by Companies.**B. Determination of Net Income.**C. Deductions.**D. Computation for Calendar Year — Returns to Be Made.**E. Notification of Assessment, and Payment, 000.**F. Penalties.**G. Tax on Net Incomes of Corporations.**H. "State" and "United States" Construed.**J. Receipts for Payment.**K. Jurisdiction of District Courts.**L. General Laws Applicable.**M. Porto Rico and Philippines.**N. Appropriation — Officers — Expenses.**Act of July 16, 1914, ch. 141.**Income Tax — Clerks, etc. — Salaries.**Res. of March 4, 1915, No. 10.**Income Tax — Returns — Refund of Penalties Imposed for Failure to Make.***XVIII. Excise Tax on Corporations. (in Vol. 4).***Act of Aug. 5, 1909, ch. 6 ("Corporation Tax Act").**Sec. 38. Excise Tax on Corporations.**Act of March 3, 1913, ch. 120.**Corporation Tax — Refund of Additional Tax Authorized — Payment if Neglect Unintentional.**Act of March 4, 1913, ch. 141.**Sec. 1. Returns — Care of — Inspection.**Act of Oct. 3, 1913, ch. 16.**Sec. IV. S. Repeal of Excise Tax on Corporations.*

XIX. Cotton Futures (in Vol. 4).

Act of Aug. 18, 1914, ch. 255 (" United States Cotton Futures Act ") [Repealed].

- Sec. 1. Title of Act.*
2. Definitions and Construction.
3. Tax Levied on Contracts for Future Delivery.
4. Contracts of Sale — Form and Contents.
5. Contracts When Exempt from Tax.
6. Determining Cotton Values.
7. Bona Fide Spot Markets — Designation.
8. Insufficient Number of Spot Markets — Effect of.
9. Standards of Cotton Officially Established.
10. Contracts When Exempt from Tax.
11. Tax Levied on Cotton Orders.
12. Payment of Tax — Stamps.
13. Unenforceable Contracts.
14. Enforcement of Act — Rules and Regulations — Agents.
15. Penalties for Violation of Act.
16. Informers Regarded — United States Attorneys When to Prosecute under Act.
17. Testimony of Interested Persons — Immunity from Prosecution.
18. Exemption from Penalty of Person Paying Tax — Right of State, etc., to Tax.
19. Appropriation for Enforcing Act.
20. Appropriation for Making Investigations, etc.— Disposition of Receipts.
21. Time of Taking Effect.

XX. Stamp Tax on Specific Objects (in Vol. 4).

Act of Oct. 22, 1914, ch. 331 [Repealed].

- Sec. 5. Adhesive Stamps.*
6. Failure to Stamp — Penalty.
7. Forging, etc., Stamps, etc.
8. Cancellation of Stamps.
9. Promissory Notes — Failure to Stamp — Penalty.
10. Supplying Stamps — Bonds from Postmasters — Regulations.
11. Issuing Instruments Mentioned in Schedule A without Stamping — Penalty.
12. Recording Unstamped Instruments Prohibited — Tax on Foreign Bonds, etc.
13. Effect of Recording Instrument.
14. Wrong Kind of Stamp on Instrument.
15. Bonds, etc., of Government Exempt from Tax.
16. Application of Act to Articles in Schedule B.
17. Sale, etc., of Articles in Schedule B without Stamping — Penalty.
18. Removal, etc., of Stamps from Articles, etc.— Penalty.
19. Hiding Articles, etc., to Evade Tax — Penalty — Articles Exported Exempt from Tax.
20. Declaration of Manufacturer, etc.— Failure to Make — False Declarations.

Sec 21. Stamp Taxes When Attaching to Articles — "Manufacturer" Defined — Articles of Foreign Manufacture Taxed.

22. Preparation and Distribution of Stamps.

SCHEDULE A.

Bonds — Debentures — Certificates of Indebtedness.

Sale, etc., of Products or Merchandise.

Promissory Notes.

Bills of Lading, etc.

Telegraph and Telephone Messages.

Bonds.

Certificates.

Broker's Notes, etc.

Conveyances, etc.

Entries of Goods.

Insurance Policies, etc.

Passage Tickets.

Powers of Attorney — Proxies.

Protests.

Parlor Car Seats — Sleeping Car Berths.

SCHEDULE B.

Perfumery, Cosmetics, etc.

Chewing Gum, etc.

Articles on Hand, etc.

Drawback.

23. Provisions of Other Acts Extended to This Act — Records and Returns — Accounting — Evading Taxes — Penalty.

24. Effect — Redemption of Unused Stamps.

Res. of Dec. 17, 1915, No. — [Repealed].

Sec. 1. War Revenue Act of Oct. 22, 1914, Extended.

2. Appropriation for Salaries and Expenses — Availability.

XXI. Provisions Common to Several Objects of Taxation (in Vol. 4).

R. S. 3443. Fraudulent Claims of Drawback.

R. S. 3434. Removal in Bond to Pacific Coast for Exportation.

R. S. 3444. Collector's Monthly Account of Articles in Bonded Warehouses, and Articles Exported.

R. S. 3445. Changes of Stamps, Instruments for Attaching and Canceling.

R. S. 3446. Power to Alter Form and Devise of Stamps — Attaching, Canceling, etc.

R. S. 3447. Where Mode of Assessing or Collecting Any Tax Is Not Provided for — Regulations.

R. S. 3448. Internal-Revenue Laws, When Co-extensive with Jurisdiction of United States.

R. S. 3449. Removing any Liquors or Wines under Other Than Trade-names — Penalty.

R. S. 3450. Removing or Concealing Articles with Intent to Defraud United States of Tax — Forfeiture and Penalty.

R. S. 3451. Fraudulently Executing Documents Required by Internal-Revenue Laws — Penalty.

- R. S. 3452. *Having Property in Possession with Intent to Sell in Fraud of Law, or to Evade Taxes — Penalty.*
- R. S. 3453. *Seizure of Property Found in Possession in Fraud of Revenue Laws.*
- R. S. 3454. *Sales to Evade Tax — Forfeiture.*
- R. S. 3455. *Disposing of or Receiving Empty Stamped Packages, etc. — Penalties.*
- R. S. 3456. *Penalty and Forfeiture by Distillers, Rectifiers, Wholesale Liquor-Dealers, and Manufacturers of Tobacco or Cigars, for Omitting Things Required, and for Doing Things Forbidden.*
- R. S. 3457. *Package Included in Forfeiture of Goods.*
- R. S. 3458. *Goods Seized May Be Delivered to Marshal before Process Issues.*
- R. S. 3459. *Bailing of Goods Seized — Sale for Want of Bail.*
- R. S. 3460. *Proceedings on Seizure of Goods Valued at \$500 or Less.*
- R. S. 3461. *Application for Remission and Return of Proceeds — Distribution.*
- R. S. 3462. *Search-Warrants.*
- R. S. 3463. *Detection and Punishment of Frauds.*
- R. S. 3464. *Purchasing for the Government Goods Subject to Tax.*
- R. S. 3465. *Construction of Certain Revenue Acts.*
- Act of Aug. 15, 1876, ch. 287.*
Transmission of Stamps.
- Act of Aug. 27, 1894, ch. 349.*
Sec. 47. Unpaid Tax on Articles Sold or Removed for Sale to Be Estimated and Collected.
- Act of May 12, 1900, ch. 393.*
Sec. 1. Redemption of Spoiled or Destroyed Stamps, etc.
2. Decision of Commissioner Final
3. Repeal.
- Act of Oct. 1, 1890, ch. 1244.*
Sec. 10. Bonded Manufacturing Warehouses for Articles Intended for Export.
- Act of Aug. 1, 1914, ch. 223.*
Sec. 1. Report of Expenditures for Punishing Violations of the Laws.
- Act of March 4, 1915, ch. 164.*
Allowance of Drawback of Tax — Goods Shipped to Porto Rico or Philippine Islands.

XXII. Prosecutions (in Vol. 4).

- Act of March 1, 1879, ch. 125.*
Sec. 9. Arrest of Illicit Distillers by Marshal.
- Act of July 5, 1884, ch. 225.*
Sec. 1. Limitation of Prosecutions for Offenses Against Internal Revenue Laws.
2. Repeal.
- Act of May 28, 1896, ch. 252.*
Sec. 19. Warrants of Arrest.

CROSS-REFERENCES

Tobacco Statistics, see *CENSUS*.

Costs in Internal Revenue Suits, see *COSTS*.

Taxes on Reimported Goods, see *CUSTOMS DUTIES*.

Books and Papers as Evidence in Internal Revenue Suits, see *EVIDENCE*.

Execution Against Revenue Officers, see *EXECUTION*.

Collection District of Hawaii, see *HAWAIIAN ISLANDS*.

Provisions Peculiar to Insular Possessions, see *HAWAIIAN ISLANDS*;
PHILIPPINE ISLANDS; *PORTO RICO*.

Tax on National Banks, see *NATIONAL BANKS*.

Offenses Against Revenue Laws, see *PENAL LAWS*.

Printing of Stamps, see *PUBLIC PRINTING*.

I. COMMISSIONER OF INTERNAL REVENUE

Sec. 319. [Commissioner of Internal Revenue.] There shall be in the Department of the Treasury a Commissioner of Internal Revenue, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of six thousand dollars a year. [*R. S.*]

Act of July 1, 1862, ch. 119, 12 Stat. L. 432; Act of June 30, 1864, ch. 173, 13 Stat. L. 223.

Sections 319-323 constitute chapter 8 of title VII of the Revised Statutes, entitled "The Commissioner of Internal Revenue."

The current appropriation for salary of the commissioner is \$6,500, made by the Act of March 4, 1915, ch. 141, 38 Stat. L. 1013.

The commissioner of internal revenue is an officer in the Department of the Treasury. *Boake v. Comingore*, (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846.

Removal of commissioner.—Under the Act of July 1, 1862, creating the office of commissioner of internal revenue, it was

held that since by the terms of the Act, there was no limitation upon the tenure of the office, an appointee thereto must be considered as holding it at the pleasure of the appointing power. *U. S. v. Avery*, (1867) Dearly 204, 24 Fed. Cas. No. 14,481.

Sec. 320. [Chief Clerk.] The Commissioner of Internal Revenue is authorized to designate one of the heads of division as chief clerk of the Bureau without additional compensation. [*R. S.*]

Act of Dec. 24, 1872, ch. 13, 17 Stat. 403.

Sec. 321. [Duties of Commissioner of Internal Revenue.] The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; and shall provide hydrometers, and proper and sufficient adhesive stamps and stamps or dies for expressing and denoting the several stamp duties, or, in the case of percentage duties, the amount thereof; and alter and renew or replace such stamps from time to time, as occasion may require. He may also contract

for or procure the printing of requisite forms, decisions and regulations, but the printing of such forms, decisions and regulations shall be done at the Public Printing-Office, unless the Public Printer shall be unable to perform the work: *Provided*, That the Commissioner of Internal Revenue may, under such regulations as may be established by the Secretary of the Treasury, after due public notice, receive bids and make contracts for supplying stationery, blank-books and blanks to the collectors in the several collection-districts; and the said Commissioner shall estimate in detail by collection-districts the expense of assessing and the expense of the collection of internal revenue. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 223.

Estimates for expenses of collection of internal revenue were made by R. S. sec. 3671, *infra*, p. 978. See the note to said section.

Authority of commissioner.—"By this law the commissioner of internal revenue, under the direction of the Secretary of the Treasury, has the general management, supervision, and control of the assessment and collection of internal revenue taxes. He has authority to give instructions and to make regulations such as may be necessary to carry out the general purposes of the law." (1899) 22 Op. Atty.-Gen. 570.

This section while relating generally to "matters pertaining to the assessment and collection of internal revenue," does not authorize a limitation of the duties of internal revenue officers and agents in special matters otherwise provided by law. (1908) 26 Op. Atty.-Gen. 517.

Award by commissioner.—When the commissioner of internal revenue makes an award in reference to subject matter of which he has jurisdiction, such award being unimpeached is binding under the decision of the Supreme Court in *U. S. v. Kaufman*, (1877) 96 U. S. 567, 24 U. S. (L. ed.) 792; *Dugan v. U. S.*, (1899) 34 Ct. Cl. 458.

Rules and regulations.—The commissioner of internal revenue, with the approval of the Secretary of the Treasury, is authorized to make rules and regulations, and such rules and regulations have the force of law. *In re Comingore*, (D. C. Ky. 1899) 96 Fed. 552, *affirmed* (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846.

A rule or regulation made by the commissioner of internal revenue, with the approval of the Secretary of the Treasury, forbidding collectors of internal revenue to produce the reports and executive papers on file in their offices, for the use of third party litigants in a state court is valid and has the force of law and a state court

has no power to overrule it. Nor has a state court any right or power to impose upon a collector the duty of making copies of the reports or that of permitting others to take them or that of compiling information from their contents. *In re Comingore*, (D. C. Ky. 1899) 96 Fed. 552, *affirmed* (1900) 177 U. S. 459, 20 S. Ct. 701, 44 U. S. (L. ed.) 846; *In re Weeks*, (D. C. Vt. 1897) 82 Fed. 729. Nor can a collector as a witness in a state court be required to state what such reports contain. As the reports and records cannot be produced, so the conversation and actions of the parties which led up to the making of such reports cannot be produced. *In re Huttman*, (D. C. Kans. 1895) 70 Fed. 699; *In re Lamberton*, (W. D. Ark. 1903) 124 Fed. 446; *Stegall v. Thurman*, (N. D. Ga. 1910) 175 Fed. 813. But compare *In re Hirsch*, (C. C. Conn. 1896) 74 Fed. 928, *affirmed* (C. C. A. 2d Cir. 1898) 87 Fed. 1005, 57 U. S. App. 165, 31 C. C. A. 350, wherein a contrary view is maintained.

Regulations as evidence.—On the trial of persons charged with a violation of the internal revenue laws, the instructions, rules and regulations prescribed by the commissioner, as authorized by statute, are admissible in evidence, where pertinent to the issues. *Springle v. U. S.*, (C. C. A. 4th Cir. 1905) 141 Fed. 811, 73 C. C. A. 285.

For perjury in justifying falsely, before a collector or deputy collector, as a surety on a distiller's or warehousing bond, given pursuant to regulations issued by the commissioner, see *U. S. v. Hardison*, (S. D. Ga. 1905) 136 Fed. 419.

Cited generally in *Armour v. Roberts*, (W. D. Mo. 1907) 151 Fed. 846.

Sec. 322. [Deputy Commissioner of Internal Revenue.] There shall be in the office of the Commissioner of Internal Revenue a Deputy Commissioner of Internal Revenue, who shall be appointed by the President, by

and with the advice and consent of the Senate, and shall be entitled to a salary of three thousand five hundred dollars a year. [R. S.]

Act of March 3, 1863, ch. 74, 12 Stat. L. 725; Act of June 30, 1864, ch. 173, 13 Stat. L. 224; Act of July 13, 1866, ch. 184, 14 Stat. L. 170.

R. S. sec. 235 (see TREASURY DEPARTMENT) provided for two deputy commissioners at a salary of \$3,000 a year each.

The Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1013, provided for two deputy commissioners, one at \$4,000 and one at \$3,000 per year.

By R. S. sec. 349, given in JUSTICE, DEPARTMENT OF, provision was made for a solicitor of internal revenue.

Sec. 323. [Duties of Deputy Commissioner of Internal Revenue.] The Deputy Commissioner of Internal Revenue shall be charged with such duties in the office of the Commissioner of Internal Revenue as may be prescribed by the Secretary of the Treasury, or by law, and shall act as Commissioner of Internal Revenue in case of the absence of that officer. [R. S.]

Act of March 3, 1863, ch. 74, 12 Stat. L. 725; Act of June 30, 1864, ch. 173, 13 Stat. L. 224; Act of July 13, 1866, ch. 184, 14 Stat. L. 170.

By temporary appointment to perform the commissioner's duties, the first deputy commissioner does not acquire the office of commissioner and vacate his own office, though by special provision of the Tenure

of Office Act he becomes entitled to the salary and emoluments of the commissioner while he performs the duties of that office. (1871) 13 Op. Atty-Gen. 512.

Sec. 3671. [Estimates by Commissioner of Internal Revenue for expenses of collection.] The Commissioner of Internal Revenue shall estimate in detail, by collection-districts, the expense of assessing and the expense of the collection of internal revenue, and submit the same to Congress at the commencement of each regular session. [R. S.]

Act of March 3, 1869, ch. 121, 15 Stat. L. 290.

The duties of the commissioner were prescribed by R. S. sec. 321, *supra*, p. 976.

The Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223, 38 Stat. L. 621, contained a provision as follows: "... The Commissioner of Internal Revenue shall make a detailed statement to Congress once in each year as to how he has expended this sum, and also a detailed statement of all miscellaneous expenditures in the Bureau of Internal Revenue." Similar provisions have appeared in prior Appropriation Acts.

II. OFFICERS OF INTERNAL REVENUE

Sec. 3140. [Definition of words "State" and "Person."] The word "State," when used in this Title, shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out its provisions. And where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word "person," as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 306.

The last sentence of this section beginning with "And where," etc., was added by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 248.

Sections 3140-3171 constitute chapter 1 of title XXXV of the Revised Statutes, "Officers of Internal Revenue."

Sec. 3141. [Collection districts.] For the purpose of assessing, levying, and collecting the taxes provided by the internal-revenue laws, the President may establish convenient collection-districts, and for that purpose he may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district, and may from time to time alter said districts: *Provided*, That the number of districts in any State shall not exceed the number of Representatives in Congress to which such State was entitled in the Thirty-seventh Congress, except in such States as were entitled to an increased representation in the Thirty-eighth Congress, in which States the number of districts shall not exceed the number of Representatives to which any such State was so entitled: *And provided further*, That in the State of California the President may establish a number of districts not exceeding the number of Senators and Representatives to which said State was entitled, in the Thirty-seventh Congress. [R. S.]

Act of July 1, 1862, ch. 119, 12 Stat. L. 433; Act of June 30, 1864, ch. 173, 13 Stat. L. 224; Act of July 12, 1870, ch. 251, 16 Stat. L. 239.

The word "was" in the last proviso, before the word "entitled," was substituted for "is" in the section as originally enacted by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 248. District of Hawaii established, see HAWAIIAN ISLANDS.

By an Act of Aug. 15, 1876, ch. 287, 19 Stat. L. 152, the President was authorized to reduce the number of districts to not to exceed 131. The number of districts was reduced to 126 by an Act of March 3, 1877, ch. 102, 19 Stat. L. 303, was reduced to 63 by an Act of Aug. 23, 1912, ch. 350, 37 Stat. L. 381, and was increased to 64 by the Act of July 16, 1914, ch. 141, § 1, *infra*, p. 1002.

"Collection districts," within the meaning of the Act, are those districts, respectively, in which the internal duties and taxes imposed by the law upon all the subjects of taxation are collected in the manner and by the officers designated in

the statute, and there is no authority to arrange a number of states into a single district for the purpose of collecting the tax on a particular commodity. (1866) 12 Op. Atty-Gen. 55. See (1863) 10 Op. Atty-Gen. 467.

Sec. 3142. [Collectors.] The President, by and with the advice and consent of the Senate, shall appoint for each collection-district a collector, who shall be a resident of the same. When two or more collection-districts are united by him, he may designate from among the existing officers of such districts one collector for the new district, or, at his discretion, he may make a new appointment of such officer for said district. [R. S.]

Act of July 1, 1862, ch. 119, 12 Stat. L. 433; Act of June 30, 1864, ch. 173, 13 Stat. L. 224; Act of July 14, 1870, ch. 255, 16 Stat. L. 261.

Power of removal.—For a general consideration of the power to remove revenue officers, see *U. S. v. Avery*, (1867) Deady 204, 24 Fed. Cas. No. 14,481.

Sec. 3143. [Collector's bond.] Every collector, before entering upon the duties of his office, shall execute a bond for such amount as may be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, with not less than five sureties, to be approved by the Solicitor of the Treasury, conditioned that said collector shall faithfully perform the duties of his office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the order or regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession; and he shall from time to time, renew, strengthen, and increase his official bond, as the

Secretary of the Treasury may direct, with such further conditions as the said commissioner shall prescribe; and he shall execute a new bond whenever required so to do by the Secretary of the Treasury, with such conditions as may be required by law or prescribed by the Commissioner of Internal Revenue, with not less than five sureties; which new bond shall be in lieu of any former bond or bonds of such collector in respect to all liabilities accruing after the date of its approval by the Solicitor of the Treasury. Said bonds shall be filed in the office of the First Comptroller of the Treasury. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 225.

The above provisions were substituted by Act of March 1, 1879, ch. 125, 20 Stat. L. 327, for the section as originally enacted. The only change therein was in the addition of the clause as to the giving of a new bond, beginning "and he shall execute a new bond," etc.

By the Act of July 31, 1894, ch. 174, § 4, the First Comptroller of the Treasury was designated the Comptroller of the Treasury. See TREASURY DEPARTMENT.

By the Act of March 2, 1895, ch. 177, § 5, it was provided that the bonds of collectors of internal revenue, theretofore filed in the office of the Comptroller of the Treasury, should be transmitted to the office of the Secretary of the Treasury and filed as he should direct. See PUBLIC OFFICERS AND EMPLOYEES.

The bond is a contract for the indemnity of the United States alone, and not for the indemnity of private persons who may be injured by the wrongs or torts of the collector or his deputies. *Clark v. U. S.*, (1878) 60 Ga. 156.

Duties imposed by subsequent statute.—"The sureties of an officer, upon his official bond, are liable for the faithful performance of all duties imposed upon the officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to and come within the scope of the particular office, though not for those which have no connection with it, and cannot be presumed to have been within the contemplation of the parties at the time the bond was executed." *U. S. v. McCartney*, (1880) 1 Fed. 106.

"Public moneys."—"Money paid for taxes past due and received by the collector as such, and for which he gives a receipt as collector, specifying with precision the taxes for which it is paid, is public money," within the meaning of the bond. *King v. U. S.*, (1878) 99 U. S. 229, 25 U. S. (L. ed.) 373.

Validity of bond covering duties of deputies.—A bond is one provided for by the statute although it guarantees the faithful discharge of their duties by all the deputies appointed by the collector, whereas the statute only requires a bond for the faithful performance of the collector's own duties, and a faithful accounting by him for all public moneys which may come into his hands. *Laffan v. U. S.*, (C. C. A. 1903) 122 Fed. 333, 58 C. C. A. 495. See also *Chadwick v. U. S.*, (1880) 3 Fed. 750.

Embezzlement by collector.—In an action on a collector's bond it is no defense that a deputy collector had embezzled the money claimed to be due and

owing from the collector. Public officers are not mere bailees of public funds, to be exonerated by the exercise of ordinary care and diligence; their liability is fixed by their bond. *Pond v. U. S.*, (C. C. A. 1901) 111 Fed. 989, 49 C. C. A. 582. See also *Soule v. U. S.*, (1879) 100 U. S. 8, 25 U. S. (L. ed.) 536; *U. S. v. Adams*, (1885) 24 Fed. 348; *Tiffany v. Morrison*, (1876) 3 Colo. 43; *Pickering v. Day*, (1866) 3 *Houst. (Del.)* 474, 95 *Am. Dec.* 291.

A demurrer to a declaration on the bond will be sustained when there is no averment that the principal was or had ever been appointed collector of any particular district, and the bond does not state for what particular district the principal was collector, though, if there be an averment in the declaration of the district for which he was appointed, the declaration, with such a bond, would be good, with a further averment that, in regard to the duties of that district, the collector has been guilty of default covered by the terms of the bond. *U. S. v. Jackson*, (1881) 104 U. S. 41, 26 U. S. (L. ed.) 651.

Recovery on breach assigned.—In an action for debt on a collector's bond, when the breach assigned is that the collector did not faithfully perform his duties as collector, but received as such a certain sum, which he never accounted for or paid to the United States, dereliction of duty in not making collections cannot be set up at the trial in support of the breach alleged. *U. S. v. Glenn*, (1872) 1 *Woods* 400, 25 *Fed. Cas. No.* 15,217.

The failure of the bond to state for what particular district the principal was collector does not render the bond void. *U. S. v. Jackson*, (1881) 104 U. S. 41, 26 U. S. (L. ed.) 651.

Sec. 3144. [Collectors to be disbursing agents.] It shall be the duty of collectors of internal revenue to act as disbursing agents of the Treasury for the payment of all expenses of collection of taxes and other expenditures for the internal-revenue service within their respective districts, under regulations and instructions from the Secretary of the Treasury, on giving good and sufficient bond, with such sureties, in such form, and in such penal sum, as shall be prescribed by the First Comptroller of the Treasury, and approved by the Secretary of the Treasury, for the faithful performance of their duties as such disbursing agents; but no additional compensation shall be paid to collectors for such services. [R. S.]

Act of March 3, 1865, ch. 78, 13 Stat. L. 483.

The above provisions were substituted by Act of March 1, 1879, ch. 125, 20 Stat. L. 328, for the section as originally enacted. The only change was in the introductory words. The section as originally enacted read: "It shall be the duty of *such* collectors of internal revenue *as may be designated by the Secretary of the Treasury* to act," etc. In other respects the provisions are identical.

As to the First Comptroller of the Treasury, see the note to the preceding R. S. sec. 3143.

Section as applicable to all collectors.— This section does not make all collectors of internal revenue disbursing agents, but only such of them as the Secretary of the Treasury may direct. *Stapp v. U. S.*, (1868) 4 Ct. Cl. 222.

The bond required by this section is separate from and additional to the bond as collector, required by the preceding section. *Hall v. U. S.*, (1881) 17 Ct. Cl. 39.

Sec. 3145. [Collector's salary and allowances.]

This section was as follows:

"SEC. 3145. There shall be allowed to collectors, in full compensation for their services, and for those of their deputies, a salary of fifteen hundred dollars per annum, to be paid quarterly, and, in addition thereto, a commission of three per centum upon the first hundred thousand dollars, of one per centum upon all sums above one hundred thousand dollars and not exceeding four hundred thousand dollars, and of one-half of one per centum on all sums above four hundred thousand dollars and not exceeding one million dollars, and of one-eighth of one per centum on all sums above one million of dollars; such commissions to be computed upon the amounts by them respectively collected and paid over and accounted for under the instructions of the Treasury Department; except that in determining the compensation to be allowed to any collector the commission shall be computed on only one half of the tax received on any articles which shall have been transported from his district in bond, and on only one-half of the tax received on any articles received in his district in bond, where such transportation has been by shipment from one district to another. And there shall be further paid, after the account thereof has been rendered to and approved by the proper officers of the Treasury, to each collector his necessary and reasonable charges for advertising, stationery, and blank-books used in the performance of his official duties, and for postage actually paid on letters and documents received or sent, and exclusively relating to official business; but no such account shall be allowed unless it states the date and the particular items of every such expenditure, and is verified by the oath of the collector. The Secretary of the Treasury may make such further allowances, from time to time, as may be reasonable, in cases where, by reason of the territorial extent of the district, or the amount of internal taxes collected, or other circumstances, it may seem just to make such allowances. But the total net compensation of a collector shall not in any case exceed four thousand five hundred dollars a year; and no collector shall be entitled to any portion of the salary pertaining to his office unless he shall have been confirmed by the Senate, except in cases of commissions to fill vacancies which happen by death or resignation during the recess of the Senate." Act of June 30, 1864, ch. 173, 13 Stat. L. 231; Act of March 3, 1865, ch. 78, 13 Stat. L. 469; Act of July 13, 1866, ch. 184, 14 Stat. L. 106; Act of March 2, 1867, ch. 169, 14 Stat. L. 473; Act of March 2, 1867, ch. 166, 14 Stat. L. 445; Act of March 3, 1873, ch. 226, 17 Stat. L. 494.

It was superseded by the provisions of the Act of Feb. 8, 1875, ch. 36, §§ 12, 13, given as amended *infra*, p. 993.

Sec. 3146. [Accounts of collectors adjusted according to fiscal year.] In adjusting the accounts of collectors, accruing after June thirtieth, eighteen hundred and sixty-four, and in the payment of their compensation for services, the fiscal year of the Treasury shall be observed. [*R. S.*]

Act of July 13, 1866, ch. 184, 14 Stat. L. 106.

Sec. 3147. [Apportionment of compensation of collectors.] When any part of the compensation of the collector of any district is by commission upon assessments of collections, and, in consequence of a new appointment, is due to more than one collector within the same year, such commissions shall be apportioned between such collectors; but in no case shall a greater amount of the commissions be allowed to two or more collectors in the same district than shall have been authorized by law to be allowed to one collector, and the same rules shall apply to the salaries and commissions of assessors and collectors heretofore earned and accrued. But no payment shall be made to collectors, on account of salaries or commissions, without the certificate of the Commissioner of Internal Revenue that all reports required by law or regulation have been received, or that a satisfactory explanation has been rendered to him of the cause of delay. [*R. S.*]

Act of June 30, 1864, ch. 173, 13 Stat. L. 232; Act of July 13, 1866, ch. 184, 14 Stat. L. 106.

The first part of this section, relating to commissions, was superseded by the Act of Feb. 8, 1875, ch. 36, § 12, given as amended *infra*, p. 993, which provided for salaries in lieu of commissions.

Sec. 3148. [Deputy collectors.]

This section was as follows:

"SEC. 3148. Each collector shall be authorized to appoint, by an instrument in writing, under his hand, as many deputies as he may think proper, to be by him compensated for their services; to revoke any such appointment, giving such notice thereof as the Commissioner of Internal Revenue may prescribe; and to require and accept bonds or other securities from such deputies. Each such deputy shall have the like authority, in every respect, to collect the taxes, levied or assessed within the portion of the district assigned to him, which is by law vested in the collector himself; but each collector shall, in every respect, be responsible both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done by any of his deputies while acting as such." Act of June 30, 1864, ch. 173, 13 Stat. L. 225.

It was superseded by the Act of Feb. 8, 1875, ch. 36, §§ 12, 13, given as amended *infra*, p. 993.

Sec. 3149. [Disability of collector, or vacancy in office.] In case of the sickness or absence of a collector, or in case of his temporary disability to discharge his duties, they shall devolve upon his senior deputy, unless he shall have devolved them upon another of his deputies; and for the official acts or defaults of such deputies the collector and his sureties shall be held responsible to the United States.

In case of a vacancy occurring in the office of collector, the deputies of such collector shall continue to act until his successor is appointed; and until a successor is appointed, the deputy of such collector senior in service shall discharge all the duties of collector, and also the duties of disbursing agent; and of two or more deputies appointed on the same day, the one residing nearest the residence of the collector when the vacancy occurred shall discharge the said duties until another collector is appointed. When

it appears to the Secretary of the Treasury that the interest of the government so requires, he may, by his order, direct the said duties to be performed by such other one of the said deputies as he may designate. For the official acts and defaults of the deputy upon whom said duties are devolved, remedy shall be had on the official bond of the collector, as in other cases; and for the official acts and defaults of such deputy as acting disbursing agent, remedy shall be had on the official bond of the collector as disbursing agent. And any bond or security taken from a deputy by a collector, pursuant to section twelve of "An act to amend existing customs and internal-revenue laws, and for other purposes", approved February eighth, eighteen hundred and seventy-five, shall be available to his legal representatives and sureties to indemnify them for loss or damage accruing from any act or omission of duty by the deputy so continuing or succeeding to the duties of such collector. [R. S.]

The above provisions were substituted for the original section 3149 by the Act of March 1, 1879, ch. 125, § 2, 20 Stat. L. 328.

The original section was as follows:

"SEC. 3149. In case of the sickness of a collector or of his temporary disability to discharge his duties, they may be devolved by him upon one of his deputies; and for the official acts or defaults of such deputy the collector and his sureties shall be held responsible to the United States. In case of a vacancy occurring in the office of collector, the deputies of such collector shall continue to act until his successor is appointed; and until a successor is appointed the deputy of such collector senior in service shall discharge all the duties of collector; and of two or more deputies appointed on the same day, the one residing nearest the residence of the collector when the vacancy occurred shall discharge the said duties until another collector is appointed: *Provided*, That when it appears to the Secretary of the Treasury that the interest of the Government so requires, he may, by his order, direct the said duties to be performed by such other one of the said deputies as he may designate. For the official acts and defaults of such senior deputy, remedy shall be had on the official bond of the collector, as in other cases. And any bond or security taken from a deputy by a collector, pursuant to the preceding section, shall be available to his legal representatives and sureties to indemnify them for loss or damage accruing from any act or omission of duty by the deputy so continuing or succeeding to the duties of such collector." Act of June 30, 1864, ch. 173, 13 Stat. L. 238; Act of March 3, 1865, ch. 78, 13 Stat. L. 471; Act of March 2, 1867, ch. 169, 14 Stat. L. 473.

The Act of Feb. 8, 1875, ch. 36, § 12, mentioned in the text, is given as amended *infra*, p. 993.

Effect of vacancy in office of collector.—A vacancy occurring in the office of collector of internal revenue, and the appointment of a successor, would seem to have the effect, under this section, of vacating the offices of the deputy collectors. (1907) 26 Op. Atty.-Gen. 363.

Appointment of deputies.—This section seems to require that a deputy collector of internal revenue should be appointed by the collector in commission, by an instrument in writing under his hand. (1907) 26 Op. Atty.-Gen. 363.

Sec. 3150. [Deputy collector, when entitled to collector's salary.] Any deputy collector who has performed or may perform, under authority of law, the duties of any collector in consequence of a vacancy in the office of said collector, shall be entitled to receive the salary and commissions allowed by law to such collector, or the allowance in lieu of said salary and commissions allowed by the Secretary of the Treasury to such collector, and the Secretary of the Treasury may make to such deputy collector such allowance in lieu of salary and commissions as he might lawfully make to such collector. And such deputy shall not be debarred from receiving such salary and commissions, or allowances in lieu thereof, by reason of the holding of another Federal office by said collector during the time for which

such deputy acts as collector. But all payments to such deputy collector shall be upon duly audited vouchers. [R. S.]

Act of March 1, 1869, ch. 57, 15 Stat. L. 282; Act of July 1, 1870, ch. 187, 16 Stat. L. 179.

Subsequent provisions relating to this subject were made by the Act of Feb. 8, 1875, ch. 36, §§ 12, 13, given as amended *infra*, p. 993.

The suspension of a collector for fraud is such a vacancy, within the meaning of the statute, as entitles a deputy to receive the salary and commissions allowed by law to the collector during the period he performed the duties of the office under

the direction of the Secretary of the Treasury, instructing him to continue in the office until a successor to the suspended officer should be appointed and qualified. *U. S. v. Farden*, (1878) 99 U. S. 10, 25 U. S. (L. ed.) 267.

Sec. 3151. [Inspectors of tobacco and cigars.]

This section was as follows:

"SEC. 3151. There shall be appointed by the Secretary of the Treasury, in every collection-district where they may be necessary, one or more inspectors of tobacco and cigars, who shall take an oath faithfully to perform their duties, in such form as the Commissioner of Internal Revenue may prescribe, and shall be entitled to receive such fees as he may prescribe, to be paid by the owner or manufacturer of the articles inspected. Such inspectors shall be required to give bonds, with security approved by the Secretary of the Treasury, or collector of the district, in a sum not less than five thousand dollars, conditioned for the faithful discharge of the duties of such inspector." Act of June 30, 1864, ch. 173, 13 Stat. L. 244; Act of July 13, 1866, ch. 184, 14 Stat. L. 125; Act of March 2, 1867, ch. 169, 14 Stat. L. 481; Act of July 20, 1868, ch. 186, 15 Stat. L. 145.

It was expressly repealed by Act of Aug. 4, 1886, ch. 896, 24 Stat. L. 218. See (1886) 18 Op. Atty-Gen. 276; *Hartson v. U. S.*, (1886) 21 Ct. Cl. 454.

Sec. 3152. [Internal revenue agents.] The Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ competent agents, not exceeding at any time thirty-five in number, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose; and he may, at his discretion, assign any such agent to duty under the direction of any officer of internal revenue, or to such other special duty as he may deem necessary; and no general or special agent or inspector, by whatever designation he may be known, of the Treasury Department, in connection with the internal revenue, except inspectors of tobacco, snuff, and cigars and except as provided for in this title, shall be appointed, commissioned, employed, or continued in office. The agents whose employment is authorized by this section shall be known and designated as internal-revenue agents, and they shall have all the powers of entry and examination conferred upon any officer of internal revenue, by sections thirty-one hundred and seventy-seven, thirty-two hundred and seventy-seven, thirty-two hundred and eighty-six, and thirty-three hundred and eighteen of the Revised Statutes; and all the provisions of said sections, including those imposing fines, forfeitures, penalties, or other punishments for the enforcement thereof, are hereby made applicable to the action of internal-revenue agents, in the same manner as if such agents were specially named in each of said sections. And all the provisions of sections thirty-one hundred and sixty-seven, thirty-one hundred and sixty-eight, thirty-one hundred and sixty-nine, and thirty-one hundred and seventy-one of the Revised Statutes shall apply to internal-revenue agents as fully as to internal-revenue officers. [R. S.]

The above provisions were substituted for the original section 3152 by Act of March 1, 1879, ch. 125, § 2, 20 Stat. L. 329.

The original section was as follows:

"SEC. 3152. The Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ competent agents, not exceeding at any time twenty-five in number, to be paid such compensation as he may deem proper, not exceeding, in aggregate, any appropriation made for that purpose, and he may, at his discretion, assign any such agent to duty under the direction of any officer of internal revenue, or to such other special duty as he may deem necessary; and no general or special agent or inspector, by whatever designation he may be known, of the Treasury Department in connection with the internal revenue, except inspectors of tobacco, snuff, and cigars, and except as provided for in this Title, shall be appointed commissioned, employed, or continued in office." Act of March 2, 1867, ch. 169, 14 Stat. L. 473; Act of July 20, 1868, ch. 186, 15 Stat. L. 145; Act of June 6, 1872, ch. 315, 17 Stat. L. 241.

The number of appointees was originally limited to twenty-five, but this limit was increased to thirty-five by the Act of June 19, 1878, ch. 329, 20 Stat. L. 187.

The number of appointees was again reduced by the Act of July 7, 1884, ch. 331, § 1, *infra*, p. 998. Ten additional agents were authorized to be appointed by the Act of June 13, 1898, ch. 448, § 3, 30 Stat. L. 449, as well as by section 47 of said Act. Said section 3 was amended by an Act of April 12, 1902, ch. 500, § 3, 32 Stat. L. 96, by substituting another section therefor in which no mention was made as to the increase in the number of agents. Further provisions relating to this subject were made by the Act of April 28, 1902, ch. 594, 32 Stat. L. 142. These were superseded by the Act of Feb. 25, 1903, ch. 755, § 1, *infra*, p. 1001; the Act of March 18, 1904, ch. 716, § 1, *infra*, p. 1001, and the Act of March 4, 1915, ch. 141, noted *infra*, p. 1001.

Construction of former section.—The detectives provided for by section 50 of the Act of July 20, 1868, from which this section was taken, were said by the Attorney-General to be entitled to receive informers' shares. (1871) 13 Op. Atty-

Gen. 369. See also (1870) 13 Op. Atty-Gen. 228.

"Detectives" as internal revenue officers.—The persons designated "detectives" by section 10 of the Act of July 20, 1868, were not internal revenue officers. (1870) 13 Op. Atty-Gen. 243.

Sec. 3153. [Store-keepers.] There shall be appointed by the Secretary of the Treasury such number of internal-revenue store-keepers as may be necessary, who shall each receive such compensation, not exceeding five dollars a day, to be paid monthly by the United States, as may be determined by the Commissioner of Internal Revenue. No store-keeper shall be engaged in any other business while in the service of the United States, without the written permission of the Commissioner of Internal Revenue. Every store-keeper shall take an oath faithfully to perform the duties of his office, and shall give a bond, to be approved by the Commissioner of Internal Revenue, for the faithful discharge of his duties, in such form and for such amount as the Commissioner may prescribe. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 145; Res. No. 5 of March 29, 1869, 16 Stat. L. 52; Act of July 12, 1870, ch. 251, 16 Stat. L. 239; Act of June 6, 1872, ch. 315, 17 Stat. L. 244.

Further provisions relating to salaries of storekeepers and gaugers were made by the Act of Aug. 15, 1876, ch. 287, *infra*, p. 996, the Act of June 21, 1879, ch. 34, § 2, *infra*, p. 997, the Act of March 3, 1885, ch. 343, *infra*, p. 998, the Act of Aug. 27, 1894, ch. 349, § 63, *infra*, p. 998, and the Act of July 7, 1898, ch. 571, *infra*, p. 999.

Sec. 3154. [Assignment and transfer of store-keepers.] One or more store-keepers shall be assigned by the Commissioner of Internal Revenue to every bonded or distillery warehouse established by law; and any store-keeper may be transferred by the supervisor on duty in the district, or by the Commissioner of Internal Revenue, from one warehouse to another. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 146; Act of June 6, 1872, ch. 315, 17 Stat. L. 241.

The office of supervisor was abolished by the repeal of R. S. sec. 3159, noted *infra*, p. 987, and by the Act of Aug. 15, 1876, ch. 287, § 1, *infra*, p. 996, the former powers of the supervisor were conferred on the Commissioner.

See further R. S. sec. 3163 given as amended, *infra*, p. 988.

Sec. 3155. [Temporary store-keeper.] In case of the absence of any internal-revenue store-keeper by reason of sickness or other cause, the collector having control of the warehouse may designate a person to have temporary charge thereof, who shall, during such absence, perform the duties and receive the pay of the store-keeper for the time he may be so employed, and shall for any violation of the law be subject to the same punishment as store-keepers. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 146.

Sec. 3156. [Gaugers.] The Secretary of the Treasury shall appoint in every collection-district where they may be necessary, one or more internal-revenue gaugers, who shall each take an oath faithfully to perform his duties, and shall give bond, with one or more sureties, satisfactory to the Commissioner of Internal Revenue, for the faithful discharge of the duties assigned to him by law or regulations; and the penal sum of said bond shall not be less than five thousand dollars, and said bond shall be renewed or strengthened as the Commissioner of Internal Revenue may require. The duties of every such gauger shall be performed under the supervision and direction of the collector of the district to which he may be assigned, or of the collector in charge of exports at any port of entry to which he may be assigned. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 147.

By the Act of Aug. 15, 1876, ch. 287, § 1, *infra*, p. 996, provisions were made for the performance of the duties of storekeeper and gauger by one man, and the person performing such combined duties was designated storekeeper-gauger by an Act of June 28, 1902, ch. 1312, *infra*, p. 1000.

A gauger is an officer of the United States. *Hedrick v. U. S.*, (1880) 16 Ct. Cl. 101.

It is not a good plea to a suit on a gauger's bond to allege an indictment, conviction, and sentence under R. S. sec. 3169, *infra*, p. 991, unless there is an

averment of satisfaction of the judgment. A satisfaction of a judgment in a criminal proceeding would be a bar to proceeding on the bond for the same delinquency. *U. S. v. Cullerton*, (1878) 8 Biss. 166, 25 Fed. Cas. No. 14,899.

Sec. 3157. [Gaugers' fees.] Gaugers shall be entitled to receive such fees, to be determined by the quantity gauged, as may be prescribed by the Commissioner of Internal Revenue; and said fees, together with their actual and necessary traveling expenses, shall be verified by their oaths, and shall be paid by the United States monthly. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 147; Act of June 6, 1872, ch. 315, 17 Stat. L. 244.

Numerous subsequent provisions have been made with respect of the compensation of gaugers and storekeeper-gaugers and to these reference is here made.

Sec. 3158. [Statement under oath of fees, etc.—penalty.] Every internal-revenue officer, whose payment, charges, salary, or compensation are composed, wholly or in part, of fees, commissions, allowances, or rewards, from whatever source derived, shall be required to render to the Commissioner of Internal Revenue, under regulations to be approved by the Secretary of the Treasury, a statement under oath setting forth the entire amount of such fees, commissions, emoluments, or rewards of whatever nature, or from whatever source received, during the time for which said statement is rendered; and any false statement knowingly and willfully rendered under

the requirements of this section, or regulations established in accordance therewith, shall be deemed willful perjury, and punished in the manner provided by law for the crime of perjury. And any neglect or omission to render such statement when required shall be punished by a fine of not less than two hundred dollars, nor more than five hundred dollars, in the discretion of the court. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 239; Act of July 13, 1866, ch. 184, 14 Stat. L. 168.

The word "two" before "hundred" was inserted by amendatory Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 319.

R. S. secs. 3159, 3160. These sections were as follows:

"SEC. 3159. The President, by and with the advice and consent of the Senate, may appoint not exceeding ten officers, to be called supervisors of internal revenue, each of whom shall be assigned by the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, to duty in any part of the United States, and may be transferred from place to place, according to the exigency of the public service." Act of July 20, 1868, ch. 186, 15 Stat. L. 144; Act of June 6, 1872, ch. 315, 17 Stat. L. 241.

"SEC. 3160. Every supervisor shall be entitled to receive, in addition to expenses necessarily incurred by him and allowed and certified by the Commissioner, such salary, not exceeding three thousand dollars a year, as the Commissioner may deem reasonable." Act of July 20, 1868, ch. 186, 15 Stat. L. 145; Act of June 6, 1872, ch. 315, 17 Stat. L. 241.

They were repealed by the Legislative, Executive, and Judicial Appropriation Act of Aug. 15, 1876, ch. 287, 19 Stat. L. 152, which provided: "And sections thirty-one hundred and fifty-nine, and thirty-one hundred and sixty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of the foregoing paragraphs relating to the internal revenue service, are hereby repealed."

Other provisions of said repealing Act are given *infra*, p. 996.

Authorities construing R. S. secs. 3159, 3160.—The following cases passed upon the Act of June 20, 1868, § 49, from which the above sections were taken: *Stacey v. Emery*, (1878) 97 U. S. 642, 24 U. S. (L. ed.) 1035; *In re Meador*, (1869) 1 Abb. 317, 16 Fed. Cas. No. 9,375; *Stan-*

wood v. Green, (1870) 2 Abb. 184, 22 Fed. Cas. No. 13,301; *In re Platt*, (1874) 7 Ben. 261, 19 Fed. Cas. No. 11,212; *In re Becker*, (1875) 3 Fed. Cas. No. 1,208; *Perry v. Newsome*, (1869) 19 Fed. Cas. No. 11,009; *U. S. v. Fordyce*, (1871) 25 Fed. Cas. No. 15,130.

Sec. 3161. [Officers in charge of exportations and drawbacks.] In any port of the United States where there is more than one collector of internal revenue, the Secretary of the Treasury may designate one of them to have charge of all matters relating to the exportation of articles subject to tax under the internal-revenue laws; and at any port where he may deem it necessary, there shall be appointed by him an officer to superintend all matters of exportation and drawback, under the direction of the collector. The compensation of the officers last named shall be prescribed by the Secretary of the Treasury, but shall not exceed, in any case, an annual rate of two thousand dollars, excepting at New York, where such compensation shall be at the annual rate of three thousand dollars. At any port where there is no superintendent of exports, all the duties and services required of such officers shall be performed by the collector of internal revenue designated to have charge of exportation. All the books, papers, and documents in the bureau of drawbacks in the respective ports, relating to the drawback of taxes paid under the internal-revenue law, shall be delivered to the collector of internal revenue in charge of exportation. [R. S.]

Act of March 3, 1865, ch. 78, 13 Stat. L. 486; Act of July 13, 1866, ch. 184, 14 Stat. L. 153, 161.

For matters of exportation see IMPORTS AND EXPORTS.

For drawbacks see CUSTOMS DUTIES.

Sec. 3162. [Superintendents of exports and drawbacks may administer oaths.] Every collector of internal revenue and every superintendent of exports and drawbacks is authorized to administer such oaths and to certify to such papers as may be necessary under any regulation prescribed under the authority of the internal-revenue laws. [R. S.]

Act of March 3, 1865, ch. 78, 13 Stat. L. 486; Act of July 13, 1866, ch. 184, 14 Stat. L. 153.

Sec. 3163. [Enforcement of laws by revenue officers—transfer of officers.] Every collector within his collection-district and every internal-revenue agent shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. And it shall be the duty of every collector and of every internal-revenue agent to report to the Commissioner in writing any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal-revenue officer or agent of which he may obtain knowledge, with a statement of all the facts in each case, and any evidence sustaining the same. The Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and gauger, from one distillery or other place of duty, or from one collection-district, to another. [R. S.]

The above provisions were substituted for the section as originally enacted, by the Act of March 1, 1879, ch. 125, 20 Stat. L. 328, entitled "An act to amend the laws relating to internal revenue." By section 3163, as originally enacted, the duty of seeing that the laws were enforced was placed upon, and the power to transfer or suspend revenue officers was given to, the supervisors of internal revenue, which office was later abolished by the repeal of R. S. sec. 3159 by the Act of Aug. 15, 1876, ch. 287, 19 Stat. L. 152, *supra*, p. 987.

The section as originally enacted was as follows:

"SEC. 3163. Every supervisor, under the direction of the Commissioner, shall see that all laws and regulations relating to the collection of internal-taxes are faithfully executed and complied with; and shall aid in the prevention, detection, and punishment of any frauds in relation thereto, and examine into the efficiency and conduct of all officers of internal revenue; and for such purposes he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as collectors may do. He shall report in writing to the Commissioner of Internal Revenue any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal revenue officer of which he may obtain knowledge, with a statement of all the facts in each case, and any evidence sustaining the same. He may, by notice in writing, suspend from duty any inspector, gauger, or store-keeper, and he may suspend any collector for fraud, or gross neglect of duty, or abuse of power. In case of the suspension of any inspector, gauger or store-keeper, he shall immediately notify the collector of the proper district and the Commissioner of Internal Revenue, and within three days thereafter report his action and his reasons therefor, in writing, to the Commissioner. In case of the suspension of any collector, he shall immediately report his action to the Commissioner, with his reasons therefor, in writing, and the Commissioner, in all cases of suspension, shall thereupon take such action as he may deem proper. Every supervisor may also transfer any inspector, gauger, or store-keeper from one distillery, or other place of duty, or from one collection-district, to another." Act of July 20, 1868, ch. 186, 15 Stat. L. 144, 145; Act of June 6, 1872, ch. 315, 17 Stat. L. 241; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

Suspension of officer.—Under this section authorizing employment in the internal revenue service and the rules and regulations pertaining thereto, a store-keeper-gauger may be suspended without

pay. *Geisert v. U. S.*, (1915) 50 Ct. Cl. 95.

Removals and reducing in grade.—In *Butler v. White*, (C. C. W. Va. 1897) 83 Fed. 578, it was held that the last clause

only authorizes the commissioner to transfer the officers mentioned in it from one place of duty to another place of duty in the same district, or from one collection district to another. It does not provide for the reducing of a man in the grade or position that he has held, and such power is limited and controlled by the Civil Service Act. See CIVIL SERVICE.

But in *White v. Berry*, (1898) 171 U. S. 386, 18 S. Ct. 917, 43 U. S. (L. ed.) 199, the above case was reversed and remanded with direction, on the ground

that the Circuit Court, sitting in equity, was without jurisdiction to control an executive officer in the matter of making wrongful removals from office.

Power to examine persons, books, etc. — The following cases passed upon the authority to examine persons, books, and papers, prior to the amending Act of March 1, 1879: *In re Meador*, (1869) 1 Abb. 317, 16 Fed. Cas. No. 9,375; *Stanwood v. Green*, (1870) 2 Abb. 184, 22 Fed. Cas. No. 13,301; *In re Becker*, (1875) 3 Fed. Cas. No. 1,208; *U. S. v. Fordyce*, (1871) 25 Fed. Cas. No. 15,130.

Sec. 3164. [Duty of collectors to report violations of law to district attorney.] It shall be the duty of every collector of internal revenue to report within ten days to the district attorney of the district in which any fine, penalty, or forfeiture may be incurred for the violation of any law of the United States relating to the revenue, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, and which may come to his knowledge from time to time, stating the provisions of the law believed to be violated, and on which a reliance may be had for condemnation or conviction; and if any collector shall in any case fail to report to the proper district attorney as prescribed in this section, his right to any compensation, benefit, or allowance in such case shall be forfeited to the United States, and the same may, in the discretion of the Secretary of the Treasury, be awarded to such persons as may make complaint and prosecute the same to judgment or conviction. [R. S.]

Act of March 3, 1873, ch. 244, 17 Stat. L. 580.

Duty of collector or deputy to divulge information in state court.—A collector or deputy collector of internal revenue cannot be compelled by a state court to disclose as a witness before the court or a grand jury the names of persons in whose places of business special tax stamps are posted, or the places in which the same are posted; his information on the subject being obtained in an official capacity, and primarily from the records of his office, copies of which he is forbidden to furnish by the lawful regula-

tions of the Treasury Department, as against public policy. *In re Lamberton*, (1903) 124 Fed. 446, wherein a deputy imprisoned by the state court for refusing to give the desired information was discharged on habeas corpus.

Supervision over circuit court commissioners or the warrants issued by them is not conferred on the district attorney, either by this section or R. S. sec. 838 (see JUDICIAL OFFICERS). *U. S. v. Scroggins*, (1879) 3 Woods 529, 27 Fed. Cas. No. 16,244.

Sec. 3165. [Revenue officers who may administer oaths and take evidence.] Every collector, deputy collector, and inspector is authorized to administer oaths and to take evidence touching any part of the administration of the internal-revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 242; Act of March 3, 1865, ch. 78, 13 Stat. L. 471.

The words "or regulation authorized by law," added by Act of March 1, 1879, ch. 125, 20 Stat. L. 329, entitled "An act to amend the laws relating to internal revenue."

R. S. sec. 3151 which authorized the office of inspector referred to in the text was repealed as noted *supra*, p. 984.

Sec. 3166. [Revenue officers authorized to make seizures.] Any officer of internal revenue may be specially authorized by the Commissioner of Internal Revenue to seize any property which may by law be subject to seizure, and for that purpose such officer shall have all the power conferred by law upon collectors; and such special authority shall be limited in respect of time, place, and kind and class of property, as the Commissioner may specify: *Provided*, That no collector shall be detailed or authorized to discharge any duty imposed by law upon any other collector. [R. S.]

Act of March 2, 1867, ch. 169, 14 Stat. L. 482; Act of July 20, 1868, ch. 186, 15 Stat. L. 145.

Probable cause as defense in action for wrongful seizure.—In an action against an internal revenue officer for a wrongful seizure of property which has been returned to the claimant intact, proof of probable cause for such seizure is a complete defense, and may be made, although the court in rendering judgment for the claimant in a proceeding for the forfeiture of the property failed to make the certificate of probable cause provided for

by R. S. sec. 970 (title Costs); and where the proof shows that the defendant made the seizure by direction of the Commissioner of Internal Revenue, based upon information received from his special agents which justified a suspicion that the plaintiff was violating the law, the court is warranted in charging the jury as matter of law that there was a probable cause. *Agnew v. Haymes*, (C. C. A. 1905) 141 Fed. 631, 72 C. C. A. 325.

Sec. 3167. [Disclosure by revenue officers of operations, etc., prohibited — penalty.] It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return by any person or corporation, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return or any part thereof or the amount or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding \$1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office and be incapable thereafter of holding any office under the Government. [R. S.]

As originally enacted this section was as follows:

"SEC. 3167. If any collector or deputy collector, or any inspector, or other officer acting under the authority of any revenue law of the United States, divulges to any party, or makes known in any other manner than may be provided by law, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to a fine of not exceeding one thousand dollars, or to be imprisoned for not exceeding one year, or to both, at the discretion of the court, and shall be dismissed from office, and be forever thereafter incapable of holding any office under the Government." Act of June 30, 1864, ch. 173, 13 Stat. L. 238; Act of March 3, 1865, ch. 78, 13 Stat. L. 469, 471.

It was amended to read as here given by the Revenue Act of Aug. 27, 1894, ch. 349, § 34, 28 Stat. L. 557. As so amended it was re-enacted by the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § 11, 38 Stat. L. 177, in the same language, except that the

figures "\$1,000" were substituted for the words "One thousand dollars," which appeared in the first amendment.

This section was again amended by an Act of Sept. 8, 1916, § 16. See Pamph. Supp. No. 8, p. 94, Fed. Stat. Ann.; 1918 Supp. Fed. Stat. Ann.

Constitutionality of Act of Aug. 27, 1894.—The portion of the Act of Aug. 27, 1894, which provided for a tax on incomes was declared unconstitutional in *Pollock v. Farmers' Loan, etc., Co.*, (1895) 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759, but the portion of the Act which amended this section was not affected by the decision.

Witness in state court.—Under the regulations of the Internal Revenue Department, promulgated with the approval of the Secretary of the Treasury, providing that officers of the department "will

decline to testify as to facts contained in the records, or coming to their knowledge in their official capacity, and this prohibition is hereby extended to include also internal revenue storekeepers and gaugers and agents," a storekeeper and gauger stationed at a distillery has no right to divulge information in regard to the business of the distiller obtained by him solely in his official capacity as an internal revenue officer, even when called as a witness in a state court. *Stegall v. Thurman*, (1910) 175 Fed. 813.

Sec. 3168. [Officers not to be interested in certain manufactures—penalty.] Any internal-revenue officer who is or shall become interested, directly or indirectly, in the manufacture of tobacco, snuff, or cigars, or in the production, rectification, or redistillation of distilled spirits, shall be dismissed from office; and every officer who becomes so interested in any such manufacture or production, rectification, or redistillation, or in the production of fermented liquors, shall be fined not less than five hundred dollars nor more than five thousand dollars. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 167; Act of July 20, 1868, ch. 186, 15 Stat. L. 164.

A typographical error in this section was corrected by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 248.

These provisions made applicable to internal revenue agents, see R. S. sec. 3152, *supra*, p. 984.

Sec. 3169. [Extortion, receiving unlawful fees, and other unlawful acts of internal revenue officers.] Every officer or agent appointed and acting under the authority of any revenue law of the United States—

First. Who is guilty of any extortion or willful oppression under color of law; or,

Second. Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or,

Third. Who willfully neglects to perform any of the duties enjoined on him by law; or,

Fourth. Who conspires or colludes with any other person to defraud the United States; or,

Fifth. Who makes opportunity for any person to defraud the United States; or,

Sixth. Who does or omits to do any act with intent to enable any other person to defraud the United States; or,

Seventh. Who negligently or designedly permits any violation of the law by any other person; or,

Eighth. Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate, or return; or,

Ninth. Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to his next superior officer and to the Commissioner of Internal Revenue; or,

Tenth. Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One-half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 165.

These provisions were made applicable to internal revenue agents by R. S. sec. 3152, *supra*, p. 984.

Provisions for the punishment of informers for extortion were made by R. S. sec. 5484, which was incorporated in the Penal Laws of 1909 as section 145 and repealed by section 341 thereof. See PENAL LAWS.

Applicability of section to Oleomargarine Act.—This section is not applicable to the Oleomargarine Act (vol. 4, div. X of this title). *Schafer v. Craft*, (1906) 144 Fed. 907; *Grier v. Tucker*, (1907) 150 Fed. 658; *Craft v. Schafer*, (C. C. A. 1907) 153 Fed. 175, 82 C. C. A. 349.

Indictment.—An indictment is not duplicitous which charges but one offense, though there are four counts, three of which charge offenses under the ninth subdivision, and the fourth charges an offense under the fourth subdivision. *Ex p. Joyce*, (1877) 13 Fed. Cas. No. 7,556.

First clause.—The word "extortion" is much used in its restricted and technical sense, and designates a crime committed by an officer of the law, who, under color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due. *U. S. v. Deaver*, (1882) 14 Fed. 595. See *U. S. v. Harned*, (1890) 43 Fed. 376.

"The word 'oppression' has not acquired a strictly technical meaning, and may in this statute be taken in its ordinary sense, which is an act of cruelty, severity, unlawful exaction, domination, or excessive use of authority." *U. S. v. Deaver*, (1882) 14 Fed. 595.

Must be acting under revenue law.—An indictment charging the defendant with extortion while acting as Chinese inspector at the port of San Francisco cannot be maintained under subdivisions 1

and 2 of this section. The accused, in his capacity of Chinese inspector, did not act under any law that could properly be regarded as a revenue law. *Williams v. U. S.*, (1897) 168 U. S. 382, 18 S. Ct. 92, 42 U. S. (L. ed.) 509.

Second clause.—The word "knowingly" means something more than is implied in the legal presumption that every man must know the law. The fact that the defendant demanded or received the several amounts charged in the indictment is not in itself sufficient to find him guilty of demanding or receiving greater sums than he was entitled to under the law; it must be found that he knew he was violating the law. *U. S. v. Highleyman*, (1876) 26 Fed. Cas. No. 15,361.

Fourth clause.—A joinder of officials and private persons in an indictment charging a conspiracy to defraud the government, under this section and R. S. sec. 5440 (now embodied in Penal Laws, sec. 37 and repealed by sec. 341 thereof; see PENAL LAWS), cannot be sustained. *U. S. v. McDonald*, (1876) 3 Dill. 543, 26 Fed. Cas. No. 15,670. See *U. S. v. Babcock*, (1876) 3 Dill. 581, 24 Fed. Cas. No. 14,487.

Seventh clause.—On the trial of a government storekeeper and gauger at a distillery charged under this section with having negligently and designedly permitted a violation of the law by another person by leaving the door of a cistern room unlocked, in consequence of which distilled spirits were unlawfully removed

therefrom, proof that the room was negligently left open or unlocked is sufficient to warrant a conviction, and it is not essential that it should have been with intent that the spirits should be removed. *Mason v. U. S.*, (C. C. A. 1908) 162 Fed. 23, 89 C. C. A. 63.

Tenth clause.—“Before you can find

the defendant guilty under this count, you must be fully satisfied from the evidence that he agreed to make a compromise as charged, and received in consideration of such agreement something of value for his personal benefit.” *U. S. v. Deaver*, (1882) 14 Fed. 602.

Sec. 3170. [District attorney or marshal, accepting or demanding anything for compromise of violation of internal-revenue laws.] Every district attorney or marshal who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift or otherwise, any sum of money or other property of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of any provision of the internal-revenue laws, except as expressly authorized by law to do so, shall be held to be guilty of a misdemeanor, and shall be fined in double the sum or value of the money or property received or demanded, and be imprisoned for not less than one nor more than ten years. [*R. S.*]

Act of March 2, 1867, ch. 169, 14 Stat. L. 483.

Sec. 3171. [Officers suffering injuries may maintain suit for damages.] If any officer appointed under and by virtue of any act to provide internal revenue, or any person acting under or by authority of any such officer, shall receive any injury to his person or property, in the discharge of his duty, under any law of the United States for the collection of taxes, he shall be entitled to maintain suit for damage therefor, in the circuit-court of the United States, in the district wherein the party doing the injury may reside or shall be found. [*R. S.*]

Act of July 13, 1866, ch. 184, 14 Stat. L. 172.

The words “in the discharge of his duty” were substituted for the words “for or on account of any act by him done” contained in the section as originally enacted by Act of March 1, 1879, ch. 125, 20 Stat. L. 329, entitled “An act to amend the laws relating to internal revenue.”

These provisions are made applicable to internal revenue agents by *R. S. sec. 3152, supra*, p. 984.

Civil remedy as inconsistent with section 5508.—This civil remedy for the recovery of damages for a personal injury done to an officer is in no way inconsistent with *R. S. sec. 5508* (now embodied in *Penal Laws, sec. 19* and repealed by *sec. 341* thereof; see *PENAL LAWS*); on the contrary, it is in perfect harmony therewith. *U. S. v. Patrick*, (1893) 54 Fed. 338.

“Injury to his property.”—In *Craw-*

ford v. Johnson, (1868) *Deady* 457, 6 Fed. Cas. No. 3,369, it was held, construing the section as it stood before amendment, that a collector of internal revenue was considered as receiving an “injury to his property” on account of an “act done by him” when a deputy appointed by him embezzled the taxes given him for collection.

SEC. 12. [Deputy collectors — appointment, bonds, and compensation — salaries of collectors.] That each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies as he may think proper, to be compensated for their services, by such allowances as shall be made by the Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue. Allowances

shall also be made in like manner for salary and office expenses of collectors, all of which shall be in lieu of the salary and commissions heretofore provided by law: *Provided, however*, That the salaries of collectors shall be fixed at two thousand dollars each per annum where the annual collections amount to twenty-five thousand dollars or less, and shall, by the Secretary, on the recommendation of the Commissioner, be graduated up to the maximum limit of four thousand five hundred dollars; which latter sum shall be allowed in all cases where the collections amount to one million of dollars or upward; and the collector shall have power to revoke the appointment of any such deputy, giving such notice thereof as the Commissioner of Internal Revenue may prescribe, and to require and accept bonds or other securities from any deputy; and actions upon such bonds may be brought in any appropriate district or circuit court of the United States; which courts are hereby given jurisdiction of such actions concurrently with the courts of the several States. Each such deputy shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself; but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such. [18 Stat. L. 309 as amended by 20 Stat. L. 329.]

The provisions of the text, and of the following section 13, were from an Act of Feb. 8, 1875, ch. 36. This section was amended to read as given in the text by an Act of March 1, 1879, ch. 125, § 2. As originally enacted this section was as follows:

"That each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies as he may think proper, to be by him compensated for their services; to revoke any such appointment, giving such notice thereof as the Commissioner of Internal Revenue may prescribe; and to require and accept bonds or other securities from such deputy; and actions upon such bonds may be brought in any appropriate district or circuit court of the United States; which courts are hereby given jurisdiction of such actions concurrently with the courts of the several States. Each such deputy shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is, by law, vested in the collector himself; but each collector shall, in every respect, be responsible both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done, or neglected to be done, by any of his deputies while acting as such."

As so amended this and the following section 13 of this Act superseded R. S. sec. 3145, noted *supra*, p. 981; R. S. sec. 3148, noted *supra*, p. 982, and in part R. S. sec. 3150, *supra*, p. 983.

Provisions restricting the number of appointees were made by the Act of March 3, 1885, ch. 343, *infra*, p. 998.

Appointment of deputies—when effective.—A notification of appointment by telegram, at the time of the deposit of his signed commission in the post-office, gives the appointee legal authority to act as deputy collector. The actual receipt of the commission is not essential to his investiture of the office. *U. S. v. Sykes*, (1893) 58 Fed. 1000.

Removal of deputies.—The power of removal of deputies rests with the appointing power, the collector, subject to such requirements as to notice as the commissioner of internal revenue may prescribe. These rules of the commissioner, if any there be, cannot have the force and effect of law, nor would a failure to comply with them justify the interference of a court

of equity. *Page v. Moffett*, (1898) 85 Fed. 38.

Compensation of collectors.—The compensation of collectors, under the provisions of the Act of March 1, 1879, "appears to be, first, that salaries shall be allowed to collectors, graded according to the amount of their annual collections, the minimum salary being \$2,000 and the maximum \$4,500; second, that in addition to the salary a commission of one-half of one per centum on the taxes on spirits collected by sales of tax-paid stamps shall be allowed collectors, provided that their total net compensation shall not be more than \$4,500; and, third, that the secretary of the treasury may make further allowances, provided the limitation of

\$4,500 as the total net compensation of the collector is not exceeded." *U. S. v. Landram*, (1886) 118 U. S. 81, 6 S. Ct. 954, 30 U. S. (L. ed.) 58.

When compensation begins.—In *U. S. v. Flanders*, (1884) 112 U. S. 88, 5 S. Ct. 67, 28 U. S. (L. ed.) 630, it was held that the title to the compensation to which a collector was entitled under section 34 of the Act of July 1, 1862, accrued when he was appointed and acted, and not from the time of taking the oath and filing his official bond.

"Other securities."—An instrument, not a bond under seal, may be enforced against the sureties as a security given by the principal. *Schuster v. Weissman*, (1876) 63 Mo. 552.

"Within the portion of the district assigned to him."—The collector has power to appoint deputies for distinct portions of his district, and these deputies are invested with all his authority within the portion of the district assigned to them. *Schuster v. Weissman*, (1876) 63 Mo. 552.

Action on deputy's bond—removal of cause.—An action by a collector of internal revenue against his deputy on his official bond is one arising under the laws of the United States, and may be removed from the state court into the Circuit Court of the United States. *Orner v. Saunders*, (1875) 3 Dill. 284, 18 Fed. Cas. No. 10,584.

SEC. 13. [Compensation and allowances of collectors.] That there shall be further paid, after the account thereof has been rendered to and approved by the proper officers of the Treasury, to each collector, his necessary and reasonable charges for advertising, stationery, and blank books used in the performance of his official duties, and for postage actually paid on letters and documents received or sent and exclusively relating to official business, but no such account shall be approved or allowed unless it states the date and the particular items of every such expenditure, and shall be verified by the oath of the collector; *Provided*, That the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, be authorized to make such further allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district, or from the amount of internal duties collected, it may seem just to make such allowances; but no such allowance shall be made if more than one year has elapsed since the close of the fiscal year in which the services were rendered. But the total net compensation of a collector shall not in any case exceed four thousand five hundred dollars a year; and no collector shall be entitled to any portion of the salary pertaining to the office unless such collector shall have been confirmed by the Senate, except in cases of commissions to fill vacancies occurring during the recess of the Senate. [18 Stat. L. 309 as amended by 20 Stat. L. 330.]

See the notes to the preceding section 12 of this Act.

This section was amended to read as given in the text by an Act of March 1, 1879, ch. 125, § 2. The only changes were in the substitution of the words "if more than one year has elapsed since the close of the fiscal year in which" for "except within one year after;" and in the substitution of "occurring" for "which may have happened by death or resignation."

Discretion of secretary as to "further allowances."—The power to be exercised in making such further allowances to such collectors, from time to time, as may be reasonable, is one vested in his discretion, both as to time and amount. He may make an allowance one year, and refuse it the next, or he may never make it at all. *Hall v. U. S.*, (1875) 91 U. S. 559, 23 U. S. (L. ed.) 446. See also *Patton v. U. S.*, (1871) 7 Ct. Cl. 371; *Ryan v. U. S.*, (1881) 17 Ct. Cl. 47.

"But when he has, in the exercise of that discretion, granted a 'further allow-

ance,' and the same has been paid to the officer, he has no more legal right to exact a return of any portion of it than he would have if the amount had been fixed by law and paid." *Patton v. U. S.*, (1871) 7 Ct. Cl. 371.

No appeal lies from the decision of the Secretary of the Treasury, as to the making further allowances, either to the accounting officers of the Treasury or to the courts. *Hall v. U. S.*, (1875) 91 U. S. 559, 23 U. S. (L. ed.) 446.

In *Herndon v. U. S.*, (1879) 15 Ct. Cl. 446, the court said that the fact that

under R. S. sec. 3145, *supra*, p. 981, the Secretary of the Treasury made an allowance to collectors on account of the employment of deputies did not change the relation of the parties as fixed by statute, or create any privity of contract on the part of the government with the collector's employees. This case arose before the passage of the Act of March 1, 1879, and the court said that the law and practice of the Treasury Department in relation to the payment of the salaries of deputy collectors have been changed by that Act. See R. S. sec. 3150, and *Farden's Case* thereunder, *supra*, p. 983. See

also *Landram v. U. S.*, (1890) 16 Ct. Cl. 85.

Effect of R. S. secs. 3385 and 3386.—As to the effect of the Act of July 20, 1868, ch. 186, §§ 73, 74 (R. S. secs. 3385 and 3386, *infra*, p. 1013), see *U. S. v. Wilcox*, (1887) 95 U. S. 661, 24 U. S. (L. ed.) 536, in which case the court said that the Act of 1868 was plainly intended to throw around the removal of the manufactured tobacco greater security against evasion of payment of the tax upon it than had existed before, and in no manner attempted to deal with the subject of collector's commissions.

[SEC. 1.] **[Compensation of store-keepers and gaugers.]** And hereafter no storekeeper shall receive a greater compensation than four dollars per day; and said gaugers and storekeepers, respectively shall only receive compensation when rendering actual service. [19 Stat. L. 152.]

The provisions of this and the following two paragraphs of the text are from the Legislative, Executive, and Judicial Appropriation Act of Aug. 15, 1876, ch. 287.

"Rendering actual service."—"While the fact that a storekeeper, when not under an assignment to duty, was obliged to hold himself in readiness to perform any duty that might be assigned, could have been considered as an element in determining his compensation and may have been considered in fixing the amount when on duty, the express inhibition of

the statute prevents any such consideration from entering into the determination of the time during which the per diem salary is computed. The time during which the storekeeper 'rendered actual service' could alone be taken into account." (1886) 18 Op. Atty-Gen. 399. See also *McNeil v. U. S.*, (1888) 23 Ct. Cl. 413.

[Storekeeper and gauger duties may be united in one officer.] That the Secretary of the Treasury may, upon the recommendation of the Commissioner of Internal Revenue, impose the duties of storekeeper and gauger upon one officer, where the amount of spirits produced at the distillery, to which such officer may be assigned, is not sufficient, in the judgment of the Commissioner to warrant the employment of two officers to perform the separate duties of storekeeper and gauger. The Secretary of the Treasury may issue a commission to such officer as storekeeper and gauger, but the compensation for his services as storekeeper and gauger shall be that of storekeeper only. And the said officer shall before entering upon the discharge of such duties, give a bond in the penal sum of not less than five thousand dollars for the faithful performance of the combined duties of storekeeper and gauger. [19 Stat. L. 152.]

See the note to the preceding paragraph of the text.

The last sentence of this paragraph relating to the bond of the officers would seem to be superseded by the more general provisions of the Act of Aug. 27, 1894, ch. 349, § 64, *infra*, p. 999.

[Transfer and suspension of officers.] The powers of transfer, and of suspension, of officers conferred upon supervisors by section thirty-one hundred and sixty-three of the Revised Statutes, are hereby vested in the Commissioner of Internal Revenue; and all other powers conferred, and duties imposed, by said section upon supervisors, are hereby conferred and

imposed upon collectors of internal revenue within their respective districts. In case of the supervision [suspension] of a collector, under the power hereby conferred, the Commissioner of Internal Revenue shall, as soon thereafter as practicable, report the case to the President through the Secretary of the Treasury for such action as he may deem proper. [19 Stat. L. 152.]

See the note to the first paragraph of this section, *supra*, p. 996.
See R. S. sec. 3163 given as amended *supra*, p. 988.

[SEC. 1.] [Gauger's pay.] Hereafter the compensation of gaugers shall not exceed five dollars per day while actually employed. [20 Stat. L. 187.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 19, 1878, ch. 329. The Appropriation Acts of June 20, 1874, ch. 328, 18 Stat. L. 93, and March 3, 1875, ch. 129, 18 Stat. L. 352, provided that "hereafter no gauger shall receive a greater compensation than six dollars per day."

[SEC. 1.] [Issuing stamps before payment of tax.] That any collector of internal revenue, or any deputy collector or other employee of, or person acting for, such collector, who shall issue any stamp or stamps indicating the payment of any internal-revenue tax, before payment in full therefor has been made to the officer or person issuing the same, shall be deemed guilty of a misdemeanor, and shall be fined for each stamp thus issued an amount equal to the face value thereof, in addition to the liability of the collector on his official bond on account of such stamp; and such collector, deputy collector, or employee shall be dismissed from office. [20 Stat. L. 327.]

This and the following section 23 are from the Act of March 1, 1879, ch. 125, entitled "An act to amend the laws relating to internal revenue."

SEC. 23. [Meaning of "Revised Statutes."] That wherever in any of the foregoing sections of this act the Revised Statutes are referred to, it shall be held to mean the "edition of eighteen hundred and seventy eight." [20 Stat. L. 352.]

See the note to the preceding section 1.

SEC. 2. [Compensation at small distilleries.] That hereafter storekeepers at distilleries that mash less than sixty bushels of grain per day shall be allowed not exceeding fifty dollars per month. But when one person acts as storekeeper and gauger, his salary shall not exceed four dollars per day for the time actually employed. [21 Stat. L. 23.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 21, 1879, ch. 34.

See the Act of March 3, 1885, ch. 343, *infra*, p. 998.

[SEC. 1.] **[Number of agents.]** * * * And hereafter there shall not be employed exceeding twenty agents, in lieu of the number now authorized by law. [23 Stat. L. 172.]

This was from the Legislative, Executive, and Judicial Appropriation Act of July 7, 1884, ch. 331.

See the notes to R. S. sec. 3152, *supra*, p. 984.

[SEC. 1.] **[Compensation at small distilleries.]** * * * Hereafter storekeepers, gaugers, and storekeeper-gaugers who are assigned to distilleries with a registered capacity of twenty bushels or less, or who are assigned to other places where the compensation is now less than three dollars a day, shall receive three dollars a day for services. [23 Stat. L. 404 as amended by 36 Stat. L. 928.]

This and the following paragraph of the text are from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1885, ch. 343.

As originally enacted the foregoing provision was as follows:

"Hereafter storekeepers, or storekeepers and gaugers, who are assigned to distilleries whose registered capacity is twenty bushels or less, shall receive two dollars per day for their services."

It was amended to read as given in the text by an Act of Feb. 24, 1911, ch. 149, entitled: "An Act To amend the provisions of the Act of March third, eighteen hundred and eighty-five, limiting the compensation of storekeepers, gaugers, and storekeeper-gaugers in certain cases to two dollars a day, and for other purposes."

See the notes to R. S. sec. 3152, *supra*, p. 984.

[Limit of number of revenue officers.] * * * And no collector in any district shall recommend, nor shall there be appointed or commissioned, more deputy collectors, storekeepers, storekeepers and gaugers, gaugers, inspectors, or other officers, or allowed to remain in commission more of any of said officers, at any one time, than fifteen per centum in excess of the number actually engaged in performing duty at the time and indispensably necessary for the performance of said duty. [23 Stat. L. 404.]

See the note to the preceding paragraph of the text.

A similar provision was contained in the Appropriation Act of July 7, 1884, ch. 331, 23 Stat. L. 172.

For provisions limiting number of agents, see R. S. sec. 3152 and note thereunder, *supra*, p. 984.

SEC. 63. [Compensation of storekeepers—storekeeper-gaugers and gaugers.] That storekeepers, storekeeper-gaugers, and gaugers, when traveling to or from assignments, or when transferred from one assignment to another, either in the same district or in different districts, shall receive the same compensation per day during the time necessarily occupied in traveling that they would be entitled to if on duty at the place to which assigned or transferred, or from which relieved, together with actual and necessary traveling expenses. [28 Stat. L. 567, as amended by 36 Stat. L. 369.]

This and the following sections 64, 65 are from the Revenue Act of Aug. 27, 1894, ch. 349.

As originally enacted this section was as follows:

"SEC. 63. That storekeepers, and storekeepers and gaugers, when transferred from one distillery to another, either in the same district or in different districts, shall

receive compensation not exceeding four dollars per day during the time necessarily occupied in traveling from one distillery to the other, together with actual and necessary traveling expenses." [28 Stat. L. 567.]

It was amended to read as given in the text by an Act of May 13, 1910, ch. 236, entitled "An Act To amend section sixty-three of the Act of August twenty-eighth, eighteen hundred and ninety-four (Twenty-eighth Statutes, page five hundred and sixty-seven)."

The reference to August "twenty-eighth" in the title was evidently intended to be "twenty-seventh."

SEC. 64. [Duties of storekeeper and gauger — bond.] That the officer holding the combined office of storekeeper and gauger, under the provisions of the legislative, executive, and judicial appropriation Act, approved August fifteenth, eighteen hundred and seventy-six (Nineteenth Statutes, page one hundred and fifty-two), may be assigned by the Commissioner of Internal Revenue to perform the separate duties of a storekeeper at any distillery, or at any general or special bonded warehouse, or to perform any of the duties of a gauger under the internal-revenue laws. And the said officer, before entering upon the discharge of such separate duties, shall give a bond to be approved by the Commissioner of Internal Revenue for the faithful discharge of his duties in such form and for such amount as the Commissioner may prescribe. [28 Stat. L. 567.]

See the note to the preceding section 63 of this Act.

SEC. 65. [Transfer of gaugers.] That internal-revenue gaugers may be assigned to duty at distilleries, rectifying houses, or wherever gauging is required to be done, and transferred from one place of duty to another, by the Commissioner of Internal Revenue, in like manner as storekeepers and storekeepers and gaugers are now assigned and transferred. [28 Stat. L. 567.]

See the note to section 63 of this Act, *supra*, p. 998.

[SEC. 1.] [Compensation of gaugers of fruit brandy, and on special duty — calculation of fees.] * * * That gaugers employed in gauging fruit brandy, and gaugers specially detailed for special duty under the direction of the Commissioner of Internal Revenue, may be paid, at the discretion of the Commissioner of Internal Revenue, either by fees to be determined by the quantity gauged, or by a daily compensation not to exceed five dollars per diem while actually employed; and in calculating the daily compensation of all gaugers paid by fees, the quantity gauged for which fees are paid may be determined by dividing the aggregate gallons of spirits gauged by the number of days on which the gauger was actually employed during the month. [30 Stat. L. 656.]

This is from the Deficiencies Appropriation Act of July 7, 1898, ch. 571, 30 Stat. L. 656.

[SEC. 1.] [Transfer of deputy collectors — compensation.] That the Commissioner of Internal Revenue is authorized to detail deputy collectors of internal revenue in one district for special duty in other districts, and

the deputy collectors so detailed shall be paid by the collector of internal revenue and disbursing agent for the district for which they are appointed and for which the allowance for their salary and expenses is made, the same as if all their services had been performed and expenses incurred in that district. [31 Stat. L. 107.]

This and the two paragraphs of the text following are from the Legislative, Executive, and Judicial Appropriation Act of April 17, 1900, ch. 192.

[Compensation of agents.] That the compensation of the chief of the internal-revenue agents shall not exceed ten dollars per day, and of the other agents not exceeding seven dollars per day each; and for per diem in lieu of subsistence, when absent on duty from their legal residence, said agents shall receive, at a rate to be fixed by the Secretary of the Treasury, not exceeding three dollars per day: [31 Stat. L. 107.]

See the note to the preceding paragraph of the text.

This is similar to the provision in the Appropriation Act of March 3, 1885, ch. 343, 23 Stat. L. 404, except in the substitution of the words "when absent on duty from their legal residence" for the words of the prior Act, "while traveling on duty."

[Transfer of gaugers, storekeeper-gaugers, and storekeepers — compensation.] That the Commissioner of Internal Revenue is authorized to detail gaugers, storekeeper-gaugers, and storekeepers, appointed in one district, for special or regular duty in other districts, and the accounts of gaugers, storekeeper-gaugers, and storekeepers, appointed in one district, for special or regular duty in other districts, and the accounts of gaugers, storekeeper-gaugers, and storekeepers so detailed shall be adjusted and paid in the district where they are appointed the same as if assigned to regular duty, without regard to the number of districts in which they may have been employed in any one month, the same as if all their services had been performed and expenses incurred in the district in which appointed, and the order of the Commissioner of Internal Revenue transferring gaugers, storekeeper-gaugers, or storekeepers to special work shall be accepted by the accounting officers of the Treasury Department as full authority for proper expenses incurred by said gaugers, storekeeper-gaugers, or storekeepers, while so assigned. [31 Stat. L. 107.]

See the note to the first paragraph of this section, *supra*, this page.

[SEC. 1.] [Storekeeper-gauger authorized — compensation.] That the internal-revenue officer holding the combined office of storekeeper and gauger shall hereafter be known and denominated as a storekeeper-gauger, and when performing the combined duties of storekeeper-gauger, or when assigned by the Commissioner of Internal Revenue to perform the duties of a storekeeper only at any distillery, or at any general or special bonded warehouse, he shall receive for his services the compensation of storekeeper only; but when assigned by the Commissioner of Internal Revenue to perform the duties of gauger only, under the internal-revenue laws, as provided by those laws, he shall receive only the compensation for

his services and the traveling expenses which are allowed by law to United States gaugers. [32 Stat. L. 492.]

This is from the Act of June 28, 1902, ch. 1312, entitled "An Act To amend the internal-revenue laws in regard to storekeepers and gaugers."

[SEC. 1.] [Number of agents.] * * * for salaries and expenses of twenty additional internal-revenue agents to be appointed and employed by the Commissioner of Internal Revenue, and these twenty agents to be in lieu of the agents provided for and appointed under the provisions of sections three and forty-seven of the Act of June thirteenth, eighteen hundred and ninety-eight, providing for war-revenue expenditures and other purposes, and these to be the only internal-revenue agents employed in addition to those provided for in section three thousand one hundred and fifty-two of the Revised Statutes. The existing provisions of law with regard to internal-revenue agents shall apply to the duties, compensation, and expenses of these twenty additional agents. [32 Stat. L. 877.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Feb. 25, 1903, ch. 755.

See the notes to R. S. sec. 3152, *supra*, p. 984.

[SEC. 1.] [Number of agents.] * * * For continuing the additional clerks and other employees in the office of the Commissioner of Internal Revenue, for salaries and expenses of increased force of deputy collectors, for continuing salaries and expenses of twenty additional internal-revenue agents appointed and employed by the Commissioner of Internal Revenue, the employment of this force being made necessary by the increased collections of internal revenue. The existing provisions of law with regard to internal-revenue agents shall apply to the duties, compensation, and expenses of these twenty additional agents. [33 Stat. L. 106.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 18, 1904, ch. 716.

See the preceding paragraph of the text and the notes to R. S. sec. 3152, *supra*, p. 984.

[SEC. 1.] [Internal revenue agents — per diem.] * * * That internal-revenue agents assigned to the duty of examining the accounts of collectors of internal revenue shall receive for per diem in lieu of subsistence, when absent from their legal residences on duty, a sum, to be fixed by the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, not to exceed four dollars, for fiscal years as follows: [34 Stat. L. 638.]

This is from the Deficiencies Appropriation Act of June 30, 1906, ch. 3912.

Similar provisions have appeared in the Appropriation Acts for preceding years. The Act of March 4, 1915, ch. 141, 38 Stat. L. 1017, provided for "salaries and expenses of forty revenue agents provided for by law, including per diem not to exceed \$4, in lieu of subsistence."

An Act Granting cumulative annual leave of absence to storekeepers, gaugers, and storekeeper-gaugers, with pay.

[*Act of June 23, 1910, ch. 356, 36 Stat. L. 592.*]

[Storekeepers, etc.—cumulative leave of absence allowed—computation—regulations.] That storekeepers, gaugers, and storekeeper-gaugers shall be, and are hereby, granted a cumulative annual leave of absence, with pay, not to exceed in the aggregate fifteen days for any one year: *Provided*, That said leave of absence is so computed as not to exceed one and one-quarter days for each twenty-six days said storekeepers, gaugers, and storekeeper-gaugers are actually assigned to duty: *Provided further*, That such leave shall be operative under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. [36 Stat. L. 592.]

[SEC. 1.] [Number of districts and collectors.] * * * On and after October first, nineteen hundred and fourteen, the whole number of collection districts for the collection of internal revenue and the whole number of collectors of internal revenue shall not exceed sixty-four. [38 Stat. L. 475.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 16, 1914, ch. 141.

Provisions relating to collection districts were made by R. S. sec. 3141, *supra*, p. 979. See the note to said section.

III. OF ASSESSMENTS AND COLLECTIONS

Sec. 3172. [Canvass of districts for objects of taxation.] That every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects. [R. S.]

The section originally was as follows:

"SEC. 3172. Every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay a special tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects." Act of June 30, 1864, ch. 173, 13 Stat. L. 225; Act of March 2, 1867, ch. 169, 14 Stat. L. 471; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

This section was amended to read as given in the text by the Revenue Act of Aug. 27, 1894, ch. 349, § 34, 28 Stat. L. 558, and as so amended was re-enacted without change by the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § II, subsec. I, 38 Stat. L. 178.

Sections 3172-3231 constitute chapter 2 of title XXXV of the Revised Statutes, entitled "Of Assessments and Collections."

This section was again amended by an Act of Sept. 8, 1916, § 16. See Pamph. Supp. No. 8, p. 94, Fed. Stat. Ann.; 1918 Supp. Fed. Stat. Ann.

Sec. 3173. [Annual returns of persons liable to tax.] It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, or other tax imposed by law, when not otherwise provided for, in case of a special tax, on or before the thirty-first day

of July in each year, in case of income tax on or before the first day of March in each year, and in other cases before the day on which the taxes accrue, to make a list or return, verified by oath or affirmation, to the collector or a deputy collector of the district where located, of the articles or objects, including the amount of annual income charged with a duty or tax, the quantity of goods, wares, and merchandise made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, articles or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose the particulars of any and all of the property, goods, wares, and merchandise, articles, and objects liable to pay any duty or tax, or any business or occupation liable to pay any tax as aforesaid, then, and in that case, it shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath or affirmation by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further*, That in case no annual list or return has been rendered by such person to the collector or deputy collector as required by law, and the person shall be absent from his or her residence or place of business at the time the collector or a deputy collector shall call for the annual list or return, it shall be the duty of such collector or deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post office, a note or memorandum addressed to such person, requiring him or her to render to such collector or deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath or affirmation. And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is false or fraudulent, or contains any undervaluation or understatement, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account containing entries relating to the business of such person, or any other person he may deem proper, to appear before him and produce such books, at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects liable to tax or the returns thereof. The collector may summon any person residing or found within the State in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned. [R. S.]

This section originally read as follows:

"SEC. 3173. It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, stamp, or tax imposed by law, when not otherwise provided for, on or before the first Monday of March in each year, and in other cases before the day of levy, to make a list or return, verified by oath or affirmation, to the deputy collector of the district where located, of the articles or objects charged with a special duty or tax, the quantity of goods, wares, and merchandise made or sold, and charged with a specific or ad valorem duty or tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, articles or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose the particulars of any and all the property, goods, wares, and merchandise, articles and objects liable to pay any duty or tax, or any business or occupation liable to pay any special tax as aforesaid, then, and in that case, it shall be the duty of the deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath or affirmation by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further*, That in case any person shall be absent from his or her residence or place of business at the time a deputy collector shall call for the annual list or return, and no annual list or return has been rendered by such person to the deputy collector as required by law, it shall be the duty of such deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post-office, a note or memorandum, addressed to such person, requiring him or her to render to such deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath or affirmation. And if any person on being notified or required as aforesaid shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is false or fraudulent or contains any undervaluation or understatement, it shall be lawful for the collector to summon such person or any other person, having possession, custody, or care of books of account containing entries relating to the business of such person, or any other person he may deem proper, to appear before him and produce such books, at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects liable to tax or the returns thereof. The collector may summon any person residing or found within the State in which his district lies; and when the person intended to be summoned does not reside and cannot be found within such State, he may enter any collection-district where such person may be found, and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned." Act of June 30, 1864, ch. 173, 13 Stat. L. 225, 226; Act of July 3, 1866, ch. 184, 14 Stat. L. 101; Act of March 2, 1867, ch. 169, 14 Stat. L. 471; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

It was amended by Act of March 1, 1879, ch. 125, § 3, 20 Stat. L. 330, by changing the introductory clauses so that it read down to the words "oath or affirmation" as follows:

"SEC. 3173. It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, stamp, or tax imposed by law, when not otherwise provided for, in case of a special tax, on or before the thirteenth day of April in each year, and in other cases before the day on which the taxes accrue, to make a list or return, verified by."

It was again amended by the Revenue Act of Aug. 27, 1894, ch. 349, § 34, 28 Stat. L. 558, and as so amended it was re-enacted by the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § II, subsec. I, in the same words as the said Act of Aug. 27, 1894, ch. 349, § 34, except that the words "first Monday of March in each year" were changed to "first day of March in each year," making the section to read as given in the text.

This section was again amended by the Act of Sept. 8, 1916, § 16. See Pamph. Supp. No. 8, p. 94, Fed. Stat. Ann.; 1918 Supp. Fed. Stat. Ann.

This section does not apply to all objects of internal revenue taxation. "The statutes of the United States disclose at least two distinct methods of taxation,—one requires a return containing a list of objects liable to tax, upon which return an assessment is made, and the other method requires that the tax be paid by

a stamp affixed to the taxable article." *In re Kinney*, (1900) 102 Fed. 468.

"When not otherwise provided for" was held, under section 11 of the Act of June 30, 1864, to apply to the cases of manufacturers from whom more frequent returns were required, as provided for in subsequent sections, and applied to manu-

facturers of tobacco. *U. S. v. McGinnis*, (1866) 1 Abb. 120, 26 Fed. Cas. No. 15,678.

Production of books.—The taxpayer's own books are the only ones the officer has authority to call for, and it was held, under the Act of 1866, amending section 14 of that of 1864, that the production of the books of a corporation for the purpose of ascertaining the income of shareholders could not be compelled. *In re Chadwick*, (1870) 1 Lowell 439, 5 Fed. Cas. No. 2,570.

Oleomargarine Act.—The enactment of a statute which is not a supplement or amendment to other revenue legislation, but is a distinct and independent one, creating a complete and comprehensive system in itself, and, by its various sections, regulating the taxation, manufacturing, selling at wholesale and retail, the import and export of oleomargarine, pro-

viding for its analysis, and fixing punishments for violation of its provisions, excludes an inference that the provisions of this section apply to it. *In re Kearns*, (1894) 64 Fed. 481. See also *In re Kinney*, (1900) 102 Fed. 468, in which the court said that powers such as are conferred by this section are not to be extended by analogy, and must be strictly limited within the express terms of the statutes.

The income tax provisions of the Act of 1894, sections 27 to 37 of that Act, were held to be unconstitutional and void, as levying a direct tax, not apportioned among the several states as required by the Constitution, art. 1, § 2, cl. 3, and § 9, cl. 4. *Pollock v. Farmers' Loan, etc., Co.*, (1895) 157 U. S. 429. 15 S. Ct. 673, 39 U. S. (L. ed.) 759, (1895) 158 U. S. 601, 15 S. Ct. 912, 39 U. S. (L. ed.) 1108.

Sec. 3174. [Summons, form and manner of service of.] Such summons shall in all cases be served by a deputy collector of the district where the person to whom it is directed may be found, by an attested copy delivered to such person in hand, or left at his last and usual place of abode, allowing such person one day for each twenty-five miles he may be required to travel, computed from the place of service to the place of examination; and the certificate of service signed by such deputy shall be evidence of the facts it states on the hearing of an application for an attachment. When the summons requires the production of books, it shall be sufficient if such books are described with reasonable certainty. [*R. S.*]

Act of June 30, 1864, ch. 173, 13 Stat. L. 226; Act of July 13, 1866, ch. 184, 14 Stat. L. 101; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

Books described with reasonable certainty.—In this case the court held that the summons, set out in full, described

the books with reasonable certainty. *In re Becker*, (1875) 3 Fed. Cas. No. 1,208.

Sec. 3175. [Failure to obey summons, proceedings on.] Whenever any person summoned under the two preceding sections neglects or refuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collectors may apply to the judge of the district court or to a commissioner of the circuit court of the United States for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or commissioner shall have power to make such order as he shall deem proper not inconsistent with existing laws for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience. [*R. S.*]

Act of June 30, 1864, ch. 173, 13 Stat. L. 226; Act of July 13, 1866, ch. 184, 14 Stat. L. 101; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

By the Act of May 28, 1890, ch. 252, § 19, 29 Stat. L. 184, as amended by the Act of March 2, 1901, ch. 814, 31 Stat. L. 956, the office of Circuit Court Commissioner

was abolished and that of United States Commissioner created in lieu thereof. See JUDICIAL OFFICERS.

By the Judicial Code of March 4, 1911, ch. 13, §§ 289-291, the Circuit Courts were abolished and their powers and duties conferred on the District Courts. See JUDICIARY.

Assessors.—By the Act of Dec. 24, 1872, the office of assessor was abolished, and its duties were transferred to and imposed upon collectors, which accounts for some of the early cases in the following notes referring to assessors.

Constitutionality.—If this section authorizes a judge or commissioner to arrest and punish for a contempt of the order of a collector of internal revenue, it is unconstitutional and void. *In re Kinney*, (1900) 102 Fed. 468. See *In re Phillips*, (1869) 19 Fed. Cas. No. 11,097.

The objection that no right or power is, or can be, vested in an officer to punish, inasmuch as he cannot act judicially, cannot arise under this section, for by its terms full hearing is to be had judicially before punishment can be imposed. If the court ascertains on hearing that any one has disobeyed the legal summons, it can order him to appear, produce his books, etc.; disobedience to which order of the court would bring the offender within the doctrine prescribed as to contempts. *In re Becker*, (1875) 3 Fed. Cas. No. 1,208.

Self-incriminating evidence.—R. S. sec. 860 (since repealed by the Act of May 7, 1910, ch. 216, see title EVIDENCE), prohibited the use of pleadings and disclosures in criminal proceedings, nevertheless interrogatories, appertaining to the regular and legitimate exercise of the jurisdiction and authority conferred upon the assessor were not open to the objection that the answers, if given, would subject the witness to a criminal prosecution. *In re Strouse*, (1871) 1 Sawy. 605, 23 Fed. Cas. No. 13,548.

A summons to produce books and appear before an officer to testify, in pursuance of the provisions of this and the preceding sections, is not a criminal but a civil proceeding, and does not violate the constitutional provision that no man can be compelled to be a witness against himself in a criminal case, nor that which forbids unreasonable searches and seizures. *In re Strouse*, (1871) 1 Sawy. 605, 23 Fed. Cas. No. 13,548.

Production of books.—The statute is

not complied with by a mere appearance and production of the books called for, but the entries relating to the trade or business of the respondent must be exhibited and proper questions concerning them answered. *In re Strouse*, (1871) 1 Sawy. 605, 23 Fed. Cas. No. 13,548.

Books must be produced by the taxpayer, but he is not at once obliged to submit them to the inspection of the assessor or of any other person. If he says there are such entries as the summons specifies, but that he cannot exhibit them without criminating himself, or furnishing a link in a chain of evidence which might criminate him, he is protected from exhibiting such entries. And he is protected in like manner from giving testimony, in reply to any particular question put to him. *Matter of Lippman*, (1868) 3 Ben. 95, 15 Fed. Cas. No. 8,382. See *U. S. v. Hughes*, (1875) 12 Blatchf. 553, 26 Fed. Cas. No. 15,417.

Practice.—A rule to show cause is the proper practice under this statute, rather than a hearing ex parte of an application for an attachment. *In re Chadwick*, (1870) 1 Lowell 439, 5 Fed. Cas. No. 2,570.

An amendment to a petition for an attachment may be allowed. *In re Chadwick*, (1870) 1 Lowell 439, 5 Fed. Cas. No. 2,570.

Defective summons.—A summons is open to objection because of its omission to specify the case or subject matter with respect to which the testimony is required. But such an objection cannot prevail, upon the hearing on attachment, when the respondent appeared in obedience to the summons and the subject matter of the inquiry was made known to him, and he refused to answer for other reasons. *In re Phillips*, (1869) 19 Fed. Cas. No. 11,097.

The re-examination of an assessment by an assessor was held to be unauthorized, under section 14 of the Act of June 30, 1864, after the annual list containing the assessment had been transmitted to the collector. *In re Brown*, (1866) 4 Fed. Cas. No. 1,977.

Sec. 3176. [Failure to make return — return by officer — penalty.]

When any person, corporation, company, or association refuses or neglects to render any return or list required by law, or renders a false or fraudulent return or list, the collector or any deputy collector shall make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of the collector, and on his own view and information, such list or return, according to the form prescribed, of the income, property, and objects liable to tax owned or possessed or under the care or management of such person or corporation, company

or association, and the Commissioner of Internal Revenue shall assess all taxes not paid by stamps, including the amount, if any, due for special tax, income or other tax, and in case of any return of a false or fraudulent list or valuation intentionally he shall add 100 per centum to such tax; and in case of a refusal or neglect, except in cases of sickness or absence, to make a list or return, or to verify the same as aforesaid, he shall add 50 per centum to such tax. In case of neglect occasioned by sickness or absence as aforesaid the collector may allow such further time for making and delivering such list or return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax unless the neglect or falsity is discovered after the tax has been paid, in which case the amount so added shall be collected in the same manner as the tax; and the list or return so made and subscribed by such collector or deputy collector shall be held *prima facie* good and sufficient for all legal purposes. [R. S.]

The section was originally as follows:

"Sec. 3176. The collector or any deputy collector in every district shall enter into and upon the premises, if it be necessary, of every person therein who has taxable property and who refuses or neglects to render any return or list required by law, or who renders a false or fraudulent return or list, and make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of the collector, and on his own view and information, such list of return, according to the form prescribed, of the objects liable to tax, owned or possessed or under the care or management of such person, and the Commissioner of Internal Revenue shall assess the tax thereon, including the amount, if any, due for special tax, and in case of any return of a false or fraudulent list or valuation, he shall add one hundred per centum to such tax; and in case of a refusal or neglect, except in cases of sickness or absence, to make a list or return, or to verify the same as aforesaid, he shall add fifty per centum to such tax. In case of neglect occasioned by sickness or absence as aforesaid, the collector may allow such further time for making and delivering such list or return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall, in all cases, be collected at the same time and in the same manner as the tax; and the list or return so made and subscribed by such collector or deputy collector shall be held good and sufficient for all legal purposes." Act of June 30, 1864, ch. 173, 13 Stat. L. 226; Act of July 13, 1866, ch. 184, 14 Stat. L. 101; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 402.

It was amended by Act of March 1, 1879, ch. 125, 20 Stat. L. 331, which provided as follows:

"That section thirty-one hundred and seventy-six be amended by striking out the words 'in all cases' in the nineteenth line, and inserting, after the word 'tax' in the twentieth line, the words 'unless the neglect or falsity is discovered after the tax has been paid, in which case the amount so added shall be collected in the same manner as the tax.'"

This section was again amended by the Revenue Act of Aug. 27, 1894, ch. 349, § 34, 28 Stat. L. 559. As so amended it was re-enacted by the Underwood Tariff Act of Oct. 3, 1913, ch. 16, § II, subsec. I, 38 Stat. L. 179, the only change being the substitution of the figures "100" and "50" before the words "per centum," in lieu of the words "one hundred" and "fifty," which had formerly appeared.

This section was again amended by the Act of Sept. 8, 1916, § 16. See the Pamph. Supp. No. 8, p. 96, Fed. Stat. Ann.; 1918 Supp. Fed. Stat. Ann.

The statute is not unconstitutional in so far as it imposes a penalty for a false or fraudulent return. It does not invest the officer with power to sentence anybody, nor even allow him any discretion as to the penal increase of the tax, but authorizes him to inquire whether the return is false or fraudulent, and if he so finds, requires him to add the one hundred per cent. to the tax. "This is not conferring judicial power upon him, within the meaning of the Constitution." *Doll v.*

Evans, (1872) 9 Phila. (Pa.) 364, 7 Fed. Cas. No. 3,969.

That the return should be wilfully false is not a prerequisite to the addition of the penalty. "If the return is not in fact true, the commissioner is authorized to affix the penalty." *German Sav. Bank v. Archbold*, (1878) 15 Blatchf. 398, 10 Fed. Cas. No. 5,364, *reversed* on another point (1881) 104 U. S. 708, 26 U. S. (L. ed.) 901.

The penalty of fifty per cent. of the tax

for refusal or neglect to make a list or return was held, under section 14 of the Act of 1864, as amended by the Act of July 13, 1866, to relate to the annual and monthly lists and returns to be made by parties taxable under the law, and not to the penalty for failing to return and give notice of a succession tax, which was pro-

vided for in a distinct section, to wit, section 148 of the Act of 1864, as amended by the Act of 1866. *Wright v. Blakeslee*, (1879) 101 U. S. 174, 25 U. S. (L. ed.) 1048.

The fifty per cent. to be added to the tax, under this section, is a penalty and not a tax. (1882) 17 Op. Atty.-Gen. 433.

Sec. 3177. [Officers may enter premises where taxable articles are kept.] Any collector, deputy collector, or inspector may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers may enter them while so open, in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector, deputy collector, or inspector, in the execution of any power and authority vested in him by law, or shall forcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 238.

The provisions of this section were extended to internal revenue agents by R. S. sec. 3152, given as amended *supra*, p. 984.

National banks.—Visitorial powers over national banks are not conferred upon internal revenue officers by this section. *U. S. v. Parkhill*, (1875) 2 W. N. C. (Pa.) 604, note, 27 Fed. Cas. No. 15,904.

But see *U. S. v. Rhawn*, (1875) 11 Phila. (Pa.) 521, 27 Fed. Cas. No. 16,150, in which the court said that the examination of checks subject to tax, to ascertain whether they were unstamped, is not the exercise of a visitorial power under the statute relative to banks.

And see *U. S. v. Mann*, (1877) 95 U. S. 580, 24 U. S. (L. ed.) 531, which was an action against an officer of a national bank to recover a forfeiture for an alleged violation of this section, the declaration in which case was held insufficient.

A clerk to the supervisor is not an officer having visitorial powers under this section. *U. S. v. Rhawn*, (1875) 11 Phila. (Pa.) 521, 27 Fed. Cas. No. 16,150.

To obstruct or hinder an officer from entering a building where illicit spirits are kept is a distinct and different offense from that of keeping or concealing them. One who obstructs or hinders the officer is clearly amenable though he owns neither the building nor the spirits. *U. S. v. Fears*, (1878) 3 Woods 510, 25 Fed. Cas. No. 15,080.

Sufficiency of declaration.—"Strictly limited as the right conferred is, it is a privilege easily defined; and it is equally clear that the prohibition addressed to the owner or person in charge of the place of business is explicitly confined to the refusal to suffer the officer to enter the building where the articles or objects subject to taxation are made, produced, or kept, for the special purpose particularly set forth in the section." This was an action against the cashier of a bank for refusing to suffer the collector to enter the bank to examine bank checks subject to tax under R. S. sec. 3418 (repealed by Act of March 3, 1883, ch. 121, sec. 1, see division XX of this title in vol. 4), and the complaint was held insufficient, in not alleging that the bank checks were not duly and sufficiently stamped at the time they were made, signed, and issued. *U. S. v. Mann*, (1877) 95 U. S. 580, 24 U. S. (L. ed.) 531.

Indictments.—An indictment for obstructing or hindering an officer should show the authority under which the officer is acting. Under this section the officer may enter without process any building where distilled spirits subject to tax are made, produced, or kept, so far as it may be necessary for examining the same, and

under R. S. sec. 3453 (vol. 4, div. XXI of this title) he may also, without process, seize illicit distilled spirits, but the authority exists only where the circumstances prescribed by these sections exist. *U. S. v. Fears*, (1878) 3 Woods 510, 25 Fed. Cas. No. 15,080.

An indictment charging that defendant "did forcibly attempt to rescue" certain property seized by a revenue collector is insufficient, although it follows the language of the statute; such words do not define the offense with proper accuracy for certainty of allegation in an indictment. *U. S. v. Ford*, (1888) 34 Fed. 26.

Collection of tax on oleomargarine.—This section is applicable to the collection or enforcement of the specific tax imposed on oleomargarine by the Act of Aug. 2, 1886, ch. 840 (vol. 4, div. X of this title), *U. S. v. Barnes*, (1912) 222 U. S. 513. 32

S. Ct. 117, 56 U. S. (L. ed.) 291, wherein the court said: "The cases of *Craft v. Schafer*, (C. C. A. 6th Cir. 1907) 154 Fed. 1002 [183 C. C. A. 677]; *Tucker v. Grier*, (C. C. A. 8th Cir. 1908) 160 Fed. 611 [87 C. C. A. 513], and *Hastings v. Herold*, (C. C. A. N. J. 1910) 184 Fed. 759, although not involving section 3177, disclose some contrariety of opinion in the lower federal courts upon the matter principally discussed herein, and we deem it appropriate to observe that our conclusion has been reached only after a careful consideration of those cases."

In *Kercheval v. Allen*, (C. C. A. 8th Cir. 1915) 220 Fed. 262, 135 C. C. A. 1, it was held that the provisions of this section are general in their nature and are applicable to the collection of the special taxes imposed on oleomargarine.

Sec. 3178. [Returns to show whether amounts are valued in coin or currency.] All persons required to make returns or lists of objects charged with an internal tax shall declare therein whether the several rates and amounts are stated according to their values in legal-tender currency or according to their values in coined money; and in case of neglect or refusal so to declare to the satisfaction of the collector receiving such returns or lists, such officer shall make returns or lists for such persons so neglecting or refusing, as in cases of persons neglecting or refusing to make the returns: or lists required by law, and the Commissioner shall assess the tax thereon, and add thereto the amount of penalties imposed by law in cases of such neglect or refusal. And whenever the rates and amounts contained in the returns or lists are stated in coined money, the collector receiving the same shall reduce them to their equivalent in legal-tender currency, according to the value of such coined money in said currency for the time covered by such returns. [R. S.]

Act of March 10, 1866, ch. 15, 14 Stat. L. 5; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

This section has never been repealed, but it may be regarded as practically obsolete.

The value of legal tender currency, in which the tax on the interest or bonds is to be paid, should be estimated on its value at the date the interest is payable, and not at the date of the trial and judgment in an action brought for its recovery.

U. S. v. Erie R. Co., (1877) 9 Ben. 67, 25 Fed. Cas. No. 15,056, reversed on another point (1882) 106 U. S. 327, 1 S. Ct. 223, 27 U. S. (L. ed.) 151.

Sec. 3179. [Making false return or refusing to produce books — penalty.] Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or, being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglects to appear or to produce said books, he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 226.

Manufacturers who are not governed by the provisions of R. S. sec. 3173, *supra*, p. 1002, by reason of the provision therein "when not otherwise provided for," are not exempt from indictment under this section. *U. S. v. McGinnis*, (1866) 1 Abb. 120, 26 Fed. Cas. No. 15,678.

Joint indictment of partners.—Partners in the business of manufacturing tobacco may be jointly indicted for making a false return to the assessor when the return is made and signed by them in their partner-

ship name. *U. S. v. McGinnis*, (1866) 1 Abb. 120, 26 Fed. Cas. No. 15,678.

Evidence of prior returns.—On the trial of an indictment for disclosing and delivering to an assistant assessor a false and fraudulent return of manufactures, evidence of returns made by the defendant for other months than that on which the indictment was founded is competent. *U. S. v. Rumsey*, (1867) 27 Fed. Cas. No. 16,207.

Sec. 3180. [Taxable property owned by nonresidents.] Whenever there are in any district any articles not owned or possessed by or under the care or control of any person within such district, and liable to be taxed, and of which no list has been transmitted to the collector, as required by law, the collector or one of his deputies shall enter the premises where such articles are situated and shall take such view thereof as may be necessary, and make lists of the same, according to the form prescribed. Said lists, being subscribed by such collector or deputy, shall be taken as sufficient lists of such articles for all purposes. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 227; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

Sec. 3181. [Lists, when taken and how denominated.] The lists or returns aforesaid shall, where not otherwise specially provided for, be taken with reference to the day fixed for that purpose by this Title as aforesaid; and where duties accrue at other and different times, the list shall be taken with reference to the time when said taxes become due, and shall be denominated annual, monthly, and special lists or returns. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 228.

The word "last," in the fourth line of this section, was changed to "list" by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 319.

Sec. 3182. [Commissioner of Internal Revenue to make assessments—correction of incomplete or imperfect lists.] The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. Whenever it is ascertained that any list which has been or shall be delivered to any collector, is imperfect or incomplete in consequence of the omission of the name of any person liable to tax, or in consequence of any omission, or understatement, or undervaluation, or false or fraudulent statement contained in any return made by any person liable to tax, the Commissioner of Internal Revenue may, at any time within fifteen months from the time of the delivery of the list to the collector as aforesaid, enter on any monthly or special list the name of such person so omitted, together with the amount of tax for which he may have been or shall become liable, and also the name of any such person in respect to

whose return, as aforesaid, there has been or shall be any omission, undervaluation, understatement, or false or fraudulent statement, together with the amount for which such person may be liable, above the amount for which he may have been or shall be assessed upon any return made as aforesaid; and he shall certify and return such list to the collector as required by law. And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 229; Act of July 13, 1866, ch. 184, 14 Stat. L. 103; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 402.

Conclusiveness of assessment.—In a suit brought by the government against a taxpayer, the court may hear legal evidence on issues of fact, as to the legality of the assessment, without restriction, and render judgment according to the law and evidence, notwithstanding that there has been no appeal to the commissioner of internal revenue against the assessment under R. S. sec. 3226, *infra*, p. 1034. U. S. v. Myers, (1878) 3 Hughes 239, 27 Fed. Cas. No. 15,846. See also Clinkenbeard v. U. S., (1874) 21 Wall. 65, 22 U. S. (L. ed.) 477. But see U. S. v. Black, (1874) 11 Blatchf. 538, 24 Fed. Cas. No. 14,600; Delaware R. Co. v. Prettyman, (1872) 7 Fed. Cas. No. 3,767; U. S. v. Hodson, (1871) 26 Fed. Cas. No. 15,376.

Assessment prima facie valid.—It may be conceded that an assessment is prima facie valid and must be regarded as binding when made by the officers as required by the law of the United States; but while this is so, it is not conclusive against all parties, and it is competent for those who may not be directly affected by the assessment to contest its validity. And when the defendants have rebutted the presumption that the law makes in relation to the validity of the tax, the burden of proof is shifted, and the United States must show that the assessment is valid. U. S. v. Rindskopf, (1879) 8 Biss. 507, 27 Fed. Cas. No. 16,166.

Action without assessment.—An action of debt may be maintained to recover taxes without an assessment, where the statute describes the subject of the taxes and fixes the rates so that the amount may be ascertained by evidence. In such an action the limitation of fifteen months within which an assessment may be made does not apply. U. S. v. Little Miami, etc., R. Co., (1880) 1 Fed. 700. See also Dollar Sav. Bank v. U. S., (1873) 19 Wall. 227, 22 U. S. (L. ed.) 80.

Payment of assessment no bar.—The fact that an assessment has been made and paid will not be a bar to a suit for the recovery of an amount claimed to be due over and above the amount assessed and paid. U. S. v. Little Miami, etc., R. Co., (1880) 1 Fed. 700.

The statute contemplates the exercise of the power of reassessment after the payment of the tax first assessed. Doll v.

Evans, (1872) 9 Phila. (Pa.) 364, 7 Fed. Cas. No. 3,969. But see *In re Brown*, (1866) 4 Fed. Cas. No. 1,977.

Reassessment for deficiencies.—It was held, under the Act of 1864, as amended by the Act of 1866, that an assessment was not void upon its face, because not made month by month so as to indicate the deficiency for each month, and to make the reassessment coincide in time with the monthly returns of the taxpayer to the assessor. "The amount for which a person has been assessed upon any return or returns," may be an aggregate of many sums, and it is the deficiency of this amount which is to be reassessed. Dandeleit v. Smith, (1873) 18 Wall. 642, 21 U. S. (L. ed.) 758.

"Within fifteen months."—In making an assessment, the commissioner is not limited to a period of fifteen months anterior to the date of assessment, but the section provides that whenever it is ascertained that any list of assessments which has been or shall be delivered to any collector is imperfect or incomplete, the entry of any omitted name may be made on any monthly or special list by the commissioner within fifteen months after the delivery of the annual list to the collector. U. S. v. O'Neill, (1884) 19 Fed. 567. See Dandeleit v. Smith, (1873) 18 Wall. 642, 21 U. S. (L. ed.) 758; *In re Archer*, (1878) 9 Ben. 427, 1 Fed. Cas. No. 506.

R. S. secs. 3182 (*supra*, p. 1010) and 3253 (vol. 4, div. V of this title) are parts of the scheme of revenue taxation and may for certain purposes be taken together, but it does not follow that the fifteen months provision in R. S. sec. 3182 puts a limitation upon the powers conferred by section 3253. U. S. v. U. S. Fidelity, etc., Co., (C. C. A. 4th Cir. 1915) 221 Fed. 27, 136 C. C. A. 553.

When original assessment is erroneous from any cause.—The power of the commissioner to make a supplementary list and assessment is not limited to cases where the distiller's returns are erroneous, but he is authorized to make a supplementary assessment, within the time specified by the statute, whenever it has been ascertained by him that the original assessment is erroneous from any cause, whether from his own mistake or from that of the distiller. But such will not

be presumed to be correct until the jurisdictional fact necessary to enable the assessor to make a new assessment has been affirmatively proved, viz., the determination or decision of the assessor that a mistake had been made in the original assessment. *Barker v. White*, (1874) 11 Blatchf. 445, 2 Fed. Cas. No. 996. See also *U. S. v. Black*, (1874) 11 Blatchf. 538, 24 Fed. Cas. No. 14,600.

Distiller's right to have official papers produced.—In a suit upon a distiller's bond, the defendants, upon the trial, have no legal right to the use of the reports, documents, and other papers on file in the office of the Secretary of the Treasury

upon which the commissioner acted in making the inquiries and determinations contemplated by this section, and from which, in whole or in part, he derived the knowledge upon which he made the assessments, as provided in R. S. sec. 3253 (vol. 4, div. V of this title), and a court has no authority to compel their production, or copies of them. (1878) 16 Op. Atty-Gen. 24.

For proofs necessary to support a complaint setting forth a cause of action under this section, see *U. S. v. U. S. Fidelity, etc., Co.*, (C. C. A. 4th Cir. 1915) 221 Fed. 27, 136 C. C. A. 553.

Sec. 3183. [Duty and authority of collectors and deputies to collect all taxes.] It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated. And every collector and deputy collector shall give receipts for all sums collected by him excepting only when the same are in payment for stamps sold and delivered; but no collector or deputy collector shall issue a receipt in lieu of a stamp representing a tax. [*R. S.*]

Act of June 30, 1864, ch. 173, 13 Stat. L. 238, 239; Act of July 13, 1866, ch. 184, 14 Stat. L. 110.

The latter part of the section beginning with the words "excepting only when," etc., was added by the Act of March 1, 1879, ch. 125, 20 Stat. L. 331.

Sec. 3184. [Notice and demand of taxes.] Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof. If such person does not pay the taxes, within ten days after the service or the sending by mail of such notice, it shall be the duty of the collector or his deputy to collect the said taxes with a penalty of five per centum additional upon the amount of taxes, and interest at the rate of one per centum a month. [*R. S.*]

Act of July 13, 1866, ch. 184, 14 Stat. L. 106; Act of March 2, 1867, ch. 169, 14 Stat. L. 473; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 402.

Notice.—This notice is not part of the assessment, nor a condition precedent to an assessment, but is necessary by the terms of the statute before the taxpayer can be charged with the penalty. This notice is also necessary before the collector can distrain for the taxes. *U. S. v. Bristow*, (1884) 20 Fed. 378. See also *U. S. v. Allen*, (1882) 14 Fed. 263; see *Clay v. Swope*, (1889) 38 Fed. 396.

"A penalty of five per cent. additional" imposed on the person who is liable for the taxes, because of his personal default in not paying the tax within the time required by law, is neither a tax nor duty upon the distilled spirits exported, and is

not discharged by the fact of exportation. *Clay v. Swope*, (1889) 38 Fed. 396.

Limitation of action.—Under this section providing for the collection of delinquent internal revenue taxes, with a penalty of five per cent. thereon and interest at the rate of one per cent. a month, such interest is not a penalty, but is recoverable as interest, and the limitation of five years, prescribed by R. S. sec. 1047 (title FINES, PENALTIES AND FORFEITURES), for suits to recover penalties, does not apply to a suit to recover such interest as a part of the debt. *U. S. v. Guest*, (C. C. A. 4th Cir. 1906) 143 Fed. 456, 74 C. C. A. 590, affirmed (C. C. A. 4th Cir. 1906) 150 Fed. 121, 80 C. C. A. 75.

Sec. 3185. [Monthly returns and special returns, when to be made, and when tax payable.] All returns required to be made monthly by any person liable to tax shall be made on or before the tenth day of each month, and the tax assessed or due thereon shall be returned by the Commissioner of Internal Revenue to the collector on or before the last day of each month. All returns for which no provision is otherwise made shall be made on or before the tenth day of the month succeeding the time when the tax is due and liable to be assessed, and the tax thereon shall be returned as herein provided for monthly returns, and shall be due and payable on or before the last day of the month in which the assessment is so made. When the said tax is not paid on or before the last day of the month, as aforesaid, the collector shall add a penalty of five per centum, together with interest at the rate of one per centum per month, upon such tax from the time the same became due; but no interest for a fraction of a month shall be demanded: *Provided*, That notice of the time when such tax becomes due and payable is given in such manner as may be prescribed by the Commissioner of Internal Revenue. It shall then be the duty of the collector, in case of the non-payment of said tax on or before the last day of the month, as aforesaid, to demand payment thereof, with five per centum added thereto, and interest at the rate of one per centum per month, as aforesaid, in the manner prescribed by law; and if said tax, penalty, and interest, are not paid within ten days after such demand, it shall be lawful for the collector or his deputy to make distraint therefor, as provided by law. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 150; Act of March 2, 1867, ch. 169, 14 Stat. L. 473; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401, 402.

Strict compliance with section.—The steps required by this section and R. S. sec. 3184, *supra*, p. 1012, must have been literally taken, and failure to comply with their provisions will not be cured by presumptions and intendments. Strict compliance must be made evident by clear and conclusive testimony, when the

United States claims title to land bid in at a collector's sale to satisfy a lien for taxes, as against one who purchased prior to the collector's sale but subsequent to the alleged demand for taxes. *U. S. v. Allen*, (1882) 14 Fed. 263. See also *Brown v. Goodwin*, (1878) 75 N. Y. 409

Sec. 3186. [Unpaid taxes a lien on property.] If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person: *Provided, however*, That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated: *Provided further*, Whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that State, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that State as against any mortgagee, purchaser, or judgment creditor, until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or

parish or parishes in the State of Louisiana, within which the property subject to the lien is situated. [R. S.]

This section, originally drawn from an Act of July 13, 1866, ch. 184, 14 Stat. L. 107, was amended by an Act of March 1, 1879, ch. 125, 20 Stat. L. 331, to read as given in the text down to the words "Provided however." The only change was in the substitution of the words "when the assessment list was received by the collector, except when otherwise provided" for the words "it was due."

It was further amended by adding all of that part beginning with the words "Provided however" to the end of the section as given in the text by an Act of March 4, 1913, ch. 166, 37 Stat. L. 1066, entitled "An Act to amend section thirty-one hundred and eighty-six of the Revised Statutes of the United States."

Recording laws of the states.—The tax system of the United States is not subject to the recording laws of the states. *U. S. v. Snyder*, (1893) 149 U. S. 210, 13 S. Ct. 846, 37 U. S. (L. ed.) 705. See also *Osterberg v. Union Trust Co.*, (1876) 93 U. S. 424, 23 U. S. (L. ed.) 964.

To create a lien for taxes, there must have been a previous ascertainment of the sum due by means of an assessment by the assessor or other officer, authorized by law. *U. S. v. Pacific R. Co.*, (1880) 1 Fed. 100.

The lien attaches when the demand is made, and relates back to the time when the tax was due; it does not attach to property of innocent purchasers prior to demand. *U. S. v. Pacific R. Co.*, (1880) 1 Fed. 100. See also *U. S. v. Pacific R. Co.*, (1877) 4 Dill. 71, 27 Fed. Cas. No. 15,984; *Brown v. Goodwin*, (1878) 75 N. Y. 409.

Validity of lien as to subsequent incumbrances.—When the requirements of the assessment and demand have been complied with, the lien of the government is superior to that of anyone acquiring any interests in the property after the date of demand. The government's lien is unaffected by the fact that a subsequent incumbrancer or purchaser became such without knowledge that the government had any interest in the property or claim upon it. *U. S. v. Curry*, (D. C. Md. 1912) 201 Fed. 371, wherein the court said: "It would seem that by a comparatively slight change of the statute law the rights of the United States could be sufficiently protected without endangering the interests of other persons. The collector of internal revenue at the time he makes demand upon the taxpayer might be required to transmit a copy of the demand to some office in which judgments and

other recognized liens upon real estate are recorded and the records of which are consequently carefully examined by conveyancers. Whether public policy does or does not require that section 3186 shall be repealed or amended in some way as that above suggested is a question of policy for Congress. The present state of the law was called to its attention at least six years ago. Part 1, Proceedings American Bar Ass'n 1906, p. 598. It has, however, not taken any action. The courts must enforce the law as they find it."

A demand should state with particularity the amount of the tax. *U. S. v. Pacific R. Co.*, (1877) 4 Dill. 71, 27 Fed. Cas. No. 15,984.

"A demand implies the previous ascertainment of the sum due, and this ascertainment is by means of the return or assessment." *U. S. v. Pacific R. Co.*, (1880) 1 Fed. 103.

"When the assessment list was received."—Any legal ascertainment of deficiency of a particular tax is, in fact, its assessment, and the receipt of the ascertainment of deficiency by the collector of internal revenue from the customs collector is, in effect, his receipt of an assessment list of the tax. (1879) 16 Op. Atty.-Gen. 634.

While R. S. sec. 3251 (vol. 4, div. V of this title) has a provision of greater definiteness for a lien for the tax upon spirits, and there may consequently be rarely occasion for calling in the provision for a lien for taxes in general, under the provisions of this section there is nothing to forbid that general policy to apply in all cases where there is nothing in the special policy to contradict. (1879) 16 Op. Atty.-Gen. 634.

R. S. sec. 3186 et seq. cited generally, in *Cambria Steel Co. v. McCoach*, (E. D. Pa. 1915) 225 Fed. 278.

Sec. 3187. [Taxes collectible by distraint.] If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, and evidences of debt, of the person delinquent as aforesaid: *Provided*, That there shall be exempt

from distraint and sale, if belonging to the head of a family, the school-books and wearing apparel necessary for such family; also arms for personal use, one cow, two hogs, five sheep and the wool thereof, provided the aggregate market-value of said sheep shall not exceed fifty dollars; the necessary food for such cow, hogs, and sheep, for a period not exceeding thirty days; fuel to an amount not greater in value than twenty-five dollars; provisions to an amount not greater than fifty dollars; household furniture kept for use to an amount not greater than three hundred dollars; and the books, tools, or implements, of a trade or profession, to an amount not greater than one hundred dollars shall also be exempt; and the officer making the distraint shall summon three disinterested householders of the vicinity, who shall appraise and set apart to the owner the amount of property herein declared to be exempt. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 106, 107, 108; Act of March 2, 1867, ch. 169, 14 Stat. L. 473.

Due process of law.—Collection by distraint is due process of law. It is not a judicial process by which the property of the debtor can be taken for the satisfaction of a debt, but it is an executive process, by which the right to seize and take property for the payment of taxes is exercised, and this is a potential right. *Mason v. Rollins*, (1869) 2 Biss. 99, 16 Fed. Cas. No. 9,252.

Sale of delinquent's interest.—The collector's sale in the summary mode prescribed in this section passes only the interest of the delinquent, and not the interest of the owner in fee who has executed a waiver in accordance with the provisions of R. S. sec. 3262 (vol. 4, div. V of this title). *Mansfield v. Excelsior Refining Co.*, (1890) 135 U. S. 326, 10 S. Ct. 825, 34 U. S. (L. ed.) 162.

Collector's immunity from liability.—An action of trespass cannot be main-

tained against a collector, as the tax list delivered to the collector, properly certified, is his warrant to seize and sell the property, in case the taxes are not paid, after he has made demand for them. *Haffin v. Mason*, (1872) 15 Wall. 671, 21 U. S. (L. ed.) 196. See also *Ersikine v. Hohnbach*, (1871) 14 Wall. 613, 20 U. S. (L. ed.) 745; *Harding v. Woodcock*, (1890) 137 U. S. 43, 11 S. Ct. 6, 34 U. S. (L. ed.) 580; *Delaware R. Co. v. Prettyman*, (1872) 7 Fed. Cas. No. 3,767.

Concurrent remedies.—The remedy afforded by this section was not superseded by the Act of July 20, 1868, 15 Stat. L. 125, 167, ch. 186, § 106, which was substantially re-enacted by R. S. sec. 3207, *infra*, p. 1022. *Blacklock v. U. S.*, (1908) 208 U. S. 75, 28 S. Ct. 228, 52 U. S. (L. ed.) 396, *affirming* (1906) 41 Ct. Cl. 89.

Sec. 3188. [Mode of levying distraint.] In such case of neglect or refusal, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 107.

Sec. 3189. [Delinquents must exhibit evidences relating to property distrained.] All persons, and officers of companies or corporations, are required, on demand of a collector or deputy collector about to distraint or having distrained on any property, or rights of property, to exhibit all books containing evidence or statements relating to the subject of distraint, or the property or rights of property liable to distraint for the tax due as aforesaid. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 107.

Sec. 3190. [Proceedings on distraint.] When distraint is made, as aforesaid, the officer charged with the collection shall make or cause to be made an account of the goods or effects distrained, a copy of which, signed by the officer making such distraint, shall be left with the owner or possessor of such goods or effects, or at his dwelling or usual place of business, with some person of suitable age and discretion, if any such can be found, with a note of the sum demanded, and the time and place of sale; and the said officer shall forthwith cause a notification to be published in some newspaper within the county wherein said distraint is made, if a newspaper is published in said county, or to be publicly posted at the post-office, if there be one within five miles nearest to the residence of the person whose property shall be distrained, and in not less than two other public places. Such notice shall specify the articles distrained, and the time and place for the sale thereof. Such time shall not be less than ten nor more than twenty days from the date of such notification to the owner or possessor of the property and the publication or posting of such notice as herein provided, and the place proposed for the sale shall not be more than five miles distant from the place of making such distraint. Said sale may be adjourned from time to time by said officer, if he deems it advisable, but not for a time to exceed in all thirty days. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 107.

Rights of third persons.—A sale of property by an internal revenue officer under a distraint warrant for the collection of a tax does not cut off the title of a third person who does not owe the tax and against whose property the warrant is not directed, and the true owner may assert his title and right of possession by replevin against the purchaser after the officer has made the sale and transferred possession, and has thus completed his

official acts with respect to the property. A sale of property by a collector under a distraint warrant is clearly distinguishable from a sale of property seized and condemned in forfeiture proceedings for violation of the customs or internal revenue laws, and passes only the interest of the tax debtor. *Sheridan v. Allen*, (C. C. A. 1907) 153 Fed. 568, 82 C. C. A. 522, *modifying* (1906) 145 Fed. 963.

Sec. 3191. [When property sold under distraint is subject to tax, and tax not paid.] When property subject to tax, but upon which the tax has not been paid, is seized upon distraint and sold, the amount of such tax shall, after deducting the expenses of such sale, be first appropriated out of the proceeds thereof to the payment of the tax. And if no assessment of such tax has been made upon such property, the collector shall make a return thereof in the form required by law, and the Commissioner of Internal Revenue shall assess the tax thereon. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 108; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 402.

Sec. 3192. [When property sold under distraint may be purchased for United States, etc.] When any property advertised for sale under distraint, as aforesaid, is of a kind subject to tax, and the tax has not been paid, and the amount bid for such property is not equal to the amount of the tax, the collector may purchase the same in behalf of the United States for an amount not exceeding the said tax. All property so purchased may be sold by the collector, under such regulations as may be prescribed by the Commissioner of Internal Revenue. The collector shall render to the

Commissioner a distinct account of all charges incurred in such sales, and, in case of sale, shall pay into the Treasury the surplus, if any there be, after defraying all lawful charges and fees. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 108.

Sec. 3193. [Property distrained to be restored on payment before sale.]

In any case of distraint for the payment of the taxes aforesaid, the goods, chattels, or effects so distrained shall be restored to the owner or possessor, if, prior to the sale, payment of the amount due is made to the proper officer charged with the collection, together with the fees and other charges; but in case of non-payment as aforesaid, the said officers shall proceed to sell the said goods, chattels, or effects at public auction, and shall retain from the proceeds of such sale the amount demandable for the use of the United States, and a commission of five per centum thereon for his own use, with the fees and charges for distraint and sale, rendering the overplus, if any there be, to the person who may be entitled to receive the same. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 106.

Sec. 3194. [Effect of certificate of sale on distraint.] In all cases of sale, as aforesaid, the certificate of such sale shall be prima-facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale, and shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold; and where such property consists of stocks, said certificate shall be notice, when received, to any corporation, company, or association of said transfer, and shall be authority to such corporation, company, or association to record the same on their books and records in the same manner as if transferred or assigned by the party holding the same, in lieu of any original or prior certificates, which shall be void, whether canceled or not. And said certificates, where the subject of sale is securities or other evidences of debt, shall be good and valid receipts to the person holding the same, as against any person holding, or claiming to hold, possession of such securities or other evidences of debt. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 107; Act of June 30, 1864, ch. 173, 13 Stat. L. 240.

Sec. 3195. [When property distrained is not divisible.] When any property liable to distraint for taxes is not divisible, so as to enable the collector by a sale of part thereof to raise the whole amount of the tax, with all costs, charges, and commissions, the whole of such property shall be sold, and the surplus of the proceeds of the sale, after satisfying the tax, costs, and charges, shall be paid to the person legally entitled to receive the same; or, if he cannot be found, or refuses to receive the same, shall be deposited in the Treasury of the United States, to be there held for his use until he makes application therefor to the Secretary of the Treasury, who, upon such application and satisfactory proofs in support thereof, shall, by warrant on the Treasury, cause the same to be paid to the applicant. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 108.

Sec. 3196. [When real estate may be sold to satisfy taxes.] When goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the collector or deputy collector, he is authorized to collect the same by seizure and sale of real estate. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 108.

State statutory provisions as to levy.— There is nothing in the internal revenue acts making the local law applicable to seizures to enforce the collection of a tax, while in the absence of any statute to the contrary it seems to be the general rule in the states that a levy upon or seizure of real property for the purposes of sale may be legally made without going upon the premises, by simply indorsing a description of the premises upon the writ,

and stating that they are levied upon for the purpose thereof. U. S. v. Hess, (1879) 5 Sawy. 533, 26 Fed. Cas. No. 15,358.

Sale of chattels not condition precedent.

— Before resort to the sale of real estate owned by a delinquent taxpayer can be had, proceedings need not be taken to recover the amount due to the United States from the sale of the chattels and personal effects of such delinquents. U. S. v. Curry, (D. C. Md. 1912) 201 Fed. 371.

Sec. 3197. [Proceedings for seizure and sale of real estate for taxes.] The officer making the seizure mentioned in the preceding section shall give notice to the person whose estate it is proposed to sell by giving him in hand, or leaving at his last or usual place of abode, if he has any such within the collection-district where said estate is situated, a notice, in writing, stating what particular estate is to be sold, describing the same with reasonable certainty, and the time when and place where said officer proposes to sell the same; which time shall not be less than twenty nor more than forty days from the time of giving said notice. The said officer shall also cause a notification to the same effect to be published in some newspaper within the county where such seizure is made, if any such there be, and shall also cause a like notice to be posted at the post-office nearest to the estate seized, and in two other public places within the county; and the place of said sale shall not be more than five miles distant from the estate seized, except by special order of the Commissioner of Internal Revenue. At the time and place appointed, the officer making such seizure shall proceed to sell the said estate at public auction, offering the same at a minimum price, including the expense of making such levy, and all charges for advertising and an officer's fee of ten dollars. When the real estate so seized consists of several distinct tracts or parcels, the officer making sale thereof shall offer each tract or parcel for sale separately, and shall, if he deem it advisable, apportion the expenses, charges, and fees aforesaid to such several tracts or parcels, or to any of them, in estimating the minimum price aforesaid. If no person offers for said estate the amount of said minimum price, the officer shall declare the same to be purchased by him for the United States; otherwise the same shall be declared to be sold to the highest bidder. And in case the same shall be declared to be purchased for the United States, the officer shall immediately transmit a certificate of the purchase to the Commissioner of Internal Revenue, and, at the proper time, as hereafter provided, shall execute a deed therefor, after its preparation and the indorsement of approval as to its form by the United States district attorney for the district in which the property is situate, and shall without delay, cause the same to be duly recorded in the proper registry of deeds, and immediately thereafter shall transmit such deed to the Commissioner of Internal Revenue. And said sale may be adjourned from time to time by said officer for not exceeding thirty days in all, if he shall think

it advisable so to do. If the amount bid shall not be then and there paid, the officer shall forthwith proceed to again sell said estate in the same manner. *And it is hereby provided*, That all certificates of purchase, and deeds of property purchased by the United States under the internal-revenue laws, on sales for taxes, or under executions issued from United States courts, which now are, or hereafter may be, found in the office of any collector, United States marshal, or United States district attorney, shall be immediately transmitted by such officers respectively to the Commissioner of Internal Revenue. *And it is hereby further provided*, That for the preparation and approval by the United States district attorney of each deed as above required, a fee of five dollars shall be allowed to that officer, to be paid by the United States, and which he shall account for in his emolument returns. [R. S.]

The above section was substituted by Act of March 1, 1879, ch. 125, 20 Stat. L. 331, for the section as originally enacted. The sections are identical down to and including the words "purchased by him for the United States." From that point on to the end, the original section read, "and shall deposit with the district attorney of the United States a deed thereof, as hereafter provided; otherwise, the same shall be declared to be sold to the highest bidder. And said sale may be adjourned from time to time by said officer for not exceeding thirty days in all, if he shall think it advisable so to do. If the amount bid shall not be then and there paid, the officer shall forthwith proceed to again sell said estate in the same manner."

The section had been previously amended by an Act of Feb. 27, 1877, ch. 69, § 1, 19 Stat. L. 248, by striking out, after the words "post-office nearest the estate" and before the word "seized" the words "to be."

For provisions relating to the compensation of district attorneys, in some respects superseding those of the last proviso of the text, see JUDICIAL OFFICERS.

Sufficiency of levy.—State statutory provisions as to levy need not be followed. There is nothing in the internal revenue acts making the local law in this respect applicable to seizures to enforce the collection of a tax. To constitute a seizure authorized by R. S. sec. 3196, *supra*, p. 1018, it seems to be the general rule, that a levy upon or seizure of real property

for the purposes of sale, may legally be made without going upon the premises, by simply indorsing a description of the premises upon the writ and giving notice thereof to the owner as provided in this section. U. S. v. Hess, (1879) 5 Sawy. 533, 26 Fed. Cas. No. 15,358. See U. S. v. Wilson, (1886) 118 U. S. 86, 6 S. Ct. 991, 30 U. S. (L. ed.) 110.

Sec. 3198. [Certificate of purchase — deed.] Upon any sale of real estate, as provided in the preceding section, and the payment of the purchase-money, the officer making the seizure and sale shall give to the purchaser a certificate of purchase, which shall set forth the real estate purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor; and if the said real estate be not redeemed in the manner and within the time hereafter provided, the said collector or deputy collector shall execute to the said purchaser, upon his surrender of said certificate, a deed of the real estate purchased by him as aforesaid, reciting the facts set forth in said certificate, and in accordance with the laws of the State in which such real estate is situate upon the subject of sales of real estate under execution. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 109.

The officer's certificate neither passes title nor is evidence that title has ceased to be where it was before the sale. This section and the next contemplate that title is to pass not by certificate but by

deed; the certificate is to be evidence of the right to a deed or to the redemption money, but not of any direct right to the land or possession thereof. *Flemister v. Flemister*, (1889) 83 Ga. 79, 9 S. E. 724.

Sec. 3199. [Collector's deed to be prima-facie evidence, etc.] The deed of sale given in pursuance of the preceding section shall be prima-facie evidence of the facts therein stated; and if the proceedings of the officer as set forth have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real estate thus sold at the time the lien of the United States attached thereto. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 109.

The deed is only prima facie evidence.—Under this section providing that the collector's deed of sale of land for internal revenue taxes against the owner shall be prima facie evidence of the name of the person for whose taxes the land was sold, of the name of the purchaser, of the real estate purchased, and of the price paid, the deed is not prima facie evidence as to other recitals. *Stewart v. Pergusson*, (1903) 133 N. C. 276, 45 S. E. 585.

The deed is only prima facie evidence of the facts required by the statute to be stated, but as to all the other statutory prerequisites to a sale of the land the statute does not provide that the deeds shall be prima facie evidence of such facts. "They must be proved by evidence dehors the deed, and as to them the statute does not change the burden of proof, and it therefore rests on the purchaser." *Fox v. Stafford*, (1884) 90 N. C. 296.

The provision that the deed shall be prima facie evidence of the facts stated in it makes such evidence only those facts which by law are authorized or required to be stated in it. It is prima facie evidence of no other facts save those which are needed by the laws of the state on a conveyance by a sheriff on a sale of real estate on execution. *Brown v. Goodwin*, (1878) 75 N. Y. 409.

Interest of the party delinquent.—The provision of this section is notice to all the world that "the interest of the party

delinquent" is all that is offered for sale, and this rule applies to the United States when they become purchaser at these sales. *U. S. v. Triplett*, (1876) 28 Fed. Cas. No. 16,539.

Proof of title under collector's deed.—R. S. sec. 3182, *supra*, p. 1010, requires the Commissioner of Internal Revenue to make assessments of all taxes under the Internal Revenue Act; R. S. sec. 3183, *supra*, p. 1012, directs that returns by persons liable for taxes shall be made by a certain date; R. S. sec. 3188, *supra*, p. 1015, provides that on failure to pay the taxes the collector may levy or by warrant may authorize the deputy collector to levy on all property, except such as is exempt, belonging to the delinquent; and R. S. sec. 3197, *supra*, p. 1018, requires the collector, on sale of property for taxes, to give the purchaser a certificate of purchase. It has been held that a purchaser claiming land under a sale for internal revenue taxes against the owner cannot sustain his title under a collector's deed where he fails to show, independently of the mere recitals in the records or in the deed, that a return was made by the person liable to be assessed, that the Commissioner of Internal Revenue had made the assessment, that a warrant of distraint had issued, or that a certificate of purchase had been given to him. *Stewart v. Pergusson*, (1903) 133 N. C. 276, 45 S. E. 585.

Sec. 3200. [Collector may seize lands of delinquent in any district of same State.] Any collector or deputy collector may, for the collection of taxes imposed upon any person, and committed to him for collection, seize and sell the lands of such person situated in any other collection-district within the State in which such officer resides; and his proceedings in relation thereto shall have the same effect as if the same were had in his proper collection-district. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 110.

Sec. 3201. [Redemption of land prior to sale.] Any person whose estate may be proceeded against as aforesaid shall have the right to pay the amount due, together with the costs and charges thereon, to the collector or deputy collector at any time prior to the sale thereof, and all further proceedings shall cease from the time of such payment. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 109.

Sec. 3202. [Redemption of lands after sale.] The owners of any real estate sold as aforesaid, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the land sold, or any particular tract thereof, at any time within one year after the sale thereof, upon payment to the purchaser, or, in case he cannot be found in the county in which the land to be redeemed is situate, then to the collector of the district in which the land is situate, for the use of the purchaser, his heirs or assigns, the amount paid by the said purchaser and interest thereon at the rate of twenty per centum per annum. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 109.

Sec. 3203. [Record of sales.] It shall be the duty of every collector to keep a record of all sales of land made in his collection-district, whether by himself or his deputies, or by another collector, in which shall be set forth the tax for which any such sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making said sale, amount of fees and expenses, the name of the purchaser and the date of the deed; and said record shall be certified by the officer making the sale. And on or before the fifth day of each succeeding month he shall transmit a copy of such record of the preceding month to the Commissioner of Internal Revenue. And it shall be the duty of every deputy making sale, as aforesaid, to return a statement of all his proceedings to the collector, and to certify the record thereof. In case of the death or removal of the collector, or the expiration of his term of office from any other cause, said record shall be delivered to his successor in office; and a copy of every such record, certified by the collector, shall be evidence in any court of the truth of the facts therein stated. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 110.

This section was substituted for the section as originally enacted, by Act of March 1, 1879, ch. 125, 20 Stat. L. 332. The only change consists in the addition of the clause, "And on or before the fifth day of each succeeding month he shall transmit a copy of such record of the preceding month to the Commissioner of Internal Revenue."

Sec. 3204. [Redemptions to be entered on record.] When any lands sold, as aforesaid, are redeemed as heretofore provided, the collector shall make entry of the fact upon the record mentioned in the preceding section, and the said entry shall be evidence of such redemption. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 108.

Sec. 3205. [Successive seizures may be made, when.] Whenever any property, personal or real, which is seized and sold by virtue of the foregoing provisions, is not sufficient to satisfy the claim of the United States for which distraint or seizure is made, the collector may, thereafter, and as often as the same may be necessary, proceed to seize and sell, in like manner, any other property liable to seizure of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 110.

Sec. 3206. [Fees and charges in seizure cases.] The Commissioner of Internal Revenue shall by regulation determine the fees and charges to be allowed in all cases of distraint and other seizures; and shall have power to determine whether any expense incurred in making any distraint or seizure was necessary. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 108.

Sec. 3207. [Proceedings in chancery to subject real estate to payment of tax.] In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell real estate to satisfy the same, the Commissioner of Internal Revenue may direct a bill in chancery to be filed, in a district or circuit court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. All persons having liens upon or claiming any interest in the real estate sought to be subjected as aforesaid, shall be made parties to such proceedings, and be brought into court as provided in other suits in chancery therein. And the said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein, and finally determine the merits of all claims to and liens upon the real estate in question, and, in all cases where a claim or interest of the United States therein is established, shall decree a sale of such real estate, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 167.

By the Judicial Code, §§ 289-291, the Circuit Courts were abolished and their powers and duties were conferred on the District Courts, and by section 24 (5) thereof the District Courts were given original jurisdiction of cases arising under the internal revenue laws. See JUDICIARY.

Nature of remedy.—The remedy given by this section is not exclusive but concurrent. The pendency of a bill in equity, filed by the United States, to subject property to sale to satisfy an assessment, under this section, does not preclude the government from enforcing an alleged lien or claim, by proceedings to restrain the property under R. S. sec. 3253 (vol. 4, div. V of this title). This latter section evidently contemplates concurrent remedies. *Alkan v. Bean*, (1877) 8 Biss. 83, 1 Fed. Cas. No. 202.

Recording laws of the states.—The tax system of the United States is not sub-

ject to the laws of the states as to recording or filing liens. *U. S. v. Snyder*, (1893) 149 U. S. 210, 13 S. Ct. 846, 37 U. S. (L. ed.) 705.

Upon a forfeiture and sale of property for violation of the revenue laws, the marshal's sale and deed passes and conveys to the purchaser all the interest of the United States in the property sold, and the United States is estopped to set up as against the purchaser any lien thereon for taxes in existence and known to it at the time the order for sale was made. *U. S. v. Mackoy*, (1872) 2 Dill. 299, 26 Fed. Cas. No. 15,696.

Sec. 3208. [Commissioner to have charge of real estate acquired by United States under internal-revenue laws.] The commissioner of internal revenue shall have charge of all real estate which is now or shall become the property of the United States by judgment of forfeiture under the internal-revenue laws, or which has been or shall be assigned, set off, or conveyed by purchase or otherwise to the United States in payment of debts or penalties arising under the laws relating to internal revenue, or which has

been or shall be vested in the United States by mortgage or other security for the payment of such debts, and of all trusts created for the use of the United States in payment of such debts due them; and, with the approval of the Secretary of the Treasury, may, at public vendue, and upon not less than twenty day's notice, sell and dispose of all real estate owned or held by the United States aforesaid; and until such sale the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may lease such real estate owned as aforesaid on such terms and for such period as they shall deem expedient. And in cases where real estate has or may become the property of the United States by conveyance or otherwise, in payment of or as security for a debt arising under the laws relating to internal revenue, and such debt shall have been paid, together with the interest thereon, at the rate of one per centum per month, to the United States, within two years from the date of the acquisition of such real estate, it shall be lawful for the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury to release by deed, or otherwise convey such real estate to the debtor from whom it was taken, or to his heirs or other legal representatives. [R. S.]

This section was substituted for the section as originally enacted by Act of March 1, 1879, ch. 125, 20 Stat. L. 332. The section as originally enacted was as follows:

"Sec. 3208. The Commissioner of Internal Revenue shall have charge of all real estate which has been or shall be assigned, set off, or conveyed, by purchase or otherwise, to the United States, in payment of debts arising under the laws relating to internal revenue, and of all trusts created for the use of the United States in payment of such debts due them; and, with the approval of the Secretary of the Treasury, may, at public vendue, and upon not less than twenty days' notice, sell and dispose of lands assigned or set off to the United States in payment of such debts, or vested in them by mortgage or other security, for the payment of such debts. And in cases where real estate has or may become the property of the United States by conveyance or otherwise, in payment of or as security for a debt arising under the laws relating to internal revenue, and such debt shall have been paid, together with the interest thereon, at the rate of one per centum per month, to the United States, within two years from the date of the acquisition of such real estate, it shall be lawful for the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to release by deed, or otherwise convey such real estate to the debtor, from whom it was taken, or to his heirs or other legal representatives." Act of March 2, 1867, ch. 169, 14 Stat. L. 472.

"In payment of debts arising under the laws relating to internal revenue" refers to real estate derived under provisions relating to fines, taxes, penalties, and forfeitures incurred under the internal revenue laws, and not to land acquired by the United States in payment of judgment recovered on official bonds of collectors. (1878) 16 Op. Atty.-Gen. 146.

The charge of property devolves upon the commissioner of internal revenue

when conveyed to the United States by reason of pecuniary forfeitures which have been levied on real estate, but not when it is proceeded against by a process in rem. (1878) 16 Op. Atty.-Gen. 186.

A state has no authority to levy a tax on property while owned by the United States. *Van Brocklin v. Tennessee*, (1886) 117 U. S. 151, 6 S. Ct. 670, 29 U. S. (L. ed.) 845.

Sec. 3209. [List to be sent to district where the party taxed resides or has property, when.] Whenever a collector has on any list duly returned to him the name of any person not within his collection-district who is liable to tax, or of any person so liable who has, in the collection-district in which he resides, no sufficient property subject to seizure or distraint, from which the money due for tax can be collected, such collector shall transmit a statement containing the name of the person liable to such tax, with the amount and nature thereof, duly certified under his hand, to the collector of any

district to which said person shall have removed, or in which he shall have property, real or personal, liable to be seized and sold for tax. And the collector to whom the said certified statement is transmitted shall proceed to collect the said tax in the same way as if the name of the person and objects of tax contained in the said certified statement were on any list of his own collection-district; and he shall, upon receiving said certified statement as aforesaid, transmit his receipt for it to the collector sending the same to him. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 236.

Sec. 3210. [Collections to be paid into Treasury daily.] The gross amount of all taxes and revenues received or collected by virtue of this Title, or of any law hereafter enacted providing internal revenue, shall be paid, by the officers receiving or collecting the same, daily into the Treasury of the United States, under the instructions of the Secretary of the Treasury, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description; and a certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the Treasurer, assistant treasurer, designated depository, or proper officer of a deposit bank, shall be transmitted to the Commissioner of Internal Revenue: *Provided*, That in districts where, from the distance of the officer, collector, or agent receiving or collecting such taxes and revenues from a proper Government depository; the Secretary of the Treasury may deem it proper, he may extend the time for making such payment, not exceeding, however, in any case a period of one month. [R. S.]

Act of March 3, 1865, ch. 78, 13 Stat. L. 483.

See further the Act of May 27, 1908, ch. 200, § 1, *infra*, p. 1040.

Sec. 3211. [Depositories.] The Secretary of the Treasury is authorized to designate one or more depositories in each State, for the deposit and safe-keeping of the money collected by virtue of the internal-revenue laws; and the receipt of the proper officer of such depository to a collector for the money deposited by him shall be a sufficient voucher for such collector in the settlement of his accounts at the Treasury Department. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 236.

Provisions relating to the failure of custodians of public money safely to keep the same were made by R. S. sec. 5490, which was incorporated in section 89 of the Penal Laws and repealed by section 341 thereof. See PENAL LAWS.

Sec. 3212. [Collector's monthly statement—final accounts.] Every collector shall, at the expiration of each month after he commences his collections, transmit to the Commissioner of Internal Revenue a statement of the collections made by him within the month. And every collector shall complete the collection of all sums assigned to him for collection, and shall pay over the same into the Treasury, and shall render his accounts to the Treasury Department as often as he may be required. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 236.

See further the Act of May 27, 1908, ch. 200, § 1, *infra*, p. 1040.

Sec. 3213. [Suits, etc., for fines, penalties, and forfeitures, and for taxes.] It shall be the duty of the collectors; in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 110.

By the Judicial Code, §§ 289-291, the Circuit Courts were abolished and their powers and duties conferred on the District Courts. See JUDICIARY.

Any common-law remedy may be employed by the government for the collection of its dues. *Dollar Sav. Bank v. U. S.*, (1873) 19 Wall. 227, 22 U. S. (L. ed.) 80.

Recover penalty by indictment.—No special form of action is prescribed by this section, but it allows any appropriate action or proceeding to be used, and an indictment will lie for the recovery of the penalty incurred under R. S. sec. 3265 (vol. 4, div. V of this title). *U. S. v. Craft*, (1890) 43 Fed. 374. But see *U. S. v. Elhöt*, (1879) 14 Am. L. Rev. 247, 25 Fed. Cas. No. 15,043.

Assessments under R. S. sec. 3309.—For assessments made under R. S. sec. 3309 (vol. 4, div. V of this title) the right to bring suit is expressly given by this section. *U. S. v. Bristow*, (C. C. Ky. 1884) 20 Fed. 378.

Recovery of fine.—In *U. S. v. Thompson*, (D. C. Ky. 1891) 45 Fed. 468, it appeared that a distiller was indicted under R. S. sec. 3279 (vol. 4, div. V of this title) for not keeping the proper sign upon his distillery, and was found guilty and fined \$500 and costs. The fine remained unpaid and an action was brought on his distiller's bond to recover the amount. It was held that such suit could be maintained, as the bond is a guaranty of the principal's conduct, and an obligation that the sureties will pay all penalties incurred or fines imposed.

Oleomargarine Act.—This section is not applicable to the Act of Aug. 2, 1886, ch. 840 (vol. 4, div. X of this title), commonly known as the Oleomargarine Act. *Grier v. Tucker*, (W. D. Ark. 1907) 150 Fed. 658.

Sec. 3214. [Suits for taxes, etc., not to be brought without sanction of Commissioner.] No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided*, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 111.

Sec. 3215. [Regulations as to suits for government of officers.] It shall be the duty of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to establish such regulations, not inconsistent with law, for the observance of revenue officers, district attorneys, and marshals, respecting suits arising under the internal-revenue laws in which the United States is a party, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States under such laws. [R. S.]

Act of March 2, 1867, ch. 189, 14 Stat. L. 472.

Sec. 3216. [Moneys recovered by suits to be paid to collectors.] All judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to collectors as internal taxes are required to be paid. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 111.

"Costs."—The section requires the costs, which belong to the government, to be paid into a different department in internal revenue cases. These costs consist of expenditures made by the government during the progress of the suits, and taxed to and recovered from defendants on its account, but does not include the officer's fees. *U. S. v. Cigars, etc.*, (1880) 2 Fed. 494.

But see *U. S. v. Wolters*, (1892) 51 Fed. 896, in which the court said: "The taxed costs include not only expenditures made by the government during the progress of the suit, such as the payment of witnesses, etc., but the legal fees of the clerk and other officers for services rendered at the instance and for the benefit of the government, for the payment of which the latter is therefore necessarily liable. Such fees of the clerk in the case now before the court amounted to \$77.40, and were taxed and included in the judgment and recovered from the defendants, and it is not suggested in the present case that they are not properly payable into the treasury through the collector. I can

see no justification for the collection from the defendants of the commissions allowed by law to the clerk and other officers, except upon the ground that they are a part of the costs to which the government was necessarily and legally subjected by reason of the suit, and recoverable as accruing costs, because not ascertainable before payment of or on account of the judgment. If so, they are as clearly embraced by the word 'costs' in section 3216, Revised Statutes, as the taxed costs. Nor do the fees or commissions of the officers belong to them without qualification. To the limit of the maximum of their compensation they do, but when that limit is exceeded, both fees and commissions belong to the government. The government, therefore, has a contingent interest in all fees and commissions allowed and received by the clerk and other officers referred to, and when such fees or commissions are allowed for services rendered the government, it would seem that the government must be liable therefor." See also (1877) 15 Op. Atty-Gen. 387.

Sec. 3217. [Dues from delinquent collector to be collected by distraint and sale.] When any collector fails either to collect or to render his account, or to pay over in the manner or within the times provided by law, the First Comptroller of the Treasury shall, immediately after evidence of such delinquency, report the same to the Solicitor of the Treasury, who shall issue a warrant of distress against such delinquent collector, directed to the marshal of the district, expressing therein the amount with which the said collector is chargeable, and the sums, if any, which have been paid over by him, so far as the same are ascertainable. And the said marshal shall, himself, or by his deputy, immediately proceed to levy and collect the sum which may remain due, with five per centum thereon, and all the expenses and charges of collection, by distress and sale of the goods and chattels, or any personal effects of the delinquent collector, giving at least five days' notice of the time and place of sale, in the manner provided by law for advertising sales of personal property on execution in the State wherein such collector resides. And the bill of sale of the officer of any goods, chattels, or other personal property, distrained and sold as aforesaid, shall be conclusive evidence of title to the purchaser, and prima-facie evidence of the right of the officer to make such sale, and of the correctness of his proceedings in selling the same. And for want of goods and chattels, or other personal effects of such collector, sufficient to satisfy any warrant of distress, issued as aforesaid, the real estate of such collector, or so much thereof as may be necessary for satisfying the said warrant, after being advertised for at least three weeks next before the time of sale, in not less

than three public places in the collection-district, and in one newspaper printed in the county or district, if any there be, shall be sold at public auction by the marshal or his deputy. Upon such sale, the marshal shall make and deliver to the purchaser of the premises sold a deed of conveyance thereof, to be executed and acknowledged in the manner and form prescribed by the laws of the State in which said lands are situated, and said deed so made shall invest the purchaser with all the title and interest of the defendant named in said warrant, existing at the time of the seizure thereof. And all moneys that may remain of the proceeds of such sale of personal or real property, after satisfying the said warrant of distress, and paying the reasonable costs and charges of sale, shall be returned to the proprietor of the property sold as aforesaid. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 237.

By the Act of July 31, 1894, ch. 174, § 4, the First Comptroller of the Treasury was designated the Comptroller of the Treasury. See TREASURY DEPARTMENT.

Purpose of section.—This section, together with R. S. secs. 3624 and 3625 (title PUBLIC MONIES), has for its object the enforcement of the liabilities of officers who are accountable for public

money; but though these sections extend to revenue officers, they cannot properly be regarded as revenue laws. (1878) 16 Op. Atty.-Gen. 146.

Sec. 239. [Accounts of receipts of internal revenue.] Separate accounts shall be kept at the Department of the Treasury of all moneys received from internal duties or taxes in each of the respective States, Territories, and collection-districts, and of the amount of each species of duty and tax that shall accrue; so as to exhibit, as far as may be, the amount collected from each source of revenue, with the moneys paid as compensation and for allowances to the collectors and deputy collectors, inspectors, and other officers employed in each of the respective States, Territories, and collection-districts. [R. S.]

Act of June 30, 1864, ch. 173, 13 Stat. L. 239.

The words "assessors and assistant assessors" which appeared in the section as originally enacted after the words "deputy collectors" were stricken out by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 317.

Sec. 3218. [Collectors charged with what.] Every collector shall be charged with the whole amount of taxes, whether contained in lists transmitted to him by the Commissioner of Internal Revenue, or by other collectors, or delivered to him by his predecessor in office, and with the additions thereto, with the par value of all stamps deposited with him, and with all moneys collected for penalties, forfeitures, fees, or costs; and he shall be credited with all payments into the Treasury made as provided by law, with all stamps returned by him uncanceled to the Treasury, and with the amount of taxes contained in the lists transmitted in the manner heretofore provided to other collectors, and by them receipted as aforesaid; also with the amount of the taxes of such persons as may have absconded, or become insolvent, prior to the day when the tax ought, according to the provisions of law, to have been collected, and with all uncollected taxes transferred by him or by his deputy acting as collector to his successor in office: *Provided*, That it shall be proved to the satisfaction of the Commissioner of Internal Revenue, who shall certify the facts to the First Comptroller of the Treasury, that due diligence was used by the collector. And each collector shall

also be credited with the amount of all property purchased by him for the use of the United States, provided he faithfully account for and pay over the proceeds thereof upon a resale of the same as required by law. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 110; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 402.

Credit of uncollected taxes.—In a suit on the bond of a collector of internal revenue for a balance of taxes charged to him, he is entitled to a credit for all uncollected taxes transferred by him to his successor in office, if he proves that due diligence was used by him for their collection. The certificate of the commissioner of internal revenue is a condition precedent to a credit by the first comptroller of the treasury before suit, but not to a defense upon the facts if a suit is brought. *U. S. v. Kimball*, (1879) 101

U. S. 726, 25 U. S. (L. ed.) 835.

Recovery on breach assigned.—In an action on a collector's bond, when the breach assigned is that the collector did not faithfully perform his duties as collector, but received as such a certain sum which he never accounted for or paid to the United States, dereliction of duty in not making collections cannot be set up at the trial in support of the breach alleged. *U. S. v. Glenn*, (1872) 1 Woods 400, 25 Fed. Cas. No. 15,217.

Sec. 3219. [Death, etc., of collector — uncollected balances.] In case of the death, resignation, or removal of any collector, all lists and accounts of taxes uncollected shall be transferred to his successor in office as soon as such successor is appointed and qualified, and it shall be the duty of such successor to collect the same. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 110.

Sec. 3220. [Refundment of taxes, penalties, etc.] The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided*, That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 111; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

Statutory remedy exclusive.—The remedy to recover back an internal revenue tax after paid is exclusively as specified in the statute, and the provisions of this section and R. S. secs. 3226, 3227 and 3228 (*infra*, p. 1034 *et seq.*) must be strictly complied with. *Public Service R. Co. v. Herold*, (D. C. N. J. 1915) 219 Fed. 301; *Public Service Gas Co. v. Herold*, (D. C. N. J. 1915) 227 Fed. 496.

This section and R. S. sec. 3226, *infra*, p. 1034, are not to be so construed as to give to an adverse decision of a commissioner, upon an appeal to him under R. S. sec. 3226, the effect of a bar to the relief to be afforded under this section after judgment has been duly recovered against a collector. *Nixon v. U. S.*, (1883) 18 Ct. Cl. 448.

Authority of commissioner.—The law imposes upon the commissioner, and upon no other officer, the duty of deciding whether a tax has been erroneously or illegally assessed or collected, and whether it should be refunded. While his decision may be impeached for fraud or mistake apparent on the record, no other officer of the government is authorized to review his discretion. *Sybrandt v. U. S.*, (1884) 19 Ct. Cl. 461. See also *U. S. v. Kaufman*, (1877) 96 U. S. 567, 24 U. S. (L. ed.) 792; (1873) 14 Op. Atty.-Gen. 275; *Green-castle First Nat. Bank v. U. S.*, (1879) 15 Ct. Cl. 230; *Barnett v. U. S.*, (1880) 16 Ct. Cl. 515; *Dunnegan v. U. S.*, (1881) 17 Ct. Cl. 254.

While the power of final decision is vested in the commissioner to determine whether any, and if so how much, shall be returned to the claimant, and there is no appeal from him to the Secretary of the Treasury, when the commissioner, acting under a treasury regulation, transmitted the case, "with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement," he expressly adopted such regulation as the guide to his procedure, and there was no final determination made or intended by him. *Stotesbury v. U. S.*, (1892) 146 U. S. 196, 13 S. Ct. 1, 36 U. S. (L. ed.) 940. See also *Dupasœur v. U. S.*, (1883) 19 Ct. Cl. 1.

A regulation which requires the commissioner, after examining a case, but "before it is finally decided, to transmit the case, with the evidence in support of it, to the Secretary of the Treasury, for his consideration and advisement," is a proper one. It prevents hasty action, and subjects the commissioner's proposed action to the knowledge and scrutiny of his official superior, but it does not attempt to coerce his final decision. *Sybrandt v. U. S.*, (1884) 19 Ct. Cl. 461. See also *Woolner v. U. S.*, (1877) 13 Ct. Cl. 355.

The commissioner's functions are judicial in their nature, and his action concludes a claimant from taking to the courts for investigation the things designed to be finally settled by him. *Corning v. U. S.*, (1899) 34 Ct. Cl. 278.

A **mistake of jurisdiction** made by the commissioner would avoid his final decision, but a mistake of judgment or discretion, while acting within the scope of his jurisdiction, cannot be set up and inquired into to impeach the conclusion at which he arrives. *Nixon v. U. S.*, (1883) 18 Ct. Cl. 448. See also *Woolner v. U. S.*, (1877) 13 Ct. Cl. 355.

The commissioner may revoke his certificate of allowance at any time before payment or before action brought thereon. The sending of the order to the accounting officers does not place it beyond his power to recall. *Ridgway v. U. S.*, (1883) 18 Ct. Cl. 707.

Sufficiency of appeal.—The lodging of an appeal made out in due form with the

proper collector of internal revenue for the purpose of transmission to the commissioner in the usual course of business, under the requirements of the regulations of the secretary, is in legal effect a presentation of the appeal to the commissioner. *U. S. v. Real Estate Sav. Bank*, 104 U. S. 728, 26 U. S. (L. ed.) 908. But see (1873) 14 Op. Atty.-Gen. 615.

An informal appeal to the commissioner, which is satisfactory to him and is accepted as such, is a sufficient presentation of a claim to lay the foundation of a more formal application to be made in conformity to the regulation, when required by the commissioner." *Green-castle First Nat. Bank v. U. S.*, (1879) 15 Ct. Cl. 231.

An informal statement made by the comptroller, in a case in which the blanks prescribed by the Secretary of the Treasury did not exactly and aptly apply, was held to be a sufficient presentation of the claim within the meaning of the statute and the regulations, accepted as it was by the commissioner. "Valid claims cannot be defeated by irregularities of the executive officers in mere matter of form." *Wayne v. U. S.*, (1891) 26 Ct. Cl. 274.

A protest upon a return for taxation against the requirements of the form on which the return is made, accompanied by an amended return made out according to the plaintiff's construction of the law, is not such a claim to the commissioner of internal revenue as is required by the law or the treasury regulations. *Kings County Sav. Inst. v. Blair*, (1886) 116 U. S. 200, 6 S. Ct. 353, 29 U. S. (L. ed.) 657.

The appeal dates from the time of its filing in the office of the commissioner of internal revenue, and not from the time the application for refund was executed, dated, and deposited with the collector and certified by him. *Cotton Press Co. v. Collector*, (1873) 1 Woods 296, 6 Fed. Cas. No. 3271.

Judgment—to whom paid.—After the recovery of a judgment against a collector of internal revenue for damages and costs for the wrongful seizure of property, if the collector appeals to the commissioner for the payment of the judgment, it is not improper to consider the application as one for the payment to the plaintiff in the judgment. As the first clause provides for the refunding of taxes and penalties to the person from whom they are collected, it is in harmony with such provision that the moneys and damages to be repaid under the second and third clauses should be paid to the person who recovers the judgment for them, if the judgment is not paid by the defendant. *U. S. v. Friedrichs*, (1888) 124 U. S. 315, 8 S. Ct. 514, 31 U. S. (L. ed.) 471. See also *Nixon v. U. S.*, (1883) 18 Ct. Cl. 456.

Costs.—This statute seems to contemplate that in suits to recover taxes illegally assessed and collected costs will be awarded against the government officers,

and that in due course they will be paid by the United States. It would be an injustice to require a party who is compelled to pay an illegal assessment to bear all the burden of the successful litigation necessary to recover the same. *De Bary v. Carter*, (C. C. A. 1900) 102 Fed. 130, 42 C. C. A. 209. See also *U. S. v. Davis*, (C. C. A. 1893) 54 Fed. 147, 12 U. S. App. 47, 4 C. C. A. 251.

Whether interest may be allowed on wrongfully collected taxes, see *Stewart v. Barnes*, (1894) 153 U. S. 456, 14 S. Ct. 849, 38 U. S. (L. ed.) 781; *White v. Arthur*, (1882) 10 Fed. 80; *Louisville Sinking Fund Com'rs v. Buckner*, (1891) 48 Fed. 533.

Limitation.—Two years after the payment of an illegal tax is the time within which, under R. S. sec. 3228, *infra*, p. 1037, the right of recovery provided for by this section may be pursued. *Logan County v. U. S.*, (1898) 169 U. S. 255, 18 S. Ct. 361, 42 U. S. (L. ed.) 737; *Public Service R. Co. v. Herold*, (C. C. A. 3d Cir. 1916) 229 Fed. 902; *Public Service R. Co. v. Herold*, (D. C. N. J. 1915) 219 Fed. 301, *citing Schwarzschild, etc., Co. v. Rucker*, (N. D. Ga. 1900) 143 Fed. 656; *Merck v. Treat*, (C. C. A. 2d Cir. 1909) 174 Fed. 388, 98 C. C. A. 606; *Hastings v. Herold*, (C. C. N. J. 1910) 184 Fed. 759; *U. S. v. Shipley*, (C. C. A. 3d Cir. 1912) 197 Fed. 265, 116 C. C. A. 627.

An adverse decision by the commissioner does not operate to extend the time within which to begin suit for a refund. *Public Service R. Co. v. Herold*, (D. C. N. J. 1915) 219 Fed. 301; *Public Service R. Co. v. Herold*, (D. C. N. J. 1915) 227 Fed. 496.

Question for commissioner.—Whether the claim was presented within the time required by R. S. sec. 3228, *infra*, p. 1037, is a question within the authority of the commissioner to determine. *Greencastle First Nat. Bank v. U. S.*, (1879) 15 Ct. Cl. 231.

Claims within purview of statute.—A claim for money alleged to have been erroneously and illegally collected from the claimant, under a judgment rendered in favor of the United States against him as surety on the bond of a distiller, is not such a one as a commissioner has authority to remit and refund. *Seat v. U. S.*, (1883) 18 Ct. Cl. 458.

Where a stamp has been destroyed, and the taxpayer is forced to affix a new stamp, the commissioner, upon proof of these facts, has power to direct the price of the second stamp to be refunded. (1871) 13 Op. Atty.-Gen. 574. See also *Woolner v. U. S.*, (1877) 13 Ct. Cl. 355.

Reduction by leakage.—A claim for a reduction in taxes on account of loss of distilled spirits in warehouse by reason of leakage or evaporation is to be determined by an appeal to the commissioner of internal revenue under this section. *Corning v. U. S.*, (1899) 34 Ct. Cl. 271.

But see (1880) 16 Op. Atty.-Gen. 667, where the Attorney-General said that the exaction of the tax on the whole amount of spirits originally deposited in bond, without allowance for leakage, is not wrongful within the meaning of this section. See also (1883) 17 Op. Atty.-Gen. 500.

Claim on account of taxes.—Under R. S. sec. 951 (title CLAIMS), a claim for credit on account of taxes erroneously assessed and collected will not be allowed in a suit by the United States, where it does not appear that the claim was ever presented to the accounting officers of the Treasury for allowance, on appeal or otherwise, or that it has ever been disallowed. *Western Union R. Co. v. U. S.*, (1879) 101 U. S. 543, 25 U. S. (L. ed.) 1068.

Conclusiveness of award.—An allowance by the commissioner of internal revenue for the refund of a tax illegally collected is not the simple passing of an ordinary claim by an ordinary accounting officer, but an award upon which an action may be brought, and which is conclusive unless impeached for fraud or mistake. *Edison Electric Illuminating Co. v. U. S.*, (1903) 38 Ct. Cl. 208.

Reconsideration of claim determined by Supreme Court.—In (1906) 25 Op. Atty.-Gen. 605, it was held that the commissioner of internal revenue had no power, under this section, to reopen and allow the claim of a steamship company for taxes voluntarily paid under a mutual mistake of law, as the judgment of the Supreme Court (200 U. S. 488, 26 S. Ct. 327, 50 U. S. (L. ed.) 569) in sustaining the ruling of the commissioner that the company had no legal claim against the government, deprived the commissioner of jurisdiction to again entertain the claim.

Taxes voluntarily paid.—The commissioner of internal revenue has no power, under this section, to refund taxes voluntarily paid without protest, under a mutual mistake of law. The rule is firmly established and unqualified that protest is indispensable to the right to recover taxes claimed to have been illegally exacted. (1908) 26 Op. Atty.-Gen. 472.

Persons liable.—Act Cong. June 13, 1898 (vol. 4, div. XVI of this title), which imposed an internal revenue tax on certain legacies, required the executor to sign a statement to the collector and to pay the tax to him, and section 30 of that Act gave the commissioner of internal revenue control of the assessment. R. S. secs. 3182, 3183 (*supra*, p. 1010) required the collector to pay the tax into the Treasury, and declared that on the death of the collector all lists should be transferred to his successor; and Act of Feb. 8, 1899, ch. 121, 30 Stat. L. 822 (see title PUBLIC OFFICERS AND EMPLOYEES), declared that an action against such collector should not abate by his death, but that his successor should be substituted as defendant. It has been

held that where the collector wrongfully received an inheritance tax on bequests which were not taxable, on his death the liability to refund was enforceable against his successor in office, it being the duty of

the commissioner to pay any judgment rendered against the collector as provided by section 3220. *Armour v. Roberts*, (1907) 151 Fed. 846.

Sec. 3221. [Taxes on spirits accidentally destroyed.] The Secretary of the Treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue in any distillery warehouse, or bonded warehouse of the United States and before the tax thereon has been paid, may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated. And when any distilled spirits are hereafter destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence of the owner thereof, after the time when the same should have been drawn off by the gauger and placed in the distillery-warehouse provided by law, no tax shall be collected on such spirits so destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified. [R. S.]

Act of May 27, 1872, ch. 218, 17 Stat. L. 162.

The latter part of the section, beginning "And when any distilled spirits are hereafter destroyed," etc., was added to the section as originally enacted, by Act of March 1, 1879, ch. 125, 20 Stat. L. 341.

By the Act of June 7, 1906, ch. 3046, § 5 (vol. 4, div. V of this title), the provisions of this section were extended to grape brandy.

The decision of the Secretary of the Treasury is final and conclusive when the case is one within the letter and purpose of the statute. *Hoffheimer v. U. S.*, (1885) 20 Ct. Cl. 371.

Distilled spirits had been in the bonded warehouse beyond the bonded period of three years, and the collector failed to collect the tax by distraint immediately upon the expiration of that period. On the accidental destruction of the warehouse by fire, the secretary had authority to abate the unpaid tax. (1886) 18 Op. Atty-Gen. 379.

"Other casualty," as used in this section, means an accidental destruction by some cause of like character and operation as fire, such as lightning, floods, cyclones, storms, and other uncontrollable force, which ordinary foresight and prudence could not guard against or prevent. A loss from undiscoverable wormholes, or the warping of barrels from excessive summer heat, causing greater evaporation of spirits, is not the destruction by "other casualty" contemplated by this section. *Crystal Spring Distillery Co. v. Cox*, (C. C. A. 1892) 49 Fed. 555, 6 U. S. App. 42, 1 C. C. A. 365.

Spirits lost after seizure by an internal revenue officer, through the latter's mere negligence, were not lost by reason of "casualty" within this section. *U. S. v.*

Siak, (C. C. A. 4th Cir. 1910) 176 Fed. 885, 100 C. C. A. 355.

Liabilities of sureties after notice of abatement.—After the secretary has abated the taxes, and has given notice thereof to the collector of internal revenue, with directions to take credit therefor in his account, which was done, and official notice has been given to the principals upon the warehouse distillers' bond, and they have given notice to their sureties, no suit can be maintained. While the secretary might, on new evidence or further consideration, reimpose the taxes, his reassessment would only subject the spirits and the distiller to a liability for their payment; it could not restore the obligation of the distillers' bond. *U. S. v. Alexander*, (1884) 110 U. S. 325, 4 S. Ct. 99, 28 U. S. (L. ed.) 166.

Defense to action on bond.—This section confers upon the owner of distilled spirits deposited in a warehouse a legal right which is enforceable in the courts, and is not dependent on the discretionary action of the Secretary of the Treasury, and therefore a destruction of spirits in a warehouse by accidental fire may be set up as a defense to an action by the government on a distiller's bond to recover the taxes thereon. *Freeman v. U. S.*, (1907) 157 Fed. 195, 84 C. C. A. 643.

Sec. 3222. [Retrospective effect of preceding section.] The preceding section shall take effect in all cases of loss or destruction of distilled spirits as aforesaid which have occurred since January one, eighteen hundred and sixty-eight. [R. S.]

Act of May 27, 1872, ch. 218, 17 Stat. L. 162.

Sec. 3223. [When tax on lost spirits is indemnified by insurance.] When the owners of distilled spirits in the cases provided for by the two preceding sections may be indemnified against such tax by a valid claim of insurance, for a sum greater than the actual value of the distilled spirits before and without the tax being paid, the tax shall not be remitted to the extent of such insurance. [R. S.]

This section was substituted for the section as originally enacted, by Act of March 1, 1879, ch. 125, 20 Stat. L. 333.

The original section was as follows:

"SEC. 3223. When the owners of distilled spirits in the cases provided for by the two preceding sections may be indemnified against such tax by a valid claim of insurance, the tax shall not be remitted to the extent of such insurance." Act of May 27, 1872, ch. 218, 17 Stat. L. 162.

By an Act of June 7, 1906, ch. 3046, § 5 (vol. 4, div. V of this title), the provisions of this section were extended to grape brandy.

Construction of insurance policy.—This law does not change the rule of construction applicable to these contracts of indemnity. It contemplates that there may be a valid insurance covering the entire interest of the assured, including the tax,

and in that event there is to be no remission of the tax. *Hedger v. Union Ins. Co.*, (1883) 17 Fed. 498. See *Germania Fire Ins. Co. v. Thompson*, (1877) 95 U. S. 547, 24 U. S. (L. ed.) 487.

Sec. 3224. [Suits to restrain assessments or collection of taxes.] No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. [R. S.]

Act of March 2, 1867, ch. 169, 14 Stat. L. 475.

The constitutionality of this statute has been upheld. *Pullan v. Kinsinger*, (1870) 2 Abb. 94, 20 Fed. Cas. No. 11,463.

Restraining an assessment.—This section prohibits a suit for the purpose of restraining an assessment of a tax as well as the collection of a tax. *Miles v. Johnson*, (1893) 59 Fed. 38.

Restraining corporation officers from paying tax.—In view of the provisions of this section and R. S. sec. 3226, *infra*, p. 1034, it was held that an injunction would not be granted restraining the officers of a corporation from paying the corporation tax provided for by Act of Aug. 5, 1909, § 38 (vol. 4, div. XVIII of this title). *Straus v. Abrast Realty Co.*, (E. D. N. Y. 1912) 200 Fed. 327.

Suit to restrain collection of personal property tax.—Both under this section and on general principles of equity an injunction suit cannot be maintained to restrain the collection by town authorities of a personal property tax; there being an adequate remedy at law to be had by paying the tax and bringing an action to recover it, and it being contrary to public policy to tie up the collection of taxes. *Nye v. Washburn*, (1903) 125 Fed. 817.

A stockholder suit to enjoin the corporation from voluntarily paying a tax charged to be unconstitutional is not prohibited by this section. *Brushaber v. Union Pac. R. Co.*, (1916) 240 U. S. 1, 36 S. Ct. 236, 60 U. S. (L. ed.) 493, *following* *Pollock v. Farmers' Loan, etc., Co.*, (1895) 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759. See also *Tyce Realty Co. v. Anderson*, (1916) 240 U. S. 115, 36 S. Ct. 281, 60 U. S. (L. ed.) 554.

Taxes levied by the United States are the ones to which the statute applies. *State Railroad Tax Cases*, (1875) 92 U. S. 575, 23 U. S. (L. ed.) 663. See also *Baltimore, etc., R. Co. v. Allen*, (1883) 17 Fed. 171; *Schulenberg-Boeckeler Lumber Co. v. Hayward*, (1884) 20 Fed. 422.

State taxes.—Whether federal courts are forbidden by this section to enjoin the collection of state taxes, see *Wells v. Central Vermont R. Co.*, (1878) 14 Blatchf. 426, 29 Fed. Cas. No. 17,390. See also *Shelton v. Platt*, (1891) 139 U. S. 591, 11 S. Ct. 646, 35 U. S. (L. ed.) 273.

Taxes levied by District of Columbia.—This section can have no application to taxes levied by the District of Columbia, although under authority of the United

States v. Alexandria Canal R., etc., Co. v. District of Columbia, (1881) 1 Mackey (D. C.) 234.

The inhibition of this statute applies to all assessments of taxes, legal or illegal, made under color of their offices by internal revenue officers charged with the general jurisdiction of the subject of assessing taxes. *Snyder v. Marks*, (1883) 109 U. S. 189, 3 S. Ct. 157, 27 U. S. (L. ed.) 901; *Dodge v. Osborn*, (1916) 240 U. S. 118, 36 S. Ct. 275, 60 U. S. (L. ed.) 557. See also dissenting opinion in *Pollock v. Farmers' Loan, etc., Co.*, (1895) 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759; *Pittsburg, etc., R. Co. v. Board of Public Works*, (1898) 172 U. S. 32, 19 S. Ct. 90, 43 U. S. (L. ed.) 354; *Pacific Steam Whaling Co. v. U. S.*, (1903) 187 U. S. 447, 23 S. Ct. 154, 47 U. S. (L. ed.) 253; *Barnes v. Philadelphia, etc., R. Co.*, (1872) 17 Wall. 294, 21 U. S. (L. ed.) 544; *Alkan v. Bean*, (1877) 8 Biss. 83, 1 Fed. Cas. No. 202; *Pullan v. Kinsinger*, (1870) 2 Abb. 94, 20 Fed. Cas. No. 11,463; *Howland v. Soule*, (1868) Deady 413, 12 Fed. Cas. No. 6,800; *Cutting v. Gilbert*, (1865) 5 Blatchf. 259, 6 Fed. Cas. No. 3,519; *Robbins v. Freeland*, (1871) 20 Fed. Cas. No. 11,883; *Kensett v. Stivers*, (1880) 10 Fed. 517.

"By the provision that no suit can be maintained for the purpose of restraining either the assessment or the collection of the tax, the statute has, in fact, provided that payment must be made at all events, whether the tax was justly or unjustly levied, and that redress for an unjust exaction must be sought subsequently." *U. S. v. Black*, (1874) 11 Blatchf. 538, 24 Fed. Cas. No. 14,600. See also *Dela-ware R. Co. v. Prettyman*, (1872) 7 Fed. Cas. No. 3,767.

Prayers for mandatory injunctions against a collector, enjoining and restraining him from refusing to accept and approve complainant's bonds for the exportation of certain described whiskey, and from doing all the other acts necessary to be done for the exportation of the whiskey, and commanding defendant to permit the withdrawal of said whiskey from the bonded warehouses for exportation, would, if granted, prevent the defendant from completing the collection of the tax, and such injunctions are not permitted by this

section. *Miles v. Johnson*, (C. C. Ky. 1893) 59 Fed. 38.

Income Tax Law.—This section was held to be applicable to the Income Tax Law of 1913. *Dodge v. Osborn*, (1916) 240 U. S. 118, 36 S. Ct. 275, 60 U. S. (L. ed.) 557.

It is within the range of possibility that the tax may be such a clear and manifest violation of the law that the whole proceeding would be a nullity. "In other words, I should not be prepared to hold that if the commissioner were to determine that a person not a distiller and not interested in the business of distilling was subject to assessment as a distiller, that he was then within his jurisdiction, and that a court of equity could not, because of the prohibition in section 3224, intervene." *Kissinger v. Bean*, (1875) 7 Biss. 60, 14 Fed. Cas. No. 7,853. But see *Pullan v. Kinsinger*, (1870) 2 Abb. 94, 20 Fed. Cas. No. 11,463.

When the bill and bill of review show that, after certain manufactured tobacco had been properly stamped at the rate of twenty cents per pound, and then sold and transferred to purchasers by the manufacturer, an additional four cents per pound was demanded by the collector, and a levy upon other property of the manufacturer threatened for this four cents, it is a clear case for the exercise of the restraining power of the court, and is not one falling within the letter, spirit, or intention of this section. *Frayser v. Russell*, (1878) 3 Hughes 227, 9 Fed. Cas. No. 5,067. But see *Howland v. Soule*, (1868) Deady 413, 12 Fed. Cas. No. 6,800.

Innocent purchasers.—"The scope of this section is not limited in terms to the party taxed." The lien of the government attaches under R. S. sec. 3251 (vol. 4, div. V of this title) from the time the spirits come into existence, and a person cannot subsequently purchase the property freed from the lien and its consequences, though his purchase may be innocent and without actual notice. *Alkan v. Bean*, (1877) 8 Biss. 83, 1 Fed. Cas. No. 202.

When the government elects to resort to the aid of the court for the collection of a tax, it must abide by its legality. The defendant may show that the assessment was illegal. *U. S. v. Bank of America*, (1883) 15 Fed. 730.

Sec. 3225. [Suits to recover taxes collected under second assessment —burden of proof as to fraud.] When a second assessment is made in case of any list, statement, or return, which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, no taxes collected under such assessment shall be recovered by any suit, unless it is proved that the said list, statement, or return was not false nor fraudulent, and did not contain any understatement or undervaluation. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 111; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

The foregoing section was amended by an Act of Sept. 8, 1916, § 14 (d). See Pamph. Supp. No. 8, p. 94, Fed. Stat. Ann.; 1918 Supp. Fed. Stat. Ann.

Evidence disproving understatement.—To prove that their returns did not contain an understatement, the manufacturers cannot show by parol that, during the period covered by the assessment, "no beer was sold or removed from their brewery for consumption or sale except in barrels or parts of barrels, which were all duly stamped with an internal revenue stamp . . . as required by the Act of Congress;" that they "had made their monthly returns to the collector regularly until and including the month of December, 1873; that there was no understatement or undervaluation in either of said returns of the quantity of beer brewed, or

of beer sold or removed from their brewery for consumption or sale, and that neither of the returns was fraudulent or false." The books which the law requires manufacturers to keep, containing an account of all materials purchased for the purpose of producing fermented liquors, and the estimated quantity produced and the actual quantity sold or removed for consumption or sale, constitute the best evidence, and until it is shown that they cannot be produced, or that they do not contain the information required, no such evidence as that offered is admissible. *Bergdoll v. Pollock*, (1877) 95 U. S. 337, 24 U. S. (L. ed.) 512.

Sec. 3226. [Suits for recovery of taxes wrongfully collected.] No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 152; Act of June 6, 1872, ch. 315, 17 Stat. L. 257.

By the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 248, the word "the" was struck out before the words "Internal Revenue."

Suits in state courts to recover taxes illegally collected are forbidden by this section as well as suits in federal courts. *Collector v. Hubbard*, (1870) 12 Wall. 1, 20 U. S. (L. ed.) 272.

As to the effect of a state statute, see *Braum v. Sauerwein*, (1869) 10 Wall. 218, 19 U. S. (L. ed.) 895.

Suit brought by government.—The suit prohibited by this statute is one brought by the person taxed to recover back a tax illegally assessed and collected. When a suit is brought by the government, and the person taxed is defendant instead of plaintiff, he may set up the defense that the tax was illegally assessed, although he may not have appealed to the commissioner. *Clinkenbeard v. U. S.*, (1874) 21 Wall. 65, 22 U. S. (L. ed.) 477. See also *U. S. v. Myers*, (1878) 3 Hughes 239, 27 Fed. Cas. No. 15,846; *U. S. v. Nebraska Distilling Co.*, (C. C. A. 1897) 80 Fed. 285, 46 U. S. App. 704, 25 C. C. A. 418.

When the government elects to resort to the aid of the court for the collection of a tax, it must abide by its legality. The defendant may show that the assessment was illegal. *U. S. v. Bank of America*, (1883) 15 Fed. 730.

When suit may be brought.—The collector cannot be sued unless the taxpayer has first applied for relief to the commissioner within the time and in the manner pointed out by law and relief has been denied him. *Kings County Sav. Inst. v. Blair*, (1886) 116 U. S. 200, 6 S. Ct. 353, 29 U. S. (L. ed.) 657.

In *Hubbard v. Kelley*, (1874) 8 W. Va. 51, the court said that to maintain the issues, on his part, it is necessary for the plaintiff to show that an appeal has been duly made by him to the commissioner according to the provisions of law and the regulations of the Secretary of the Treasury, and that a decision has been had thereon, if there has in fact been such a decision. See *Coblens v. Abel*, (1868) Woolw. 293, 5 Fed. Cas. No. 2,926; *Stuart v. Barnea*, (1890) 43 Fed. 281.

But in *Hendy v. Soule*, (1868) Deady 400, 11 Fed. Cas. No. 6,359, the court held it does not affect the jurisdiction of the court, that an appeal was not taken to the commissioner prior to bringing suit against a collector of internal revenue, to recover the amount of a tax paid under protest. "If no appeal has been made, the defendant may protect himself, by plea

to that effect, in abatement of the action, or he may by his silence waive this defense, and then it becomes immaterial whether an appeal was made to the commissioner or not."

"An appeal to the commissioner of internal revenue from an assessment is only a condition precedent to an action for the recovery of taxes paid. It is not a condition precedent to any other action where such action is permissible." *Erskine v. Hohnbach*, (1871) 14 Wall. 613, 20 U. S. (L. ed.) 745. See *Nichols v. U. S.*, (1868) 7 Wall. 122, 19 U. S. (L. ed.) 125.

The allowance of the claim by the commissioner may be used as the basis of an action against the United States in the Court of Claims, when payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim, and it will be prima facie evidence of the amount that is due, and puts on the government the burden of showing fraud or mistake. *U. S. v. Real Estate Sav. Bank*, (1881) 104 U. S. 728, 26 U. S. (L. ed.) 908. See also *U. S. v. Kaufman*, (1877) 96 U. S. 567, 24 U. S. (L. ed.) 792; *Dunnegan v. U. S.*, (1887) 17 Ct. Cl. 254; *McClure v. U. S.*, (1883) 19 Ct. Cl. 29; *Boehm v. U. S.*, (1886) 21 Ct. Cl. 204; *Dugan v. U. S.*, (1899) 34 Ct. Cl. 458; *Commonwealth Title Ins., etc., Co. v. U. S.*, (1902) 37 Ct. Cl. 532.

"If on the appeal the claim is rejected, an action lies against the collector, and through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the government in the Court of Claims." *U. S. v. Real Estate Sav. Bank*, (1881) 104 U. S. 728, 26 U. S. (L. ed.) 908. See *Greencastle First Nat. Bank v. U. S.*, (1879) 15 Ct. Cl. 225.

"If the appeal is denied, he can then resort to the courts to obtain repayment." *U. S. v. Black*, (1874) 11 Blatchf. 538, 24 Fed. Cas. No. 14,600.

Protest as condition precedent.—Though not paid under protest, an action to recover the amount of an illegal tax paid may be maintained, provided the taxpayer had taken an appeal to the commissioner of internal revenue. *Hubbard v. Kelley*, (1874) 8 W. Va. 46. See *Northrup v. Shook*, (1872) 10 Blatchf. 243, 18 Fed. Cas. No. 10,329.

But in *Philadelphia v. Diehl*, (1866) 5 Wall. 720, 18 U. S. (L. ed.) 614, the court said: "When a party, knowing his rights, voluntarily pays duties or taxes illegally or erroneously assessed, the law will not afford him redress for the injury; but when the duties or taxes are illegally demanded, and he pays the same under protest, or gives notice to the collector that he intends to bring a suit against him to test the validity of the claim, the collector may be compelled to refund the amount illegally exacted." See *Nelson v. Carman*,

(1867) 5 Blatchf. 511, 17 Fed. Cas. No. 10,103.

Appeal as condition precedent.—The provision in this section that no suit shall be maintained to recover back any internal revenue tax claimed to have been illegally or erroneously collected until an appeal shall have been taken to the commissioner and a decision had therein, unless such decision shall have been delayed more than six months, is not merely a statute of limitations, but prescribes an absolute condition precedent, which is not waived by a failure to plead it, and without compliance with which a suit cannot be maintained; but where, before payment of the tax, a claim for its abatement was presented to the commissioner in accordance with the rules of the department, and rejected, the same was equivalent to an appeal, and an appeal after payment on the same grounds was not necessary to authorize a suit. *De Bary v. Dunne*, (1908) 162 Fed. 961. See also *State Line, etc., R. Co. v. Davis*, (M. D. Pa. 1915) 228 Fed. 246.

Appeal before payment.—An appeal taken from an assessment before payment is sufficient. It is not necessary, as a condition precedent to bringing suit, that there should be a second appeal after payment upon the same question previously passed upon by the commissioner. *Schwarzchild, etc., Co. v. Rucker*, (N. D. Ga. 1906) 143 Fed. 656; *San Francisco Sav., etc., Soc. v. Cary*, (1873) 2 Sawy. 333, 21 Fed. Cas. No. 12,317.

Appeal heard on the merits.—An appeal to a commissioner must be considered and rejected on its merits. A claim for the recovery of taxes alleged to have been illegally collected has not been so considered when it was made on a form, "For the remission of taxes improperly assessed," and presumably rejected by the commissioner because it was made on the wrong form, nor, when made on the proper form, if it is not supported by the certificate of the assessor or collector of the district, which is required, by regulations of the department, to accompany every such claim. *Hicks v. James*, (1882) 48 Fed. 542, *affirmed* (1884) 110 U. S. 272, 4 S. Ct. 6, 28 U. S. (L. ed.) 144.

Effect of application to refund.—A written application to the commissioner of internal revenue to refund a sum expended in the voluntary purchase of revenue stamps from a collector, to be affixed to a conveyance, though it may be sufficient to justify favorable action by the commissioner, under R. S. sec. 3220, *supra*, p. 1028, is not the equivalent of an appeal to him from an adverse decision by the collector, which, under this section and the following R. S. secs. 3227, 3228, is essential to the maintenance of a suit for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected. *Chesbrough v. U. S.*, (1904) 192 U. S. 253, 24 S. Ct. 262, 48 U. S. (L. ed.) 432.

Application to commissioner for review

of assessment.—The provision of this section requiring an appeal to the commissioner of internal revenue as a condition precedent to the maintenance of an action to recover a tax, does not apply where the matter has already been brought before the commissioner on an application to review an assessment of taxes. *Weaver v. Ewers*, (C. C. A. 8th Cir. 1912) 195 Fed. 247, 115 C. C. A. 219.

Evidence of commissioner's decision.—There is not sufficient evidence that a decision has been made, when the record merely shows that certain affidavits and certificates were at some time transmitted to the Treasury Department, and that upon them is indorsed, "Examined and rejected Sept. 8, 1868, by J. Dille." It does not appear what office Mr. Dille held, nor that the commissioner ever adopted or sanctioned his decision. *Lauer v. U. S.*, (1869) 5 Ct. Cl. 447.

Remedy when claim rejected.—If a claim is rejected by the commissioner a judicial remedy is given the party by an action against the collector. If the claim is allowed by the commissioner and payment refused by the accounting officers, a suit may be brought directly against the government in the Court of Claims. *Edison Electric Illuminating Co. v. U. S.*, (1903) 38 Ct. Cl. 208.

A cause of action accrues against a collector at the time the commissioner renders his decision, and stands upon the primary enactment of this statute, requiring that suit should be brought within two years next after the cause of action accrued. The provision of the proviso that action may be brought on any claim pending before the commissioner within one year after his decision does not apply to a claim presented to a commissioner since the enactment of the statute. *Wright v. Blakeslee*, (1879) 101 U. S. 174, 25 U. S. (L. ed.) 1048; *State Line, etc., v. Davis*, (M. D. Pa. 1915) 228 Fed. 246. See also *Cheatham v. U. S.*, (1875) 92 U. S. 85, 23 U. S. (L. ed.) 561, in which case the court said that the period of limitation begins at the time of the decision of the commissioner, and not at the time thereafter that payment of the tax may be made. And see (1879) 16 Op. Atty.-Gen. 249.

This section and R. S. sec. 3220, *supra*, p. 1028, are not to be so construed as to give to an adverse decision of a commissioner, upon an appeal to him under this section, the effect of a bar to the relief to be afforded under R. S. sec. 3220, after judgment has been duly recovered against a collector. *Nixon v. U. S.*, (1883) 18 Ct. Cl. 448.

Splitting causes of action.—In *Johnson v. Herold*, (1907) 161 Fed. 503, it was held that a manufacturer of surgical supplies, who purchased internal revenue stamps from time to time under protest for use on articles made and sold by him,

might maintain different actions against successive collectors to recover the amounts paid to each, and different actions against the same collector, when required to prevent the bar of limitations, or when they related to different classes of articles, and the questions involved might be different, and that a recovery in one such suit was not a bar to the prosecution of the others pending, where no motion was made to consolidate.

Duress.—The purchase of documentary stamps at various times without protest, and the affixing of such stamps to manifests of cargoes on vessels bound to foreign ports, cannot be deemed to have been under duress, so as to sustain a recovery from the United States of the amount of the illegal tax so collected, because clearance papers for vessels so bound could not be procured without delivery to the collector of the district of the stamped manifests, without which clearance papers the vessels would be prevented from sailing, or would be liable, under R. S. sec. 4197 (title SHIPPING AND NAVIGATION) for the penalty therein prescribed. *U. S. v. New York, etc., Mail Steamship Co.*, (1906) 200 U. S. 488, 26 S. Ct. 327, 50 U. S. (L. ed.) 569, *reversing* (1903) 125 Fed. 320.

What may constitute duress is set forth by Justice Gray, speaking for the Circuit Court of Appeals for the third circuit in *Herold v. Kahn*, (C. C. A. 3d Cir. 1908) 159 Fed. 608, 86 C. C. A. 598. See also *Cambria Steel Co. v. McCoach*, (E. D. Pa. 1915) 225 Fed. 278.

Assessment list as evidence.—In the assessment of special taxes the officers of the internal revenue act in a quasi-judicial capacity, and in an action to recover such taxes the introduction in evidence of the assessment list, regular in form, makes a *prima facie* case for the government. *Western Express Co. v. U. S.*, (1905) 141 Fed. 28, 72 C. C. A. 516.

Sufficiency of protest.—For facts establishing sufficiency of protest, see *Johnson v. Herold*, (C. C. N. J. 1907) 161 Fed. 593.

Proviso not compulsory.—The proviso in this section is permissive only, and does not compel a claimant to bring suit within two years and six months after taking appeal in any case, but he may at his election await the decision of the commissioner, and, if adverse, bring suit within two years thereafter. *Merck v. Treat*, (1909) 174 Fed. 388, 98 C. C. A. 606.

Limitations.—Actions brought under this section are exclusively subject to the limitations imposed by this and the following section. *Christie St. Commission Co. v. U. S.*, (1904) 129 Fed. 506, *affirming* (1905) 136 Fed. 326, 69 C. C. A. 464.

Removal of bar.—As to the effect of an Act entitled "An act for the relief of the board of commissioners of the sinking fund of the City of Louisville, Ky.," approved June 16, 1890, upon the bar of the

statute, see *Louisville Sinking Fund Com'rs v. Buckner*, (C. C. Ky. 1891) 48 Fed. 533.

Enforcement of Oleomargarine Law.—This section is applicable to the collection and enforcement of the specific tax im-

posed on oleomargarine by Act of Congress of Aug. 2, 1886, ch. 840, 24 Stat. L. 209 (vol. 4, div. X of this title). *Weaver v. Ewers*, (C. C. A. 8th Cir. 1912) 195 Fed. 247, 115 C. C. A. 219.

Sec. 3227. [Limitation of suits for recovery of taxes wrongfully collected.] No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section. [R. S.]

Act of June 6, 1872, ch. 315, 17 Stat. L. 257.

Limitation.—The bar of the statute does not apply when suit is brought by the government and the person taxed is defendant instead of plaintiff. The limitation does not affect the right to set up matter of defense in a proceeding in which the government is the moving party, so that in an action against a receiver, in which the government intervened by petition praying an order upon the receiver to pay a deficiency assessment against the distillery alleged to be unpaid, the receiver, representing the interests involved, had the right to show that the assessment was erroneous or illegal and should not be enforced. *U. S. v. Nebraska Distilling Co.*, (C. C. A. 1897) 80 Fed. 285, 46 U. S. App. 704, 25 C. C. A. 418.

The running of the statute is not suspended during the pendency of the appeal before the commissioner of internal revenue. *Christie St. Commission Co. v. U. S.*, (1904) 129 Fed. 506, *affirmed* (1905) 136 Fed. 326, 69 C. C. A. 464.

Pleading.—The bar of the statute may be raised by demurrer when the petition shows the bar complete. *Louisville Sinking Fund Com'rs v. Buckner*, (1891) 48 Fed. 535.

Account corrected—draft withheld.—The statute embraces claims where the action is grounded on the wrongful conduct of an officer empowered to act as col-

lector of internal tax, and does not present a bar to the maintenance of a suit brought to recover the amount represented by a draft for a sum wrongfully deducted and withheld as a tax by the officers of the Treasury, but which had been corrected by them by the due issue of the draft for such amount. "The government thereafter held this fund in the nature of a trust awaiting demand of the payee or his legal representative." *Ray v. U. S.*, (1892) 50 Fed. 166. See also *Wayne v. U. S.*, (1891) 26 Ct. Cl. 274.

As to the effect of a special Act, such as an Act entitled "An act for the relief of the board of commissioners of the sinking fund of the city of Louisville, Ky.," approved June 16, 1890, upon the bar of the statute, see *Louisville Sinking Fund Com'rs v. Buckner*, (1891) 48 Fed. 533. See also *Van Schaick v. U. S.*, (1886) 21 Ct. Cl. 7.

Effect of Act of March 3, 1887.—Act of March 3, 1887, ch. 359, § 1, 24 Stat. L. 505 (repealed in part by the Judicial Code, see JUDICIARY), providing generally for the bringing of suits against the United States, and limiting such suits to six years after the right accrued, did not supersede this and the preceding section. *Christie St. Commission Co. v. U. S.*, (1903) 126 Fed. 991; *Christie St. Commission Co. v. U. S.*, (1905) 136 Fed. 326, 69 C. C. A. 464, *affirming* (1904) 129 Fed. 506.

Sec. 3228. [Claims for refundment—limitation.] All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal

Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date. [*R. S.*]

Act of June 6, 1872, ch. 315, 17 Stat. L. 257.

Amendment subsequent to limitation.—Whenever a bona fide litigant or claimant brings his cause before a tribunal having jurisdiction, such proceeding, even where fatally informal, is usually held to be an action or claim, so far at least as to be a foundation for an amendment, and thus to be capable of becoming perfect by relation to its original institution, and so of defeating a plea of limitation which, otherwise, might avail the defendant. (1873) 14 Op. Atty-Gen. 615.

Refund of legacy tax on contingent interests.—The limitation provided for in the section does not apply to the refund of legacy tax provided for by Act of June 27, 1902, ch. 1160, § 3 (vol. 4, div. XVI of this title). *U. S. v. Shipley*, (C. C. A. 3d Cir. 1912) 197 Fed. 265, 116 C. C. A. 627.

Time statute begins to run.—Under this and the preceding section it is held that on the expiration of six months after an appeal to the commissioner of internal revenue without its having been acted

upon, a right of action accrues and becomes barred after two years. *Christie St. Commission Co. v. U. S.*, (1903) 126 Fed. 991; *Christie St. Commission Co. v. U. S.*, (1905) 136 Fed. 326, 69 C. C. A. 464, *affirming* (1904) 129 Fed. 506; *Schwarzchild, etc., Co. v. Rucker*, (1906) 143 Fed. 656.

Cases falling under the provisions of R. S. sec. 3426 (vol. 4, div. XX of this title), which provided for the replacement of spoiled stamps, etc., were not governed by the provisions of this section. (1878) 15 Op. Atty-Gen. 427. But see (1875) 14 Op. Atty-Gen. 513.

As to rights of informers see *U. S. v. Harris*, (1866) 1 Abb. 110, 26 Fed. Cas. No. 15,312; *U. S. v. Thomasson*, (1869) 4 Bias. 336, 28 Fed. Cas. No. 16,479; *U. S. v. Hook*, (1867) 26 Fed. Cas. No. 15,387; *U. S. v. One Hundred and Sixty-three, etc., Barrels Whiskey*, (1871) 27 Fed. Cas. No. 15,937; (1869) 12 Op. Atty-Gen. 558; (1870) 13 Op. Atty-Gen. 228.

Sec. 3229. [Compromises.] The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise. [*R. S.*]

Act of July 20, 1868, ch. 186, 15 Stat. L. 166.

Scope of compromise.—This section is not restricted in terms, nor by any reasons of public policy, to compromises of penalties for the nonpayment of taxes. A technical violation of the internal revenue laws, such as a failure to make a tax return in time, may be the proper subject of compromise. (1911) 29 Op. Atty-Gen. 217.

Suits commenced by the government to recover taxes are the suits referred to in this section. (1901) 23 Op. Atty-Gen. 507.

An assessment of ten per cent. upon the

circulating notes of Canada banks, made by the Treasury Department, the notes having been received and paid out within the United States by banks in the United States, and the assessment made under and in pursuance of section 20 of the Act of Feb. 8, 1875 (vol. 4, div. XV of this title), is a case which may be compromised under the provisions of this section. (1897) 21 Op. Atty-Gen. 558.

Compromise of claim against corporation failing to file corporation tax return.—See *U. S. v. Acorn Roofing Co.*, (E. D. N. Y. 1912) 204 Fed. 157.

Motive of compromise.—The Secretary of the Treasury should not act from motives merely of compassion or charity, but he may consider not only the pecuniary interest of the Treasury, but also considerations of justice and equity and of public policy. (1881) 17 Op. Atty.-Gen. 213.

Authority to compromise.—The statute implies the duty of independent examination by each of the officers named of every case presented for his action, and the grounds on which the proposal should be accepted or rejected. The final authority and responsibility rest with the commissioner. It is he who alone can actually compromise a claim; the functions of the Secretary of the Treasury and the Attorney-General are advisory. (1868) 12 Op. Atty.-Gen. 472.

Before suit the commissioner can compromise with the advice of the Secretary of the Treasury; but after the commencement of suit or proceeding in court, the recommendation of the Attorney-General is also necessary. (1871) 13 Op. Atty.-Gen. 479. See also *U. S. v. Distilled Spirits*, (1870) 4 Ben. 349, 27 Fed. Cas. No. 16,099; (1868) 12 Op. Atty.-Gen. 536.

A deputy internal revenue collector has authority at least to transmit an offer of compromise, and when he turns over money, received for the purpose of effecting the compromise, to his superior, and it is retained, it will be presumed that the offer was accepted. *Willingham v. U. S.*, (C. C. A. 5th Cir. 1913) 208 Fed. 137, 127 C. C. A. 263.

Procedure on compromise.—A failure to follow the technical rules of procedure laid down by the Internal Revenue Department will not invalidate a compromise under this section. *Willingham v. U. S.*, (C. C. A. 5th Cir. 1913) 208 Fed. 137, 127 C. C. A. 263.

A voluntary relinquishment of a part of a tax lawfully assessed upon and due from a solvent person or corporation is not permitted by this section. "A compromise

implies some mutuality of concession, some real doubt about the legality of the claim, or the ability to meet it." (1879) 16 Op. Atty.-Gen. 249.

When no suit or proceeding in court has been commenced on an export bond executed on the withdrawal from the internal-revenue bonded warehouse and entering at the custom house for exportation of certain barrels of alcohol distilled, a case against the obligors may be compromised under this section. (1869) 13 Op. Atty.-Gen. 116.

The unconditional dismissal of a suit or proceeding pending in court may be made by the commissioner without the approval of the Attorney-General, as such action is not a compromise within the meaning of the statute. (1869) 12 Op. Atty.-Gen. 552.

The power to compromise ceases when the judgment is entered. (1871) 13 Op. Atty.-Gen. 479.

The words "arising under the internal-revenue laws" have reference to a compromise with the taxpayer, and not with the collector of taxes, and do not refer to charges of embezzlement against officers of internal revenue. (1872) 14 Op. Atty.-Gen. 8. See also (1872) 14 Op. Atty.-Gen. 43.

Motion to withdraw plea of guilty.—"The statute [this section] permits a compromise of criminal cases of this character to be made by the commissioner of internal revenue, and, while any considerable lapse of time between conviction and sentence is not favored by the court, an agreement to give the prisoners reasonable delay, in order that, if so advised, they might endeavor to effect a compromise with the department, is far from being an inducement of such a character as will justify the court's permitting the withdrawal of a plea of guilty made as this one was made." *U. S. v. Bayaud*, (1883) 23 Fed. 721. See also (1871) 13 Op. Atty.-Gen. 479.

Sec. 3230. [Discontinuances of criminal prosecutions.] No discontinuance or nolle prosequi of any prosecution under section three thousand two hundred and fifty-seven shall be allowed without the permission in writing of the Secretary of the Treasury and the Attorney-General. [R. S.]

Act of March 31, 1868, ch. 41, 15 Stat. L. 60.

R. S. sec. 3257 mentioned in the text is given in division V of this title, vol. 4.

Sec. 3231. [Continuances in criminal proceedings.] It shall be lawful for any court in which any suit or criminal proceeding arising under the internal-revenue laws may be pending, to continue the same at any stage thereof, for good cause shown on motion by the district attorney. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 166.

[SEC. 1.] [Collections to be covered into Treasury.] * * * After June thirtieth, nineteen hundred and eight, collectors of internal revenue shall pay daily into the Treasury of the United States, under instructions of the Secretary of the Treasury, the gross amounts of all collections of whatever nature, made by authority of law, and the same shall be covered into the Treasury as internal-revenue collections. [35 Stat. L. 325.]

This and the following paragraph are from the Sundry Civil Appropriation Act of May 27, 1908, ch. 200.

[Accounts to be rendered quarterly.] * * * Collectors of internal revenue shall render their revenue accounts quarterly. [35 Stat. L. 325.]

See the note to the preceding paragraph of this section.

IV. SPECIAL TAXES*

Sec. 3232. [Trade or business not to be carried on until tax paid.] No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 113. Sections 3232-3246 constitute chapter 3 of title XXXV of the Revised Statutes, entitled "Special Taxes."

The provisions of R. S. secs. 3232-3241, 3243, are made applicable to the special taxes on "filled cheese" by Act of June 6, 1896, ch. 337, § 3, 29 Stat. L. 253, *infra*, p. 1065, to special taxes on adulterated butter by Act of May 9, 1902, ch. 784, § 4, 32 Stat. L. 195, *infra*, p. 1066, and to special taxes on oleomargarine by Act of Aug. 2, 1886, ch. 840, § 3, 24 Stat. L. 210, *infra*, p. 1061.

Sugar bounties.—The Act of Oct. 1, 1890, ch. 1244, 26 Stat. L. 583, provided for bounties on sugars produced in the United States from beets, sorghum, sugar cane or maple sap, and provided for licenses and regulations governing their manufacture.

The Act of March 3, 1891, ch. 541, 26 Stat. L. 925, authorized the appointment of twelve sugar-bounty inspectors.

The Act of Aug. 27, 1894, ch. 349, 28 Stat. L. 521, repealed the sugar-bounty provisions of the Act of 1890, above mentioned, and forbade the issue of any license to produce sugar or to pay any bounty for the production of sugar of any kind under said Act.

The Act of March 2, 1895, ch. 189, 28 Stat. L. 933, provided for the payment of bounty on productions prior to June 30, 1895, for the examination of claims to such bounty, and the punishment of fraudulent claims.

For cases construing these Acts, see *Field v. Clark*, (1892) 143 U. S. 649, 12 S. Ct. 495, 36 U. S. (L. ed.) 294; *U. S. v. Realty Co.*, (1896) 163 U. S. 427, 16 S. Ct. 1120, 41 U. S. (L. ed.) 215; *Burdon Cent. Sugar Refining Co. v. Payne*, (1897) 167 U. S. 127, 17 S. Ct. 754, 42 U. S. (L. ed.) 105; *Allen v. Smith*, (1899) 173 U. S. 389, 19 S. Ct. 446, 43 U. S. (L. ed.) 741; *Calder v. Henderson*, (C. C. A. 1893) 54 Fed. 802, 2 U. S. App. 627, 4 C. C. A. 584; *Barrow v. Milliken*, (C. C. A. 1896) 74 Fed. 612, 41 U. S. App. 332, 20 C. C. A. 559; *Burdon Cent. Sugar Refining Co. v. Payne*, (C. C. A. 1897) 81 Fed. 663, 52 U. S. App. 312, 26 C. C. A. 552; *American Sugar Refining Co. v. U. S.*, (1899) 91 Fed. 646; *Bartram v. U. S.*, (1903) 123 Fed. 327, (C. C. A. 1904) 131 Fed. 833, 65 C. C. A. 557; (1890) 19 Op. Atty-Gen. 697; *Glynn v. U. S.*, (1897) 32 Ct. Cl. 82.

Constitutionality.—Federal statutes requiring licenses to be paid to carry on the licensed business within a state, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy, and are not inconsistent with a recognition of the exclusive control by the states over their internal commerce or domestic trade. *License Tax Cases*, (1866) 5 Wall. 462, 18

U. S. (L. ed.) 497. See also *Mason v. Rollins*, (1869) 2 Biss. 99, 16 Fed. Cas. No. 9,252.

"Until he has paid."—The presence of the words "until he has paid" show clearly that payment of the tax in advance is required by the statute. Until the tax is paid the particular business cannot be lawfully pursued. *U. S. v. Clare*, (E. D. Pa. 1880) 2 Fed. 55.

* Further provisions relating to taxes on distilled spirits are given in subdivision V of this title, vol. 4.

Carrying on business after application for assessment.—In *U. S. v. Pressy*, (1869) 1 Lowell 319, 27 Fed. Cas. No. 16,086, the facts showed that a peddler paid his tax for 1867, and in April, 1868, duly applied to the assessor to pay the special tax for that fiscal year, beginning with May 1, 1868. The taxes were usually assessed about May 20 in each year, and the bills sent in on the next day. It was held that he could not be indicted for carrying on business after May 1 without payment of license, when he sold out his business four or five days afterward and refused to pay the tax. The court said: "His application to be assessed was all that he could do, or was bound to do, until the bill was rendered. So that, while many defendants had been rightly convicted . . . who had never been assessed for a tax, because the failure to assess them arose out of their own wrong in not making application to the assessor, and therefore they could not be heard to object to the want of assessment; yet this

stringent penalty was not intended for delinquent taxpayers merely as such, if they had been guilty of no act or omission at the time they carried on their business." *U. S. v. Pressy*, (1869) 1 Lowell 319, 27 Fed. Cas. No. 16,086.

Agents of state.—The dispensing and selling agents of a state, which in the exercise of its sovereign power has taken charge of the business of selling intoxicating liquors, are fairly within the scope of this section and R. S. secs. 3244 (*infra*, p. 1045) and 3140 (*supra*, p. 978), under which an excise tax is to be collected from all sellers of intoxicating liquors. *South Carolina v. U. S.*, (1905) 199 U. S. 437, 26 S. Ct. 110, 50 U. S. (L. ed.) 261, 4 Ann. Cas. 737, *affirming* (1904) 39 Ct. Cl. 257.

Licensee.—The fact that the owner of a hall has a license to retail liquors at the bar of the hall does not protect a licensee in the sale of liquors. *Gormely v. South Side Gymnastic Ass'n*, (1882) 55 Wis. 350, 13 N. W. 242.

Sec. 3233. [Trade or business to be registered.] Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same, and their places of residence, shall be so registered. [*R. S.*]

Act of July 13, 1866, ch. 184, 14 Stat. L. 113; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401.

Sec. 3234. [Persons in partnership at same place liable for only one tax.] Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax. [*R. S.*]

Act of July 13, 1866, ch. 184, 14 Stat. L. 115.

Dissolution of partnership.—Where a firm consisting of two partners has paid the special tax, and one of the firm purchases the interest belonging to the other, the one who becomes the sole and exclusive owner of the trade or business may

carry on the same trade or business at the same place for the balance of the term for which the tax is paid. *U. S. v. Glab*, (1878) 99 U. S. 225, 25 U. S. (L. ed.) 273. See also *U. S. v. Davis*, (1889) 37 Fed. 468.

Sec. 3235. [Payment of one special tax not to cover several places of business.] The payment of the special tax imposed shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register; but nothing herein contained shall require a special tax for the storage of goods, wares, or merchandise in other places than the place of business, nor, except as herein-after provided, for the sale by manufacturers or producers of their own goods, wares, and merchandise, at the place of production or manufacture, and at their principal office or place of business, provided no goods, wares, or merchandise shall be kept except as samples at said office or place of business. [*R. S.*]

Act of July 13, 1866, ch. 184, 14 Stat. L. 113.

3 F. S. A.—34

Sec. 3236. [When more than one pursuit is carried on in same place by same person at same time.] Whenever more than one of the pursuits or occupations hereinafter described are carried on in the same place by the same person at the same time, except as hereinafter provided, the tax shall be paid for each according to the rates severally prescribed. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 114.

Application of section.— This section refers to the exaction of a tax, not to the conferring of authority to sell; and does not give authority to carry on the manufacture of cigars and tobacco, and their sale at retail, at the same time and in the same place. (1878) 16 Op. Atty.-Gen. 89. See *U. S. v. Neid*, (1870) 27 Fed. Cas. No. 15,860.

It refers only to pursuits or occupations which can be carried on in the same place by the same person at the same

time consistently with other requirements of law on the subject of the special pursuit or occupation. "It has no reference to the grant of any authority to carry on two occupations at the same time and place by the same person, but concerns only the obtaining of a tax for each of two occupations when they are lawfully carried on." *Ludloff v. U. S.*, (1883) 103 U. S. 176, 2 S. Ct. 475, 27 U. S. (L. ed.) 693. See also *Crisp v. Proud*, (1878) 4 Hughes 57, 7 Fed. Cas. No. 3,392.

R. S. sec. 3237. This section was as follows:

"Sec. 3237. All special taxes shall become due on the first day of May, in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced to the first day of May following." Act of July 13, 1866, ch. 184, 14 Stat. L. 113; Act of June 6, 1872, ch. 315, 17 Stat. L. 252.

It was superseded by the provisions of the Act of Oct. 1, 1890, ch. 1244, § 53, *infra*, p. 1064.

Sec. 3238. [Stamps for special taxes.] All special taxes imposed by law, including the tax on stills or worms, shall be paid by stamps denoting the tax, and the Commissioner of Internal Revenue is required to procure appropriate stamps for the payment of such taxes; and the provisions of sections thirty-three hundred and twelve and thirty-four hundred and forty-six, and all other provisions of law relating to the preparation and issue of stamps for distilled spirits, fermented liquors, tobacco, and cigars, shall, so far as applicable, extend to and include such stamps for special taxes; and the Commissioner of Internal Revenue shall have authority to make all needful regulations relative thereto. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 137, 165; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 402.

The words "thirty-three hundred and twelve" were substituted for "thirty-three hundred and thirteen" by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 319.

R. S. secs. 3312 and 3446 mentioned in the text are given in vol. 4, divisions V and XXI of this title.

Sec. 3239. [Special-tax stamp to be exhibited in place of business.] Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax; and any person who shall, through negligence, fail to so place and keep said stamps, shall be liable to a penalty equal to the special tax for which his business rendered him liable, and the costs of prosecution; but in no case shall said penalty be less than ten dollars. And where the failure to comply with the foregoing provision of law shall be through wilful neglect or refusal, then the penalty shall be double

the amount above prescribed: *Provided*, That nothing in this section shall in any way affect the liability of any person for exercising or carrying on any trade, business, or profession, or doing any act for the exercising, carrying on, or doing of which a special tax is imposed by law, without the payment thereof. [R. S.]

Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 402.

The word "stamps," in the sixth line of this section, was substituted for "stamp" by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 248.

Certified copy of records of internal revenue collector.—In *Daniel v. State*, (1912) 11 Ga. App. 799, 76 S. E. 162, there was a holding as follows: "In the trial of an indictment for the illegal sale of intoxicating liquor, a certified copy from the records of the internal revenue collector of the United States, showing that the accused has paid a special tax as a retail liquor dealer, is admissible in evidence. . . . Whether or not such a certified copy is evidence of an application for

the internal revenue tax receipt of the United States, as required by section 3239 of the Revised Statutes of the United States, . . . so as to shift the burden of proof on the defendant, under the provisions of the act of the General Assembly of August 21, 1911 (Acts 1911, p. 180), need not be decided, since, under the decisions above cited, the evidence was admissible without reference to the provisions of that act."

Sec. 3240. [List of special taxpayers to be exhibited in collector's office—certified copy of list.] Each collector of internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality he shall furnish a certified copy thereof, as of a public record, for which a fee of one dollar for each one hundred words or fraction thereof in the copy or copies so requested may be charged. [R. S.]

This section was amended to read as given in the text by an Act of June 21, 1906, ch. 3509, 34 Stat. L. 387, entitled "An Act to amend the internal revenue laws so as to provide for furnishing certified copies of certain records." As originally enacted it was as follows:

"Sec. 3240. Each collector of internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid."

Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 403.

Form of record.—The record of special taxes which the collectors of internal revenue are required to make under this section should be in such form as to show clearly in each instance the business for which the special taxes are paid. The words should be written in full, not abbreviated. (1911) 28 Op. Atty-Gen. 561.

Certified copy of record as evidence.—A certified copy by the collector of internal revenue from the records of his office, showing the names of all the persons who have paid special taxes within his district, is admissible evidence for the purpose of showing that a particular person has paid the special taxes as a retail liquor dealer. *Huckabee v. State*, (1910) 7 Ga. App. 677, 67 S. E. 837. See

also *State v. Dowdy*, (1907) 145 N. C. 432, 58 S. E. 1002.

A certified copy of the records in the office of the collector of internal revenue relating to the issuance of a liquor license is admissible in evidence in a prosecution for maintaining a liquor nuisance when properly proved, and such record is properly proved when there is attached thereto, a certificate by the collector of internal revenue as to its correctness and authenticity, and a statement in a certificate of the collector of internal revenue, which is attached to a certified copy of the record of special taxpayers and registers of his district, does not render the admission of such record reversible error, because it states in substance that the record shows

the issuance of United States special tax stamps to the defendant, when the record upon its face shows the same fact. *State v. Kilmer*, (1915) 31 N. D. 442, 153 N. W. 1089.

Book as prima facie evidence.—The book is prima facie evidence that a person named therein had paid for a license as a

retail liquor dealer, for a specific period. "It is an official record, kept by a sworn officer, and authorized by law." *State v. Gorham*, (1876) 65 Me. 270. See *State v. Davis*, (1898) 69 N. H. 350, 41 Atl. 267. This section, as amended, is cited in *People v. Lalonde*, (1912) 171 Mich. 286, 137 N. W. 74.

Sec. 3241. [Death or removal after paying tax — business carried on without additional tax.] When any person who has paid the special tax for any trade or business dies, his wife or child, or executors or administrators or other legal representatives, may occupy the house or premises, and in like manner carry on, for the residue of the term for which the tax is paid, the same trade or business as the deceased before carried on, in the same house and upon the same premises, without the payment of any additional tax. And when any person removes from the house or premises for which any trade or business was taxed to any other place, he may carry on the trade or business specified in the collector's register at the place to which he removes, without the payment of any additional tax: *Provided*, That all cases of death, change, or removal, as aforesaid, with the name of the successor to any person deceased, or of the person making such change or removal, shall be registered with the collector, under regulations to be prescribed by the Commissioner of Internal Revenue. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 114.

Sale of spirits by executor, administrator, or other fiduciary, see amendment to R. S. sec. 3244, subsec. fifth, *infra*, p. 1048.

Sec. 3242. [Carrying on business without payment of special tax — penalties.] Every person who carries on the business of a rectifier, wholesale liquor-dealer, retail liquor-dealer, or manufacturer of stills, without having paid the special tax as required by law, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all apparatus fit or intended to be used for the distillation or rectification of spirits or the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the rectifying establishment, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, shall be forfeited to the United States. Every person who carries on the business of a manufacturer of tobacco, snuff, or cigars, dealer in manufactured tobacco, dealer in leaf-tobacco, or retail dealer in leaf-tobacco, without having paid a special tax therefor, as provided by law, shall, besides being liable to the payment of the tax, be fined not more than five hundred dollars or be imprisoned not more than one year, or both, at the discretion of the court. And every person who carries on the business of a brewer or wholesale or retail dealer in malt liquors, without having paid a special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than ten dollars nor more than five hundred dollars. [R. S.]

Act of March 2, 1867, ch. 169, 14 Stat. L. 473; Act of July 20, 1868, ch. 186, 15 Stat. L. 142; Act of June 6, 1872, ch. 315, 17 Stat. L. 240, 255.

This section is at least in part superseded by Act of Feb. 8, 1875, ch. 36, § 16, given

infra, p. 1053, and by Act of Oct. 1, 1890, ch. 1244, § 26, repealing some of the taxes above mentioned, given in vol. 4, div. VII of this title.

See the note to R. S. sec. 3232, *supra*, p. 1040.

Delivery at customer's residence.—One who has paid a special tax entitling him to retail liquor at his regular place of business does not violate this section by delivering liquor to a customer at the latter's residence, though the sale be com-

pleted there. *Benbrook v. U. S.*, (C. C. A. 1911) 188 Fed. 153, 108 C. C. A. 265.

Sufficiency of indictment.—See *John Gund Brewing Co. v. U. S.*, (C. C. A. 8th Cir. 1913) 204 Fed. 17, 122 C. C. A. 331.

Sec. 3243. [Payment of special tax not to authorize violation of State laws, nor prohibit State taxation.] The payment of any tax imposed by the internal-revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State, for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 122; Act of July 20, 1868, ch. 186, 15 Stat. L. 151.

Independence of state and federal revenue systems.—State and federal revenue systems are entirely independent of each other, and the federal statutes make it plain that by taxing an occupation it is by no means meant to authorize such occupation contrary to local laws. "It only intends to tax the occupation if it is in fact carried on, but does not authorize it to be carried on." *In re Comingore*, (1899) 96 Fed. 561. See also *License Tax Cases*, (1866) 5 Wall. 462, 18 U. S. (L. ed.) 497; *Pervear v. Massachusetts*, (1866) 5 Wall. 475, 18 U. S. (L. ed.) 608; *McGuire v. Massachusetts*, (1865) 3 Wall. 387, 18 U. S. (L. ed.) 226; *Austin v. State*, (1898) 101 Tenn. 563, 48 S. W. 305, 70 A. S. R. 703, 50 L. R. A. 478; *Com. v. Crane*, (1893) 158 Mass. 218, 33 N. E. 388; *Com. v. Sheckels*, (1883) 78 Va. 36.

This section was adopted to make it clear that Congress had no purpose to restrict the power of the state over the manufacture and sale of particular articles. When taxes are imposed by statute for national purposes, their imposition does not give authority to those who pay them to engage in the manufacture or sale of such articles in any state which lawfully forbids such manufacture or sale, or to disregard any regulations which a state might lawfully

prescribe in reference to that article. *Plumley v. Massachusetts*, (1894) 165 U. S. 461, 15 S. Ct. 154, 39 U. S. (L. ed.) 223. See also *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1, 18 S. Ct. 757, 43 U. S. (L. ed.) 49; *Austin v. Tennessee*, (1900) 179 U. S. 343, 21 S. Ct. 132, 45 U. S. (L. ed.) 224.

One element only is withheld from the otherwise absolute right and power of the state to regulate or prohibit the sale of intoxicating liquors, and that relates to interstate relations. *In re Jordan*, (1892) 49 Fed. 238.

Applicability to Alaska local law.—"The circumstance that the local law for Alaska and the national revenue law were both enacted by Congress is immaterial in view of the provision in the latter that the local law must prevail in determining whether a business for which a special tax is required may or may not be carried on in a given locality." Evidence of the payment of the special tax required by the general government is therefore clearly irrelevant on an indictment for retailing liquor in violation of the local law of Alaska. *Endleman v. U. S.*, (C. C. A. 1898) 86 Fed. 456, 57 U. S. App. 1, 30 C. C. A. 186. See also *U. S. v. Nelson*, (1886) 29 Fed. 202.

Sec. 3244. [Special taxes imposed on whom.] Special taxes are imposed as follows:

[Brewers.] First. Brewers shall pay one hundred dollars. Every person who manufactures fermented liquors of any name or description for sale, from malt, wholly or in part, or from any substitute therefor, shall be

deemed a brewer: *Provided*, That any person who manufactures less than five hundred barrels a year shall pay the sum of fifty dollars. [R. S.]

Act of July 13, 1866, ch. 184, 14 Stat. L. 117; Act of July 14, 1870, ch. 255, 16 Stat. L. 256.

Further provisions relating to special taxes were made by the Act of Oct. 22, 1914, § 3, *infra*, p. 1067. See the notes to the first paragraph of said section.

Refunding excess tax.—A brewer who has paid a tax of one hundred dollars as a brewer of five hundred barrels or more, is entitled to have fifty dollars refunded to him if he has not manufactured more than three hundred and fifty barrels, on

showing that he has complied with the provisions of R. S. sec. 3426 (noted as superseded under subdivision XX of this title, vol. 4). *U. S. v. Kaufman*, (1877) 96 U. S. 567, 24 U. S. (L. ed.) 792.

[Manufacturers of stills — drawback of tax on stills exported.] Second. Manufacturers of stills shall each pay fifty dollars, and twenty dollars for each still or worm for distilling made by him. Any person who manufactures any still or worm to be used in distilling shall be deemed a manufacturer of stills. Upon all stills manufactured for export, and actually exported, there shall be allowed a drawback, where the tax thereon has been paid, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 151.

That portion of the above section beginning "Upon all stills," etc., was added by Act of March 1, 1879, ch. 125, 20 Stat. L. 342.

[Rectifiers.] Third. Rectifiers of distilled spirits shall pay two hundred dollars. Every person who rectifies, purifies, or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete, and every wholesale or retail liquor-dealer who has in his possession any still or leach-tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, and every person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors for sale, under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying: *Provided*, That any person who rectifies, purifies, refines, or manufactures as aforesaid less than five hundred barrels a year, counting forty gallons of proof spirits to the barrel, shall pay one hundred dollars. *And provided*, That nothing in this section shall be held to prohibit the purifying or refining of spirits in the course of original and continuous distillation through any material which will not remain incorporated with such spirits when the manufacture thereof is complete: *And provided further*, That no officer shall collect any special tax for rectifying distilled spirits on any premises distant less than six hundred feet in a direct line from any distillery. And every officer who collects any special tax in violation of this proviso shall be liable to a penalty of five thousand dollars for each offense. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 130, 150; Act of April 10, 1869, ch. 18, 16 Stat. L. 41, 42; Act of June 6, 1872, ch. 315, 17 Stat. L. 239, 244; Act of Dec. 24, 1872, ch. 13, 17 Stat. L. 401-403.

The word "proviso" where it occurs in the last sentence of the section was substituted by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 319, for the word "section" appearing in the section as originally enacted.

The words following the word "Provided," where it first appears in the section, down to and including the words "And provided" where they first occur, were added to the section as originally enacted, by Act of March 1, 1879, ch. 125, 20 Stat. L. 339.

What constitutes rectification—Generally.—Rectification of distilled spirits, in the legal sense, means any process, exclusive of "original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete," by which the spirits are separated from the substance with which it is mixed or combined. The rectifier may take the raw spirit of the distiller, and by repeated processes of distillation separate the spirit from the oils and impurities left in it by the distiller; or he may take the refuse material of the manufacturer of ginger or vanilla extract, saturated with alcohol, and by distillation separate the spirit from that material. *Wampole v. U. S.*, (C. C. A. 3d Cir. 1911) 191 Fed. 573, 112 C. C. A. 633.

In *U. S. v. Smith, etc., Co.*, (1911) 184 Fed. 532, it appeared that the defendants manufactured fluid extract of ginger by pouring distilled spirits on ginger root. After drawing off the fluid, the distilled spirit remaining in the dregs was separated therefrom by the distillation, and this product, less in quantity and lower in grade than that previously placed in the receptacle with the ginger root, was reused in repeating the process and in the manufacture of medicinal preparations. It was held that the defendant was a person engaged in the business or occupation of rectifying, purifying, and refining distilled spirits and subject to internal revenue taxation imposed by this section. To the same effect see *U. S. v. Hance*, (1911) 184 Fed. 528.

A rectifier may rectify, purify, or refine distilled spirits or wines by any process other than original and continuous process. He may use high wines and cologne spirits, and recover from any material, such as fruit that contains spirits by reason of its former use by rectifiers, and saloon washings which contain no fermented liquors or substances, any spirits which existed in that material, upon which tax had been paid, but he has no right to create spirits—that is, to take fruits, or beer, or any other fermented substances and make spirits out of them. *U. S. v. Marshall*, (1876) 26 Fed. Cas. No. 15,726.

Addition of water to spirits or mixing of spirits.—A mere addition of water to spirits, or the mixing of certain spirits of the same character, if they were under a certain age, would not be rectification. *U. S. v. Thirty-two Barrels of Distilled Spirits*, (1880) 5 Fed. 188.

Mixing whiskey, sugar, and water, by a

retail liquor dealer, and putting it in jugs and bottles, and keeping it in his stock in that form, and selling it, when wanted, as he sold other whiskeys and wines in his stock, when called for, by measuring out whatever quantity the customer wanted, whether that was a drink or a small or large bottle, was held to constitute the dealer a rectifier within the meaning of the statute. *Michel v. Nunn*, (1900) 101 Fed. 423.

Making of ginger ale paste.—In *U. S. v. Twitchell Co.*, (1911) 184 Fed. 525, it appeared that the defendant manufactured a ginger ale paste used for making ginger ale. The paste was manufactured by placing a quantity of ginger in a percolator and adding alcohol. The oleoresin thus obtained from the ginger containing unnecessary alcohol was distilled and the alcohol separated. This alcohol was of a low grade, and was charged with ginger essence so as not to be commercially salable and could not be used except in repeating the process of extracting oleoresin from ginger root and in the manufacture of flavors. It was held that the defendant in so distilling the alcohol was engaged in the business of rectifying, purifying, and refining distilled spirits within this section.

Mixing water and blackberry juice with whiskey, whereby its proof is reduced and the color restored, was held to constitute a retail dealer, following that practice, a rectifier within the meaning of the statute. *Michel v. Nunn*, (1900) 101 Fed. 423.

"Through continuous closed vessels," etc.—The phrase "through continuous closed vessels and pipes until the manufacture thereof is complete" refers to the exception, to wit, "other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes until the manufacture thereof is complete," and not to "every person who rectifies, purifies, or refines distilled spirits or wines by any process." *U. S. v. Twitchell Co.*, (1911) 184 Fed. 525.

"Beverages" or liquors.—Flavoring extracts, composed of from forty to fifty per cent alcohol, three per cent flavoring principle, and the remainder water, the quantity of alcohol being no greater than is required to hold the flavoring principle in solution, which are not made, sold, or used, or capable of being used, as a beverage, but which are chiefly used in flavoring soda water syrups, the quantity of extract used in each glass of the beverage being about three or four drops, are not "beverages" or "liquors" within the

meaning of this section, and the manufacturer is not subject to special tax thereunder as a rectifier or wholesale or

retail dealer in liquors. *Allen v. Liquid Carbonic Co.*, (1909) 170 Fed. 315, 95 C. C. A. 11.

[Retail and wholesale liquor dealers.] Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors.

Wholesale liquor-dealers shall pay one hundred dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor-dealer. But no distiller who has given the required bond, and who sells only distilled spirits of his own production at the place of manufacture, in the original packages to which the tax-stamps are affixed, shall be required to pay the special tax of a wholesale liquor-dealer on account of such sales.

Act of July 20, 1868, ch. 186, 15 Stat. L. 125, 150; Act of April 10, 1869, ch. 18, 16 Stat. L. 42; Act of June 6, 1872, ch. 315, 17 Stat. L. 239.

These paragraphs were modified by the Act of Feb. 8, 1875, ch. 36, § 18, given as amended *infra*, p. 1058.

"Malt liquors" distinguished from "spirituous liquors."—This and the following provision seem plainly to distinguish "malt liquors," the product of fermentation, from "spirituous liquors," the result of distillation. *Sarlls v. U. S.*, (1893) 152 U. S. 570, 14 S. Ct. 720, 38 U. S. (L. ed.) 556.

Retail liquor dealer.—Without regard to the amount of his annual sales, a retail

liquor dealer is one who sells or offers for sale within the quantity allowed by law. *U. S. v. Howard*, (1871) 1 Sawy. 507, 26 Fed. Cas. No. 15,402.

Wholesale dealer.—If the quantity sold at one time exceeds five gallons, the party selling is a "wholesale dealer" within the meaning of the statute, though the liquor is not sold "in one package." *U. S. v. Clare*, (1880) 2 Fed. 55.

[Retail and wholesale dealers in malt liquors.] Fifth. Retail dealers in malt liquors shall pay twenty dollars. Every person who sells or offers for sale malt liquors in quantities of five gallons or less at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors.

Wholesale dealers in malt liquors shall pay fifty dollars. Every person who sells or offers for sale malt liquors in larger quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a wholesale dealer in malt liquors: *Provided*, That no brewer shall be required to pay a special tax as a wholesale dealer by reason of selling in the original stamped packages, whether at the place of manufacture or otherwise, malt liquors manufactured by him. But no special tax shall be held to accrue on a sale of distilled spirits, wines, or malt liquors made by a person who is not otherwise a dealer in liquors, where such spirits, wines, or liquors have been received by the person so selling as security for or in payment of a debt, or as executor, administrator, or other fiduciary, or have been levied on by any officer, under order or process of any court or magistrate, and where such spirits are sold by such person in one parcel only, or at public auction in parcels not less than twenty wine-gallons, nor shall such tax be held to accrue on a sale made by a retiring partner, or the representatives of a deceased partner to the incoming, remaining, or surviving partner or partners of a firm; nor shall the special tax of a wholesale liquor-dealer or wholesale dealer in malt liquors be held to apply to a

retail dealer in liquors or a retail dealer in malt liquors, because of such retail dealer selling out his entire stock of liquors in one parcel, or in parcels embracing not less than his entire stock of distilled spirits, of wines, or of malt liquors; and section thirty-three hundred and nineteen of the Revised Statutes shall not be held to prohibit a rectifier or liquor-dealer from purchasing, in quantities greater than twenty wine-gallons, the distilled spirits sold in one parcel as aforesaid. [R. S.]

Act of July 20, 1868, ch. 186, 15 Stat. L. 151; Act of April 10, 1869, ch. 18, 16 Stat. L. 42; Act of June 6, 1872, ch. 315, 17 Stat. L. 244, 245.

This clause was amended by an Act of March 1, 1879, ch. 125, § 4, 20 Stat. L. 333, by adding thereto all that part beginning with the words "But no special tax shall be held to accrue" to the end thereof as given in the text.

These provisions were modified by the Act of Feb. 8, 1875, ch. 36, § 18, *infra*, p. 1058.

Wholesale dealer.—A brewer selling at another place than that of manufacture was held liable to taxation as a wholesale dealer, under the Acts of July 20, 1868, and April 10, 1869. *Underhill v. Pleasonton*, (1871) 8 Blatchf. 260, 24 Fed. Cas. No. 14,337.

Action to recover tax—estoppel.—A verdict of acquittal, upon the trial of a criminal action under R. S. sec. 3242,

supra, p. 1044, on the question whether the defendant carried on the business of a wholesale dealer in malt liquor, is not an estoppel to an action brought by the government against the same person to recover the amount of the special tax alleged to be due from him as such wholesale dealer. *U. S. v. Schneider*, (1888) 35 Fed. 107.

[**Dealers in leaf tobacco.**] Sixth. Dealers in leaf-tobacco, except retail dealers in leaf-tobacco, as hereinafter defined, shall pay twenty-five dollars. Every person shall be regarded as a dealer in leaf-tobacco whose business it is, for himself or on commission, to sell, or offer for sale, or consign for sale on commission, leaf-tobacco; and payment of a special tax as dealer in tobacco, manufacturer of tobacco, manufacturer of cigars, or any other special tax, shall not exempt any person dealing in leaf-tobacco from the payment of the special tax therefor hereby required. But no farmer or planter, nor the executor or administrator of such farmer or planter, nor the guardian of any minor, shall be required to pay a special tax as a dealer in leaf-tobacco, for selling tobacco produced by said farmer or planter, or by said executor, administrator, or guardian, or received by either of them as rents from tenants who have produced the same on the land of said farmer, planter, or minor: *Provided*, That nothing in this section shall be construed to exempt from a special tax any farmer or planter who, by peddling or otherwise, sells leaf-tobacco at retail directly to consumers, or who sells or assigns, consigns, transfers, or disposes of, to persons other than those who have paid a special tax as leaf-dealers or manufacturers of tobacco, snuff, or cigars, or to persons purchasing leaf-tobacco for export. No sheriff or other officer acting under order or process of any court or magistrate, nor trustee, or other fiduciary, legally acting under the powers vested in him, shall be liable to said special tax as a dealer or retail dealer in selling tobacco under such authority. And no purchaser at any sale by such sheriff, officer, trustee, or fiduciary, shall be held liable to any other tax or restriction as to a sale of tobacco so purchased than he would have been had such purchaser been the producer thereof on his own land. Dealers in leaf-tobacco shall sell only to other dealers who have paid a special tax as such, and to manufacturers of tobacco, snuff, or cigars, and to such persons as are known to be purchasers of leaf-tobacco for export: *Provided*,

It shall be lawful for any licensed manufacturer of cigars to purchase leaf-tobacco of any licensed dealer or other licensed manufacturer in quantities less than the original package, for use in his own manufactory exclusively. *Provided further*, That dealers in leaf-tobacco (other than retail dealers as defined in the seventh sub-division of the section) who do not deal in leaf tobacco otherwise than to sell, or offer for sale, or consign for sale on commission, to an amount not exceeding twenty five thousand pounds in any one special-tax year, only such leaf-tobacco as they purchase or receive in the hand directly from farmers or planters who have produced the same on land owned, rented, or leased by them, or received the same as rent from their tenants, who have produced the same on such land, shall each be required to pay for carrying on such business a special tax of five dollars only. If any person who has paid such special tax shall be found to have purchased or received and sold, or consigned for sale on commission, more than twenty-five thousand pounds of leaf-tobacco, such as is herein provided for, in any one special-tax year, the Commissioner of Internal Revenue is authorized and directed to assess such person an amount of tax equal to the difference between the special tax paid by him and the special tax of twenty-five dollars hereinbefore imposed upon a dealer in leaf-tobacco. [R. S.]

The provisions of the above subdivision sixth of R. S. sec. 3244, preceding the words, "*Provided further*, That dealers in leaf tobacco," etc., were substituted for the subdivision as originally enacted, by Act of March 1, 1879, ch. 125, 20 Stat. L. 343. The provisions beginning with the words quoted were added by Act of June 16, 1880, ch. 250, 21 Stat. L. 291.

The original subdivision read as follows:

"Sixth. Dealers in leaf-tobacco, except retail dealers in leaf-tobacco, as hereinafter defined, shall pay twenty-five dollars. Every person shall be regarded as a dealer in leaf-tobacco, whose business it is, for himself or on commission, to sell, or offer for sale, or consign for sale on commission, leaf-tobacco; and payment of a special tax as dealer in tobacco, manufacturer of tobacco, manufacturer of cigars, or any other special tax, shall not exempt any person dealing in leaf-tobacco from the payment of the special tax therefor hereby required. But no farmer or planter shall be required to pay a special tax as a dealer in leaf-tobacco, for selling tobacco of his own production, or tobacco received by him as rent from tenants who have produced the same on his land: *Provided*, That nothing in this section shall be construed to exempt from a special tax any farmer or planter who, by peddling or otherwise, sells leaf-tobacco at retail directly to consumers, or who sells or assigns, consigns, transfers, or disposes of to persons other than those who have paid a special tax as leaf-dealers or manufacturers of tobacco, snuff, or cigars, or to persons purchasing leaf-tobacco for export.

"Dealers in leaf-tobacco shall sell only to other dealers who have paid a special tax as such, and to manufacturers of tobacco, snuff, or cigars, and to such persons as are known to be purchasers of leaf-tobacco for export." Act of July 20, 1868, ch. 186, 15 Stat. L. 150; Act of June 6, 1872, ch. 315, 17 Stat. L. 250.

The above taxes were modified by the Act of Oct. 22, 1914, ch. 331, § 4, *infra*, p. 1069.

Seventh. The seventh subdivision of this section was as follows:

"Seventh. Retail dealers in leaf-tobacco shall each pay five hundred dollars, and if their annual sales exceed one thousand dollars, shall each pay, in addition thereto, fifty cents for every dollar in excess of one thousand dollars of their sales. Every person shall be regarded as a retail dealer in leaf-tobacco whose business it is to sell leaf-tobacco in quantities less than an original hogshead, case, or bale; or who sells directly to consumers, or to persons other than dealers in leaf-tobacco, who have paid a special tax as such; or to manufacturers of tobacco, snuff, or cigars who have paid a special tax; or to persons who purchase in original packages for export. Retail dealers in leaf-tobacco shall also keep a book, and enter therein daily their purchases and sales, in a form and manner to be prescribed by the Commissioner of Internal Revenue, which book shall be open at all times for the inspection of any revenue officer. Whenever it becomes necessary to ascertain the amount of annual sales made by any retail dealer in leaf-tobacco, or to ascertain the excess of such sales over one thousand dollars, such amount and excess, shall be ascertained and returned under such regulations and in such form as may be prescribed by the Commissioner of Internal Revenue. And whenever the amount of sales or receipts is understated or underestimated by any retail

dealer in leaf-tobacco, he shall be again assessed for such deficiency, and shall be required to pay the same, with any penalties that may by law have accrued or be chargeable thereon."

Act of July 29, 1868, ch. 186, 15 Stat. L. 152; Act of June 6, 1872, ch. 315, 17 Stat. L. 250.

The above taxes were reduced by Act of March 3, 1883, ch. 121, § 2, 22 Stat. L. 488.

Repeal of taxes imposed on dealers in leaf-tobacco and provisions as to registry practically superseding the above provisions, see Act of Oct. 1, 1890, ch. 1244, § 26, 26 Stat. L. 618, given in subdivision VII of this title, vol. 4.

Taxes on tobacco dealers were fixed by the Act of Oct. 22, 1914, ch. 331, § 4, *infra*, p. 1069.

[Dealers in tobacco.] Eighth. Dealers in tobacco shall each pay five dollars. Every person whose business it is to sell, or offer for sale, manufactured tobacco, snuff, or cigars, shall be regarded as a dealer in tobacco, and the payment of a special tax as a wholesale or retail liquor-dealer, or the payment of any other special tax, shall not relieve any person who sells manufactured tobacco and cigars from the payment of this tax: *Provided*, That no manufacturer of tobacco, snuff, or cigars shall be required to pay a special tax as dealer in manufactured tobacco and cigars for selling his own products at the place of manufacture.

Act of June 6, 1872, ch. 315, 17 Stat. L. 250.

The tax was reduced by the Act of March 3, 1883, ch. 121, § 2, 22 Stat. L. 488, and was abolished by the Act of Oct. 1, 1890, ch. 1244, § 26, given in division VII of this title, vol. 4.

A tax on dealers in tobacco was imposed by the War Revenue Act of Oct. 22, 1914, ch. 331, § 3, *infra*, p. 1067.

Payment of employees in tobacco as sale.—Payment of employees in tobacco, even at cost price, is technically a sale, and also comes within the spirit of the Act requiring the payment of a special tax by one "whose business it is to sell or offer for sale manufactured tobacco." *U. S. v. Vinson*, (1881) 8 Fed. 507.

Effect of proviso.—The provision of this section, that no manufacturer of tobacco, snuff or cigars shall be required to pay a special tax as dealer in manufactured tobacco and cigars for selling his own products at the place of manufacture, has no other effect than not to require that a manufacturer of tobacco, snuff, or cigars, who sells his own products at the place of manufacture in such manner as is consistent with other provisions of law as to the manner of the sale of such products, shall pay a special tax as a dealer in manufactured tobacco and cigars. It has relation solely to the exaction of a tax, and not to the conferring of authority to sell, in violation of regulations prescribed by the commissioner of internal revenue under R. S. sec. 3396 (vol. 4, div. VIII of this title). *Ludloff v. U. S.*, (1883) 108 U. S. 176, 2 S. Ct. 475, 27 U. S. (L. ed.) 693.

"Particular emphasis is laid upon the concluding proviso of item eight of section 3244, Rev. Stat., and the newspaper report represents the distinguished judge

as saying that he 'could not understand how the wildest imagination could conceive of any other construction' than that it was 'competent for the same person to be a manufacturer and retail dealer of cigars, etc., at the same place.' That proviso is: 'That no manufacturer of tobacco, snuff, or cigars shall be required to pay a special tax as dealer in manufactured tobacco and cigars for selling his own products at the place of manufacture.' That this clause contemplates a sale at the manufactory is evident, but it is not apparent that it necessarily implies a sale in a less quantity than a box. The idea conveyed by this language is that no dealer's tax shall be imposed upon a manufacturer for making a sale of his wares at his factory such as the other provisions of law permit him there to make. This section, like 3236 [*supra*, p. 1042], refers to the exaction of a tax, not to the conferring of an authority to sell." (1878) 16 Op. Atty-Gen. 89.

Branding and stamping.—In *U. S. v. Neid*, (1870) 27 Fed. Cas. No. 15,860, it was held that where cigars were made in the back part of a room, and sold in the front part thereof, the back part was to be regarded as a manufactory, and no cigars could be removed therefrom to the front part without first branding and stamping them.

Ninth. This subdivision defined manufacturers of tobacco and imposed on them a tax of ten dollars a year. It was superseded by Act of Aug. 27, 1894, ch. 349, § 69, 28 Stat. L. 568, given in the text, and by the repealing Act of Oct. 1, 1890, ch. 1244, § 26, 26 Stat. L. 618, both given under subdivision VII of this title, vol. 4.

A further tax on manufacturers of tobacco was imposed by the War Revenue Act of Oct. 22, 1914, ch. 331, § 4, *infra*, p. 1069.

Tenth. The tenth subdivision of this section was as follows:

"Tenth. Manufacturers of cigars shall each pay ten dollars. Every person whose business it is to make or manufacture cigars for himself, or who employs others to make or manufacture cigars, shall be regarded as a manufacturer of cigars. No special tax stamp shall be issued to any manufacturer of cigars until he has given the bond required by law. Every person whose business it is to make cigars for others, either for pay, upon commission, on shares, or otherwise, from material furnished by others, shall be regarded as a cigar-maker. Every cigar-maker shall cause his name and residence to be registered, without previous demand, with the collector of the district in which such cigar-maker shall be employed; and every manufacturer of cigars employing any cigar-maker who shall have neglected or refused to make such registry shall be fined five dollars for each day that such cigar-maker so offending, by neglect or refusal to register, shall be employed by him."

Act of July 20, 1868, ch. 186, 15 Stat. L. 150; Act of June 6, 1872, ch. 315, 17 Stat. L. 251.

These taxes were reduced by the Act of March 3, 1883, ch. 121, § 2, 22 Stat. L. 488, and were repealed by the Act of Oct. 1, 1890, ch. 1244, § 26, given under subdivision VII of this title, vol. 4.

Manufacturers of cigars were required to pay a tax by the War Revenue Act of Oct. 22, 1914, ch. 331, § 4, *infra*, p. 1069.

[Peddlers of tobacco.] Eleventh. Peddlers of tobacco shall be classified and rated as follows, to wit: When traveling with more than two horses, mules, or other animals, as of the first class, and shall pay fifty dollars; when traveling with two horses, mules, or other animals, as of the second class, and shall pay twenty-five dollars; when traveling with one horse, mule, or other animal, as of the third class, and shall pay fifteen dollars; when traveling on foot or by public conveyance, as of the fourth class, and shall pay ten dollars. Any person who sells or offers to sell and deliver manufactured tobacco, snuff, or cigars, traveling from place to place, in the town or through the country, shall be regarded as a peddler of tobacco.
[R. S.]

Act of June 6, 1872, ch. 315, 17 Stat. L. 251.

These taxes were reduced by the Act of March 3, 1883, ch. 121, § 2, 22 Stat. L. 488, and the tax on peddlers was repealed by the Act of Oct. 1, 1890, ch. 1244, § 26, given under subdivision VII of this title, vol. 4.

This subsection was amended by an Act of Sept. 7, 1916. See Pamph. Supp. No. 8 Fed. Stat. Ann., p. 76; 1918 Supp. Fed. Stat. Ann.

Legislative definition of peddler as controlling.—"If this statute had simply imposed a license tax upon the occupation of a 'peddler in tobacco,' it would be proper to have recourse to the significance of the word at the time the law was passed, to ascertain whether the person charged was comprehended within the general epithet. But when the legislature saw fit to declare that a person who com-

mits certain enumerated acts shall be considered a peddler and treated as such, it is too late to resort to glossaries to ascertain whether the legislature observed the dictionary definition of the occupation, according to antecedent usage or strict etymological rules. The legislative definition outweighs the dictum of the lexicographers." *In re Wilson*, (1890) 8 Mackey (D. C.) 341.

Sec. 3245. [Balance of distillers' special tax to be refunded.] The special tax paid by distillers prior to August one, eighteen hundred and seventy-two, which has not been exhausted by the quantity of spirits distilled as provided by law, shall be refunded, upon proper application, out of any money arising from internal taxes, not otherwise appropriated.
[R. S.]

Act of June 6, 1872, ch. 315, 17 Stat. L. 238.

This section may be regarded as temporary and executed.

Sec. 3246. [Special tax not payable by vintners, apothecaries, manufacturing chemists, etc., in certain cases.] Nothing in this chapter shall

be construed to impose a special tax upon vintners who sell wine of their own growth, or manufacturers who sell wine produced from grapes grown by others, at the place where the same is made or at the general business office of such vintner or manufacturer: *Provided*, That no vintner or manufacturer shall have more than one office for the sale of such wine that shall be exempt from special tax under this Act; nor shall any special tax be imposed upon apothecaries as to wines or spirituous liquors which they use exclusively in the preparation or making-up of medicines.

Nor shall any special tax be imposed upon manufacturing chemists or flavoring extract manufacturers for recovering tax-paid alcohol or spirituous liquors from dregs or marc of percolation or extraction if said recovered alcohol or spirituous liquors be again used in the manufacture of flavoring extracts. [R. S.]

The section as originally enacted was as follows:

"SEC. 3246. Nothing in this chapter shall be construed to impose a special tax upon vintners who sell wine of their own growth at the place where the same is made; or upon apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making up of medicines." Act of July 13, 1866, ch. 184, 14 Stat. L. 122.

It was amended by an Act of March 1, 1879, ch. 125, § 5, 20 Stat. L. 334, to read as follows:

"SEC. 3246. Nothing in this chapter shall be construed to impose a special tax upon vintners who sell wine of their own growth, or manufacturers who sell wine produced from grapes grown by others, at the place where the same is made or at the general business office of such vintner or manufacturer: *Provided*, That no vintner or manufacturer shall have more than one office for the sale of such wine that shall be exempt from special tax under this act; nor shall any special tax be imposed upon apothecaries as to wines or spirituous liquors which they use exclusively in the preparation or making-up of medicines."

It was again amended by an Act of March 3, 1915, ch. 78, 38 Stat. L. 893, by adding the last paragraph, beginning with the words "Nor shall any special tax" to the end thereof, making the section to read as given in the text.

Apothecaries.—The exemption as to apothecaries in this section does not embrace one who recovers alcohol from a substance with which it has been previously mixed. *Wampole v. U. S.*, (C. C. A. 3d Cir. 1911) 191 Fed. 573, 112 C. C. A. 633, wherein the court said: "Such a person is not one of the 'apothecaries' referred to in the exempting clause, [which] . . . provides that no compounding who is an apothecary shall be liable for the special tax as to any spirits which he uses exclusively in the preparation of medicine. The recovery of spirits from the dregs of the vanilla bean or ginger root is not the business of an apothecary; the use of spirits in compounding medicines is. The exempting clause relates to the latter and not the former business."

A distiller of alcohol from oleoresin, ob-

tained from ginger root in the manufacture of a ginger ale paste, which alcohol so obtained is again used in obtaining ginger extract by percolation, is not engaged in business as an "apothecary," and is not exempt from liability for the internal revenue taxation as a rectifier, purifier, or refiner of distilled spirits by this section, exempting apothecaries from liability to taxation for the distillation of spirits used exclusively in the preparation of medicines. *U. S. v. S. Twitchell Co.*, (1911) 184 Fed. 525; *U. S. v. Hance*, (1911) 184 Fed. 528; *U. S. v. Smith, etc., Co.*, (1911) 184 Fed. 532.

Physicians.—A physician who has not paid the special tax cannot keep on hand a supply of spirituous liquor, and sell it out to his patients, even if he does this in the way of prescription. *U. S. v. Smith*, (1891) 45 Fed. 115.

SEC. 16. [Carrying on business without paying special tax, or with intent to defraud — penalty and forfeiture.] That any person who shall carry on the business of a rectifier, wholesale liquor-dealer, retail liquor-dealer, wholesale dealer in malt-liquors, retail dealer in malt-liquors, or

manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intending [intended] to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, inclosures connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or enclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard, or enclosure, and all the right, title, and interest, of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States. [18 Stat. L. 310.]

The provisions of the text and of the following section 18 are from the Act of Feb. 8, 1875, ch. 36. Sec. 17 of this Act relating to fixing imitation stamps on packages of distilled spirits is given under subdivision V of this title, vol. 4.

This section would seem to supersede, in part at least, R. S. sec. 3242, given *supra*, p. 1044.

The provisions of the text in respect of distillers are a re-enactment, with slight change, of those of R. S. sec. 3281 given in vol. 4, div. V of this title.

Purposes of law.—While the cardinal purposes of the provisions of the Internal Revenue Law imposing taxes on dealers in liquors is the raising of revenue for the United States, the federal courts may properly, in the exercise of the powers vested in them, rigidly enforce the penalties provided for a violation of such law, for the secondary purpose of aiding in the enforcement of the laws of a state regulating or prohibiting the sale of liquors. *In re Charge to Grand Jury*, (1908) 162 Fed. 736.

Who are "wholesale dealers"—Grocer.—A grocer, who never sold liquor in large or small quantities, received a letter from B., living in the country, telling him to purchase for him a barrel of whiskey of a certain brand and quality, and for a fixed price, and send it to him; the grocer purchased the whiskey from a liquor dealer and forwarded it direct to B., and made an entry in his books against him for the amount which he paid for the whiskey, not charging any profits or com-

mission; the liquor dealer charged the same amount in his books against the defendant. It was held that such facts did not warrant a conviction of the defendant for carrying on the business of a wholesale liquor dealer without a license. *U. S. v. Howell*, (1884) 20 Fed. 718.

Members of a "protection union," who were licensed retail liquor dealers, and organized themselves into an association for the purpose of ordering beer direct from a brewery, and established a place of deposit to which consignments of beer were shipped by the brewery, deliveries being made from such deposit to the individual members upon order made to the secretary and treasurer of the union, were held to be wholesale liquor dealers. *U. S. v. Kallstrom*, (1887) 30 Fed. 184.

Commission merchants.—Commission merchants were held to be wholesale liquor dealers when they, as the agents of certain foreign principals, purchased from time to time for shipment to their principals, and either charged the costs and

their commissions upon their books to the account of the foreign correspondents, or drew upon them for the full amount of the purchase price, together with the costs incurred and their commission or profit in the transaction. *Quinn v. Dimond*, (C. C. A. 1896) 72 Fed. 993, 44 U. S. App. 469, 19 C. C. A. 336.

Who are "retail dealers" — Generally.—"When a person has procured spirituous liquor with the intent to sell it out again in small quantities to any one who may apply for it, or, having it on hand, determines to sell it out to any one who may apply for it, he must pay the special tax. If he does not, his attempt to carry out his intent is a violation of the law, for he is engaged in the business of retail liquor dealer without having paid the special tax." *U. S. v. Rennecke*, (1886) 28 Fed. 847, wherein the court said: "The defendants are indicted for the violation of section 3242, R. S. [*supra*, p. 1044], in that they carried on the business of retail liquor dealers without having paid the special tax. The question you must answer by your verdict is, did they carry on the business of retail liquor dealers? The sale of liquor on more than one occasion has been testified to by several witnesses. In answering this question regard must be had to the circumstances attending the sale. If the sale was under such circumstances as indicated that the defendants had the liquor on hand to be sold to any one who applied for it, then they may be said to have been engaged in the business, although but one act of selling has been proved. On the other hand, if they permitted a neighbor or friend to have a part of the supply of whiskey which they had on hand for their own use, and did this in a spirit of accommodation, they could not be said to be engaged in the business, even if they received money for this accommodation. *U. S. v. Jackson*, [1875] 1 Hughes 532 [26 Fed. Cas. No. 15,455]. In answering this question, you need not be influenced by the fact that no proof has been given that the defendants had no bar-room, nor the usual appliances of retail liquor dealers, although stress was laid upon this in the case in *Hughes*."

Clerk or hired servant.—A clerk or hired servant, acting not for himself but as the employee of another, cannot be convicted for carrying on the business of retailing spirituous liquors without license. *U. S. v. Logan*, (1867) 26 Fed. Cas. No. 15,624.

Testimony of the defendant that he kept a book in which he entered the names of all persons who employed him to procure beer or liquor for them, and that if any one wished to employ his services to procure a bottle of beer, he required him to make a payment, and on delivery to pay

a further sum as remuneration for his trouble in going to another state and getting the beer, and further evidence showing that when a number of orders had been received the defendant would procure the liquor and then deliver it when called for, were held not to sustain the claim of the defendant that he was acting simply as an express agency and that he was in fact merely an agent for the parties who gave him orders for the beer or liquor, when the evidence failed to show that he bought specific quantities of beer or liquor to correspond with specific orders previously given to him, but, on the contrary, showed that he bought the beer by the case and delivered it to customers by the bottle. *U. S. v. Allen*, (1889) 38 Fed. 736.

Where the defendant purchased liquor in his own name and had the same billed to him in his own name, and dealt it out from time to time as called for, he was held to be a retail dealer notwithstanding that the money for the purchase of the liquor was advanced to him by various persons, and he procured and dealt out the same without profit to himself. *U. S. v. Angell*, (1881) 11 Fed. 34.

Club or members thereof.—A club organized for the purpose of social enjoyment is liable for the payment of the special tax as a retail dealer in liquors when it sells drink to its members when they order and receive this kind of refreshment, and pay for it. *U. S. v. Alexis Club*, (1899) 98 Fed. 725.

An association, formed for the purpose of providing the members with liquor and beer to drink as they wanted it, was held to be a partnership engaged in the business of retailing liquor, in which all the members were partners and liable for carrying on the business without paying special tax, and the fact that none but members of the association were allowed to partake of the liquor, and that it was done without any attempt to make a profit, made no difference. *U. S. v. Roliger*, (1882) 27 Fed. Cas. No. 16,190a. But see *Com. v. Smith*, (1869) 102 Mass. 144.

Under the statute law of Georgia which makes it unlawful for any person to sell or barter either directly or indirectly or to keep or furnish at any public place, or to keep on hand at any place of business, intoxicating liquors, a municipal corporation cannot lawfully license or charter a so-called "locker club" which, in fact, sells or furnishes liquors to its members, and such illegal charter is no protection to its members, each one of whom, who by his money, name, or patronage contributes to its support and maintenance, is a retail liquor dealer within the Internal Revenue Law of the United States, subject to special tax as such and to the penalty imposed for carrying on the business without payment of such tax where a single tax stamp

only is taken out in the name of the club. *In re Charge to Grand Jury*, (1908) 162 Fed. 736.

Janitor of club.—A club, formed for the purpose of social amusement, owned certain spirituous liquors, and kept them for the use of the members of the club, who were entitled to use them on paying the janitor the value thereof, which went into the treasury of the club. The janitor was held to be a retail dealer. *U. S. v. Woods*, (1878) 28 Fed. Cas. No. 16,759.

Officer of benevolent association.—An officer of a benevolent association duly incorporated was held guilty of the offense of selling malt liquors without the payment of a license tax where it appeared that it was the custom of the society to assemble the members and their families at picnics, and that on entering the grounds the members obtained as many tickets as desired from the proper officer, paying five cents each, and each ticket entitled the holder to any one article of refreshment provided by the society, which included beer. *U. S. v. Giller*, (1892) 54 Fed. 656. See also *U. S. v. Wittig*, (1876) 2 Lowell 466, 28 Fed. Cas. No. 16,748.

Officer of army in charge of post exchange.—An officer of the army in charge of a post exchange, in which beer and light wines are sold, is not a retail dealer in liquors within the meaning of the statute. *Dugan v. U. S.*, (1899) 34 Ct. Cl. 464.

Apothecary.—"An apothecary who bona fide uses spirituous liquor exclusively in the preparation or making up of medicines need not pay the special tax." See R. S. sec. 3246, *supra*, p. 1052. *U. S. v. Calhoun*, (1889) 39 Fed. 604. See *U. S. v. White*, (1890) 42 Fed. 138.

Physician.—A physician who has not paid the special tax cannot keep on hand a supply of spirituous liquor, and sell it out to his patients, even if he does this in the way of prescription. *U. S. v. Smith*, (1891) 45 Fed. 115.

Jury question.—It is for the jury to decide how many sales, and what preparation and appointments of a bar-room are necessary, in each case, to constitute the offense of carrying on the business of retailing liquor. *U. S. v. Jackson*, (1875) 1 Hughes 531, 26 Fed. Cas. No. 15,455.

"Carrying on business"—Single sale.—Proof of selling to one person is, at least, *prima facie* evidence of criminality, but the real offense consists in carrying on the business of a retail dealer in liquors, and if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental, or made under such circumstances as to indicate that it was not the business of the vendor. *Ledbetter v. U. S.*, (1898) 170 U. S. 606, 18 S. Ct. 774, 42 U. S. (L. ed.) 1162, *citing U. S. v. Jackson*, (1875) 1 Hughes 531, 26 Fed. Cas.

No. 15,455; *U. S. v. Rennecke*, (1886) 28 Fed. 847.

Although but one act of selling has been proved, if the sale was under such circumstances as indicated that the defendants had the liquor on hand to be sold to any who applied for it, then they may be said to have been engaged in the business. On the other hand, if they permitted a neighbor or friend to have a part of the supply of whiskey which they had on hand for their own use, and did this in a spirit of accommodation, they could not be said to be engaged in the business, even if they received money for this accommodation. *U. S. v. Rennecke*, (1886) 28 Fed. 847.

A single transaction, in respect to a lot of spirits taken for debt, affords no ground to infer that it was in prosecution of a business requiring the payment of a license as a wholesale liquor dealer. *U. S. v. Feigelstock*, (1877) 14 Blatchf. 321, 25 Fed. Cas. No. 15,084. See also *Rahter v. Lancaster First Nat. Bank*, (1880) 92 Pa. St. 393.

A few instances of selling liquor in small quantity by persons having no bar-rooms, and none of the usual appliances of retail liquor dealers, with no intention apparent of defrauding the national revenue, do not constitute a carrying on the business of retail liquor dealing. *U. S. v. Jackson*, (1875) 1 Hughes 531, 26 Fed. Cas. No. 15,455. See also *U. S. v. Logan*, (1867) 26 Fed. Cas. No. 15,624; *U. S. v. Angell*, (1881) 11 Fed. 34; *U. S. v. Bonham*, (1887) 31 Fed. 808.

Absence of bar-room.—The fact that there was no bar-room nor the usual appliances of retail liquor dealers need not influence the jury in determining the question whether the defendants were engaged in the business. *U. S. v. Rennecke*, (1886) 28 Fed. 847. See also *U. S. v. Harbison*, (1871) 26 Fed. Cas. No. 15,300.

Place of carrying on business—Filling orders at distance.—On an indictment for carrying on the business of retail liquor dealers without having paid the special tax, the court charged the jury: "If parties dealing in liquor, who have paid the special tax, receive orders for whiskey at the place of business, and fill the orders so that the sale is consummated at their place of business,—so consummated that the property in the liquor passes to the purchaser,—this is no violation of the law, although they may sell and may send the liquor to parties residing at a distance. If, however, they receive orders from persons at a distance, and in consequence of such orders they send out whiskey in barrels, and, going through the country, they draw from the barrels, and deliver in small quantities,—say a pint, quart, or gallon,—to parties who pay them on receipt of the liquor, this is a violation of the law; the property in the whiskey in the barrels remains in the sellers until it is delivered to the

purchaser. The sale is consummated upon the delivery of the whiskey, and it is not protected by the tax paid for sales at the distillery." *U. S. v. Durham*, (1888) 33 Fed. 834. See also *U. S. v. Cline*, (1885) 26 Fed. 515.

C. O. D. shipments.—In *Jones v. U. S.*, (1909) 170 Fed. 1, 95 C. C. A. 213, it was held that a retail liquor dealer who has his internal revenue tax paid stamp duly posted in his place of business is not subject to prosecution for carrying on business without paying the special tax therefor because of the shipment of a quantity of liquor from his stock on an order received by mail by an express company C. O. D. to the purchaser at another place. In such case the sale is completed and the property passes when the goods are delivered to the carrier; the collection and transmission of the price being merely an incident of the express business.

Branch house.—The defendant, a duly licensed wholesale and retail liquor dealer in San Francisco, Cal., maintained a branch house in Oregon, at Portland, over the door of which was painted the sign "F. Chevallier & Co., W. H. Fiske manager." The manager, who was also a "salesman," was authorized to sell, and he was required to sell, judiciously, but the right to cancel his contracts was reserved to the defendant in San Francisco, who filled all orders, and delivered the goods to a carrier at San Francisco, and consigned them to the purchasers in Oregon. It was held that such facts did not make the defendant liable to a special tax for carrying on the business of a wholesale and retail liquor dealer at Portland. "These facts constitute a sale at San Francisco, upon the receipt and acceptance of the order there, and the shipment of the goods from that point." *U. S. v. Chevallier*, (C. C. A. 1901) 107 Fed. 434, 46 C. C. A. 402, *affirming* (1900) 102 Fed. 125.

Duly licensed wholesale liquor dealers in New York imported wines and liquors at the port of New Orleans, which they caused to be stored in a warehouse, and, when sales were made in New York by the New York office direct to the trade at any place in the United States, deliveries of such goods were made to purchasers thereof on orders from the New York office to the warehouse people in New Orleans, with whom the imported goods were temporarily stored. They never had any place of business in New Orleans nor any agent there authorized to sell, or offer to sell, their goods. Such facts were held not to authorize the collection of a second tax as carrying on the business in New Orleans. *De Bary v. Souer*, (C. C. A. 1900) 101 Fed. 425, 41 C. C. A. 417.

Shipments of liquor by express, C. O. D., render the shipper liable to pay a special tax as a retail liquor dealer at the point of delivery. *U. S. v. Shriver*, (1885) 23 Fed. 134.

Persons affected by forfeiture provisions.—The forfeiture provisions of this section are applicable to distillers and rectifiers only. The court said that section 44 of the Act of July 20, 1868, from which this section and R. S. sec. 3281 (vol. 4, div. V of this title) were taken, did not indicate an intention to inflict upon a wholesale liquor dealer a forfeiture of his whole stock for an omission to pay a special tax, and the words "such person" had not reference to all the classes of persons previously mentioned. *Two Thousand Bottles of Liquors*, (1871) 5 Ben. 265, 24 Fed. Cas. No. 14,302.

Disposition of liquors on bond at expiration of license.—Having liquors on hand at the time a license expires gives no right to sell such surplus without further license. *U. S. v. Angell*, (1881) 11 Fed. 34.

Medicinal preparations—"Reed's Gilt Edge Tonic."—On an information against a boarding-house keeper for selling a beverage without license at a bar to all persons who called for it, the court charged the jury that "if the article sold was a medicine and contained spirits simply to preserve its medicinal qualities, and was sold and taken as a medicine in good faith, the defendant should be acquitted. But if the jury found from the evidence that the article was a compound containing such a quantity of spirits as to be intoxicating, and was sold by the defendant as a beverage, he knowing its intoxicating quality, and was drunk by persons not as a medicine, but as a beverage, because of its intoxicating and stimulating qualities; then, no matter by what name it was known or called, the defendant was guilty as charged." *U. S. v. Cota*, (1883) 17 Fed. 734.

"Diggs' Appetizer."—Charging the jury, the court said: "If as a matter of fact such preparation contains a large per cent., say as much as thirty per cent., as indicated by the evidence in this case, of alcohol, and the other ingredients of such bottle consist of nothing more than sugar and water, combined with some other substance like an herb, or the like, which other substance is inoffensive and possessing no curative quality or character, and that such preparation, although sold by the bottle, was sold by the vender as a beverage, or with knowledge of the fact that those purchasing it are buying it merely as a beverage, and because of the spirituous liquor contained in it, to realize its intoxicating or exhilarating influence as a beverage, such facts would constitute a sale of distilled spirits within the meaning of the statute." *U. S. v. Bray*, (1902) 113 Fed. 1009. See also *U. S. v. Starnes*, (1889) 37 Fed. 665, as to "Burton's Bitters."

"Lemon Ginger" and "Empire Tonic Bitters," which are preparations put up, advertised, and sold by the manufacturers as medicinal preparations, and contain

about one-third by weight of dilute alcohol, and in which it appears that the quantity of alcohol is not greater than is necessary to extract the virtues of the medicinal herbs employed and hold the same in solution, and is less than that contained in some ordinary tinctures, must be classed as medicinal preparations, and those who sell them are not retail liquor dealers within the meaning of the statute. *U. S. v. Stubblefield*, (1889) 40 Fed. 454.

Information or indictment — Generally.

—Retailing liquor without a license, being punishable by imprisonment for a longer period than one year, is an infamous offense, under R. S. secs. 5539, 5541, and 5542 (see PRISONS AND PRISONERS), and must be prosecuted upon presentment or indictment by the grand jury, and not on information. *U. S. v. Johannesen*, (1888) 35 Fed. 411. But see *U. S. v. Strickland*, (1885) 25 Fed. 469, as to the sufficiency of an affidavit to support an information, which, it was said, should substantially conform to the language of the statute, and is insufficient when it states that the prisoner "sold tobacco without paying the special tax."

Charging offense in language of statute.

—An indictment in the language of the statute, charging the defendant with carrying on the business of a retail liquor dealer without payment of a special tax, is sufficient, notwithstanding that section 18 of this Act of Feb. 8, 1875, given below, describes the offense with more particularity by defining a retail liquor dealer. An indictment in the exact language of the statute is not sufficient where the statute does not contain all the elements of the offense, but where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient though that offense be more fully defined in some other section. *Ledbetter v. U. S.*, (1898) 170 U. S. 606, 18 S. Ct. 774, 42 U. S. (L. ed.) 1162. See also *U. S. v. Page*, (1873) 2 Sawy. 353, 27 Fed. Cas. No. 15,988, in which case a similar indictment for carrying on the business of a wholesale liquor dealer, without license, was held sufficient. *U. S. v. Howard*, (1871) 1 Sawy. 507, 26 Fed. Cas. No. 15,402.

As to place.—An indictment alleging that the offense was committed in a certain county and district of Iowa, "and within the jurisdiction of this court," is not fatal upon a motion in arrest of judgment. The indictment should state, not only the county, but the township, city, or other municipality within which the crime is alleged to have been committed, and in the absence of such averments might be open to special demurrer, but is sufficient on motion in arrest of

judgment. *Ledbetter v. U. S.*, (1898) 170 U. S. 606, 18 S. Ct. 774, 42 U. S. (L. ed.) 1162.

As to time.—An indictment alleging that the offense of retailing liquor was committed "on the — day of April, A. D. 1896," is not fatal upon a motion in arrest of judgment. It is not necessary to prove that the offense was committed on the day alleged (if alleged), unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient. Such an indictment might be open to special demurrer for insufficiency as to the allegation of time, but upon motion in arrest of judgment the court considered it sufficient. *Ledbetter v. U. S.*, (1898) 170 U. S. 606, 18 S. Ct. 774, 42 U. S. (L. ed.) 1162.

Intent.—Intent to defraud the United States out of the tax or some part of it is no part of the offense of carrying on the business of rectifying spirits without having paid the special tax. Only two things are necessary to be averred and proved—the carrying on the business, and that the special tax was not paid as required by law. *U. S. v. Rectifying Establishment*, (1870) 27 Fed. Cas. No. 16,131. See *U. S. v. White*, (1890) 42 Fed. 138.

"The statute makes the act of selling, and not the good or bad intent of the seller, that which constitutes a retail dealer." *U. S. v. Giller*, (1892) 54 Fed. 656.

That he did not know that he could not lawfully sell spirituous liquor to his patients, even in the way of a prescription, without paying the special tax, is no defense to an indictment against a physician for carrying on the business of retailing liquor without license. *U. S. v. Smith*, (1891) 45 Fed. 115.

Retrospective effect of receipt for payment of taxes.—A receipt for the payment of taxes has no retrospective effect, and is no defense to an indictment for retailing without license. The statute makes the offending party liable to fine and imprisonment in addition to the payment of the tax, so that the payment of the tax is no release from the fine and imprisonment. *U. S. v. Angell*, (1881) 11 Fed. 34.

Verdict of acquittal as estoppel.—A verdict of acquittal, upon the trial of a criminal action, on the question whether the defendant did carry on the business of wholesale dealer in malt liquor, is not an estoppel to an action brought by the government against the same person to recover the amount of the special tax alleged to be due from him as such wholesale dealer. *U. S. v. Schneider*, (1888) 35 Fed. 107.

SEC. 18. [Retail and wholesale liquor dealers — retail and wholesale dealers in malt liquors.] That retail dealers in liquors shall pay twenty-

five dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine-gallons at the same time, shall be regarded as a retail dealer in liquors.

Wholesale liquor-dealers shall each pay one hundred dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in quantities of not less than five wine-gallons at the same time, shall be regarded as a wholesale liquor-dealer. But no distiller who has given the required bond and who sells only distilled spirits of his own production at the place of manufacture in the original packages to which the tax-stamps are affixed, shall be required to pay the special tax of a wholesale liquor-dealer on account of such sales.

Retail dealers in malt liquors shall pay twenty dollars. Every person who sells, or offers for sale, malt liquors in less quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors.

Wholesale dealers in malt liquors shall pay fifty dollars. Every person who sells, or offers for sale, malt liquors in quantities of not less than five gallons at one time, but who does not deal in spirituous liquors at wholesale, shall be regarded as a wholesale dealer in malt liquors. *Provided*, That no brewer shall be required to pay a special tax as a dealer by reason of selling in the original stamped packages whether at the place of manufacture or elsewhere, malt liquors manufactured by him, or purchased and procured by him in his own casks or vessels, under the provisions of section thirty-three hundred and forty-nine of the Revised Statutes; but the quantity of malt liquors so purchased shall be included in calculating the liability to brewer's special tax of both the brewer who manufactures and sells the same and the brewer who purchases the same: *And it is hereby provided*, That no further collection of special tax as retail dealers in malt liquors shall be made from brewers for selling malt liquors of their own manufacture in the original stamped eighth-barrell [*sic*] package: [18 Stat. L. 311, as amended by 20 Stat. L. 333.]

This was from the Act of Feb. 8, 1875, ch. 36. It was amended to read as given in the text by an Act of March 1, 1879, ch. 125, § 4, 20 Stat. L. 333.

The only change consisted in the addition of the words "at wholesale" following the words "in spirituous liquors," the omission of the word "wholesale" before "dealer" in the first proviso, and the addition of the latter part of the section, beginning with the words "or purchased and procured by him," etc.

A further provision relating to the remission of certain assessments is omitted as temporary and executed.

This section modified R. S. sec. 3244, subsections fourth and fifth, *supra*, p. 1048.

Who are "dealers"—*Express companies*.—In *Western Express Co. v. U. S.*, (1905) 141 Fed. 28, 72 C. C. A. 516, it appeared that the local agents of an express company in a prohibition state took orders from persons desiring beer and forwarded the same to breweries in another state. The breweries delivered the beer to the company for shipment to the agent who sent the order, charging the price to the company, and having no knowledge of the local customer. On its receipt the agent stored the beer in the company's warehouse until it was called for, and

then delivered it to the customer, collecting the price and the express charges, and accounting to the company for the same. He sometimes also sent orders which had not been requested, and delivered the beer to persons who thereafter applied for it. No receipts were taken from persons to whom beer was delivered, and their names did not appear on the company's books. When beer was not called for it was returned to the breweries, and the company given credit therefor. The company received nothing except the usual charges for transportation. It was held that the

company was not merely a carrier or a commercial broker in the transaction, but was, in effect, a commission merchant, and as such was subject to special tax under this section as a dealer in malt liquors at each of the agencies where such business was carried on.

Druggist.—Under this section and R. S. sec. 3248, in subdivision V of this title, vol. 4, it was held that where a druggist, without paying the internal revenue tax on retail liquor dealers, sold a medicinal preparation which was eighty-eight per cent. proof spirits, more than sufficient to preserve the medicinal properties of any herbs, roots, or drugs contained therein, he was a retail liquor dealer within such sections. *U. S. v. Morfew*, (1905) 136 Fed. 491.

For additional authorities of a similar nature see the notes to preceding section.

Ownership as essential element.—To render one who "sells or offers for sale" malt liquors subject to special tax as a dealer in malt liquors, under this section, his ownership of such liquors is not essential. *Western Express Co. v. U. S.*, (1905) 141 Fed. 28, 72 C. C. A. 516.

Place of carrying on business.—In *De Bary v. Dunne*, (1909) 172 Fed. 940, it appeared that the plaintiffs, who were wholesale liquor dealers in New York city, paid the special internal revenue tax

there and kept imported wines on storage with McC. & Co. at Portland, Oregon, from which jobbers in that city and vicinity were supplied. The plaintiffs delivered to McC. & Co. a list of dealers to whom they were authorized to deliver wines from the stock on storage when requested to do so by such dealers, not exceeding a certain number of cases in any one month. The persons or firms on such credit list, when desiring to purchase wines of plaintiff, delivered to McC. & Co. a written order for the number of cases desired, and if the maximum limit to which the purchaser was entitled for the current month had not been exceeded, McC. & Co. immediately delivered the goods without consulting plaintiffs, and reported the sale to them at New York, from whence an invoice for the goods at the current price would be shipped to the buyer and the price remitted to plaintiffs in New York. There was no contract that the accredited purchasers should buy any particular quantity per month, or any at all. It was held that sales made under such arrangements were made in Portland and not in New York, and that the plaintiff was therefore subject to the payment of a federal wholesale liquor dealer's tax in Oregon.

For additional authorities of a similar nature see the preceding section.

Joint resolution concerning special-tax stamps.

[*Res. of May 8, 1876, No. 10, 19 Stat. L. 213.*]

[**Special-tax stamps to retail dealers in liquors and tobacco on railway-trains, vessels, etc.**] That nothing contained in chapter three of title thirty-five of the Revised Statutes shall prevent the issue, under such regulations as the Commissioner of Internal Revenue may prescribe, of special-tax stamps to persons carrying on the business of retail dealers in liquors, retail dealers in malt liquors, or dealers in tobacco, upon passenger railroad-trains or upon steamboats or other vessels engaged in the business of carrying passengers. [*19 Stat. L. 213.*]

Chapter 3 of title XXXV of the Revised Statutes consists of sections 3232-3246, entitled "Special Taxes."

Special taxes imposed upon dealers in tobacco were repealed by Act of Oct. 1, 1890, ch. 1244, § 26, 26 Stat. L. 618, given in subdivision VII of this title, vol. 4.

SEC. 18. [Manufacture of wooden stills by registered distillers for their own use.] That subsection second of section thirty-two hundred and forty-four shall not apply to distillers in registered distilleries who manufacture for their own use wooden stills, but each of said distillers shall give notice

to the collector of the district in which his distillery is located of each still manufactured before the same is used. [21 Stat. L. 149.]

This is from the Carlisle Act of May 28, 1890, ch. 108.

R. S. sec. 3244, subsection second, mentioned in the text, is given *supra*, p. 1046.

SEC. 3. [Oleomargarine — special taxes on manufacturers of or dealers in.] That special taxes are imposed as follows:

Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine. And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said Act, and subject to the provisions thereof.

Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargarine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in oleomargarine on account of such sales.

Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine.

And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the persons upon whom they are imposed: *Provided*, That in case any manufacturer of oleomargarine commences business subsequent to the thirtieth day of June in any year, the special tax shall be reckoned from the first day of July in that year, and shall be five hundred dollars. *Provided further*, That wholesale dealers who vend no other oleomargarine or butterine except that upon which a tax of one-fourth of one per cent per pound is imposed by this Act, as amended, shall pay two hundred dollars; and such retail dealers as vend no other oleomargarine or butterine except that upon which is imposed by this Act, as amended, a tax of one-fourth of one cent per pound shall pay six dollars. [20 Stat. L. 290 as amended by 32 Stat. L. 194.]

This and the following section 4 are from the Oleomargarine Act of Aug. 2, 1886, ch. 840. See the notes to section 1 of said act, under subdivision X of this title, vol. 4.

This section was amended by the Act of May 9, 1902, ch. 784, 32 Stat. L. 194. The amendment consisted in the addition of the last sentence of the first clause as given in the text, and the addition of the second and last proviso at the close of the section.

Applicability of internal revenue laws.—The Oleomargarine Acts are complete in themselves, only those provisions of the general internal revenue statutes which are expressly enumerated therein being applicable thereto; and therefore a collector is not authorized to exact a penalty of fifty per cent. provided for by R. S. sec. 3176, *supra*, p. 1006, from a dealer for neglecting to make the proper return. *Craft v. Schafer*, (1907) 153 Fed. 175, 82 C. C. A. 349. See also *Grier v. Tucker*, (1907) 150 Fed. 658, *affirmed* (1908) 160 Fed. 611, 87 C. C. A. 513.

Manufacturer of oleomargarine.—The term "manufacturer of oleomargarine" applies not only to one who completes the whole process of manufacture for sale, including the use of artificial coloration, but to one who adds artificial coloration to oleomargarine manufactured by others and sells or disposes of it. *U. S. v. Orr*, (D. C. R. I. 1916) 233 Fed. 718.

The actual selling, vending, or furnishing of oleomargarine for use and consumption by others is not one of the necessary components of a manufacturer so as to require proof of actual selling, vending, or furnishing of some of the product to constitute the offense; the term "manufacturer" as so used being construed to mean one engaged in the business of selling, vending, or furnishing oleomargarine for consumption of others. *Vermont v. U. S.*, (1909) 174 Fed. 792, 98 C. C. A. 500.

"Any person."—The words "any person," as used in the third sentence of the first paragraph of this section, are not limited to licensed wholesale or retail dealers in oleomargarine, but are comprehensive enough to embrace any or all persons, whether licensed dealers or not, selling, vending, or furnishing oleomargarine to which they have added coloring matter to represent butter. *Vermont v. U. S.*, (1909) 174 Fed. 792, 98 C. C. A. 500.

"Dealer."—A hotel keeper bought oleomargarine through an agent of the wholesale house, the agreement, however, being that it should be shipped in the name of a merchant, who expressly stipulated that he was not to receive or handle or have anything to do with the goods except to see that they were paid for. The merchant acted thus merely as an accommodation, and he was to receive no profit therefrom. It was held that he was not subject to the special tax as being a dealer in oleomargarine under this section. *Hartzell v. U. S.*, (1897) 83 Fed. 1002.

Where a licensed retail dealer, being temporarily out of oleomargarine, borrowed an unbroken original manufacturer's package from another retailer, which, in his own place of business, he broke and sold as he was authorized to

do, and subsequently, when he had received a fresh stock from the manufacturer, he returned an unbroken package to the dealer from whom he had borrowed some, it was held that the facts failed to show that he was a "wholesale dealer" in oleomargarine within the meaning of that term as used in this section. *Weaver v. Ewers*, (C. C. A. 8th Cir. 1912) 195 Fed. 247, 115 C. C. A. 219.

A person, firm, or corporation may be a wholesale dealer in oleomargarine, although the sales are confined to one individual, firm, or corporation. To constitute a wholesale dealer, it is not necessary that the seller have two or more customers. *Mitchell v. Cole*, (N. D. N. Y. 1915) 226 Fed. 824, wherein the court said: "The question in this case is: Was the firm of Mitchell & Lewis, which made the transfers and sales of oleomargarine to Hall, Mitchell & Lewis, hereafter mentioned, at the time of such sales 'a wholesale dealer in oleomargarine'? If so, the tax and penalty was legally imposed and collected, and plaintiff cannot recover. If not, it was illegally imposed and collected, and judgment must be for the plaintiffs, inasmuch as it was paid under protest and all necessary preliminary steps have been taken to enable the plaintiffs to recover. There is no dispute as to the actual facts. In November, 1911, the plaintiffs, Frank A. Mitchell and George F. Lewis, under the firm name of Mitchell & Lewis, were engaged in the business of selling at retail oleomargarine and other articles, and had a retailer's license. Their place of business was at 107 Washington street, city of Binghamton, N. Y., and they had been doing this business at that place under this name for a long time. In November, 1911, said Mitchell and said Lewis formed a copartnership with one Hall, and this last-mentioned firm from then on did business under the firm name of Hall, Mitchell & Lewis at 155 Hawley street, in said city, and thereafter each firm carried on the same kind of business at their respective locations. Hall, Mitchell & Lewis also had a retail dealer's oleomargarine license. Neither of these firms manufactured oleomargarine, but from November, 1911, on each sold it at retail. Mitchell & Lewis purchased the oleomargarine desired for the business of both firms from a wholesaler, and had it charged and billed and delivered to Mitchell & Lewis at its said place of business, and paid therefor with its check. The amount of oleomargarine desired by Hall, Mitchell & Lewis for sale in its business was then sent to that firm by Mitchell & Lewis, and charged by the latter firm to Hall, Mitchell & Lewis at same price, which firm paid Mitchell & Lewis therefor

by its check, without profit. All these sales and transfers of the oleomargarine were made in the original packages. It is evident that Mitchell & Lewis and Hall, Mitchell & Lewis were two separate and distinct concerns. It is not the case of the same partners doing business under one firm name at one place and under another firm name at another place, and the one branch sending goods from the main place of business to the other place of business for sale there. Here Hall was the member of one firm, but not of the other, and the stocks of goods in the two stores were not owned by the same persons. It is clear that Mitchell & Lewis, having purchased the oleomargarine at wholesale, sold it, and sold it at wholesale in the unbroken original packages, to Hall, Mitchell & Lewis, which firm paid Mitchell & Lewis therefor. Here was every element of a sale—a seller, a purchaser, a fixed price, a delivery, and payment for the articles sold. It is immaterial that Mitchell & Lewis did not sell oleomargarine at wholesale to other dealers."

"Barter" as distinguished from "sale."—In *Ewers v. Weaver*, (1910) 182 Fed. 713, it appeared that the plaintiff and his brother were both retail dealers in oleomargarine, and had paid the tax for the first six months of 1910. The plaintiff, having purchased a wholesale shipment of oleomargarine, which had not arrived, borrowed from his brother a package of the same material which the brother had obtained from the same wholesale dealer from whom plaintiff's supply had been ordered. A few days thereafter the plaintiff's shipment arrived, and he returned to his brother the precise amount borrowed of the same product and brand. It was held that such a transaction constituted a barter, and not a sale, and did not subject the plaintiff to the tax imposed on wholesale dealers in oleomargarine.

Absence of unlawful intent.—The fact that a retail dealer really believes that the oleomargarine which he has sold is butter and not oleomargarine does not exempt him from the tax as provided in this section. *Eagle v. Nowlin*, (1899) 94 Fed. 446.

SEC. 4. [Penalty for carrying on business without paying tax.] That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law; shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousand dollars; and every person who carries on the business of a retail dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty nor more than five hundred dollars for each and every offense. [24 Stat. L. 209.]

See the notes to the preceding section 3 of this Act.

Manner of prosecution.—A violation of this section, while not in terms a misdemeanor, is in the nature of a criminal offense and may be prosecuted by information or indictment. *U. S. v. Joyce*, (1905) 138 Fed. 455.

Indictment.—Where a person is indicted for the unlawful sale of oleomargarine, in violation of this Act, it is sufficient to charge in the words of the Act that the defendant was carrying on the business of a wholesale or of a retail dealer, as the case may be, without having paid the tax required by law. *U. S. v. Joyce*, (1905) 138 Fed. 457; *Hart v. U. S.*, (C. C. A. 1910) 183 Fed. 368, 105 C. C. A. 588.

An indictment need not set out a statement of the facts which constitute the defendant a manufacturer. *Hart v. U. S.*, (C. C. A. 1910) 183 Fed. 368, 105 C. C. A. 588.

An indictment in the words of this Act was held not to be objectionable for indefiniteness nor for failure to negative that defendant was a manufacturer selling his own product in stamped packages at the place of manufacture, within the exception of the statute. *U. S. v. Joyce*, (1905) 138 Fed. 455.

Since the tax on oleomargarine is leviable when the substance is manufactured and sold or removed for consumption and use, an indictment alleging a manufacture and sale of oleomargarine without payment of the tax, and with intent to defraud the United States of the same and that it should not be paid, in the language of the statute, was not invalid, in the absence of an application for a bill of particulars, for failure to allege the specific means by which defendant attempted or intended to attempt to defraud the

United States. *Enders v. U. S.*, (C. C. A. 1911) 187 Fed. 754, 109 C. C. A. 502.

The previous section creates two classes of manufacturers, one manufacturing oleomargarine itself for sale, and the other those selling oleomargarine for consumption after adding artificial coloration; and hence an indictment against an alleged member of the second class for selling oleomargarine on which the tax was not paid is not defective for failure to contain the averment, applicable only to original manufacture, that the oleomargarine on which the tax was not paid was intended for sale. *Enders v. U. S.*, (C. C. A. 1911) 187 Fed. 754, 109 C. C. A. 502.

Special plea to indictment.—An indictment for the violation of the Criminal Code of Maryland, § 89, art. 27, as amended by Act of 1900, ch. 496, alleged that the party had in his possession with intent to sell within the state, and that he did unlawfully sell to a party therein

named, a certain quantity of oleomargarine "in imitation and semblance of yellow butter produced from pure and unadulterated milk and cream from the same." A special plea to the indictment, after confessing the possessions, alleged that the oleomargarine in question was a pure article of commerce of that name defined in the Act of Congress of Aug. 2, 1886. An objection to the plea that it was virtually a plea of general issue was overruled. *McAllister v. State*, (1902) 94 Md. 290, 50 Atl. 1046.

Evidence.—In *Vermont v. U. S.*, (C. C. A. 1909) 174 Fed. 792, 98 C. C. A. 500, the evidence was held to be sufficient to warrant a conviction of the defendants as manufacturers of oleomargarine for mixing coloring matter therewith to represent butter without having paid the federal tax and obtained the required license, and for selling, vending, or furnishing oleomargarine for use and consumption of others.

SEC. 53. [When special tax to be due — how reckoned — returns of special taxpayers.] That all special taxes shall become due on the first day of July, eighteen hundred and ninety-one, and on the first day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced to the first day of July following. * * * And it shall be the duty of special tax payers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence, as provided for in section three thousand one hundred and seventy-six of the Revised Statutes. [26 Stat. L. 624.]

This is from the Act of Oct. 1, 1890, ch. 1244, § 53, 26 Stat. L. 624, superseding R. S. sec. 3237, noted *supra*, p. 1042.

The omitted part of this section, indicated by asterisks, has expired.

R. S. sec. 3176 mentioned in the text is given *supra*, p. 1006.

See note to R. S. sec. 3232, *supra*, p. 1040.

SEC. 62. [Distillers selling product not liable to special tax.] That no distiller who has given the required bond and who sells only distilled spirits of his own production at the place of manufacture, or at the place of storage in bond, in the original packages to which the tax-paid stamps are affixed, shall be required to pay the special tax of a wholesale liquor dealer on account of such sales: *Provided*, That he shall be required to keep the book prescribed by section thirty-three hundred and eighteen of the Revised Statutes of the United States, or so much as shall show the date when he sent out any spirits, the serial numbers of the packages containing

same, the kind and quality of the spirits in wine gallons and taxable gallons, the serial numbers of the stamps on the packages, and the name and residence of the person to whom sent; and the provisions of section five of an Act entitled "An Act to amend the laws relating to internal revenue," approved March fifth [first] eighteen hundred and seventy-nine, as to transcripts, shall apply to such books. Any failure, by reason of refusal or willful neglect, to furnish the transcript by him shall subject the spirits owned or distilled by him to forfeiture. [28 Stat. L. 567.]

This is from the Revenue Act of Aug. 27, 1894, ch. 349.

The reference to the Act of "March fifth" was evidently intended to be the Act of March 1, 1879, ch. 125, § 5, which amended R. S. sec. 3318 and is incorporated therein as given under subdivision V of this title, vol. 4.

SEC. 3. [Filled cheese — special taxes on manufacturers of and dealers in — special taxes — wholesale dealers — retail dealers.] That special taxes are imposed as follows:

Manufacturers of filled cheese shall pay four hundred dollars for each and every factory per annum. Every person, firm, or corporation who manufactures filled cheese for sale shall be deemed a manufacturer of filled cheese.

Wholesale dealers in filled cheese shall pay two hundred and fifty dollars per annum. Every person, firm, or corporation who sells or offers for sale filled cheese in the original manufacturer's packages for resale, or to retail dealers as hereinafter defined, shall be deemed a wholesale dealer in filled cheese.

But any manufacturer of filled cheese who has given the required bond and paid the required special tax, and who sells only filled cheese of his own production, at the place of manufacture, in the original packages, to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in filled cheese on account of such sales.

Retail dealers in filled cheese shall pay twelve dollars per annum. Every person who sells filled cheese at retail, not for resale, and for actual consumption, shall be regarded as a retail dealer in filled cheese, and sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the persons, firms, or corporations upon whom they are imposed:

Provided, That all special taxes under this Act shall become due on the first day of July in every year, or on commencing any manufacture, trade, or business on which said tax is imposed. In the latter case the tax shall be reckoned proportionately from the first day of the month in which the

liability to the special tax commences to the first day of July following. [29 Stat. L. 253.]

This and the following section 4 are from the "Filled Cheese" Act of June 6, 1896, ch. 337. See the notes to section 1 of this Act given in subdivision XI of this title, vol. 4.

SEC. 4. [Penalties for not paying tax.] That every person, firm, or corporation who carries on the business of a manufacturer of filled cheese without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than four hundred dollars and not more than three thousand dollars; and every person, firm, or corporation who carries on the business of a wholesale dealer in filled cheese without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than two hundred and fifty dollars nor more than one thousand dollars; and every person, firm, or corporation who carries on the business of a retail dealer in filled cheese without having paid the special tax therefor, as required by law, shall, besides being liable for the payment of the tax, be fined not less than forty nor more than five hundred dollars for each and every offense. [29 Stat. L. 254.]

See the note to the preceding section 3 of this Act.

SEC. 36. [Mixed flour — special taxes on manufacturers or packers of.] That every person, firm, or corporation, before engaging in the business of making, packing, or repacking mixed flour, shall pay a special tax at the rate of twelve dollars per annum, the same to be paid and posted in accordance with the provisions of sections thirty-two hundred and forty-two and thirty-two hundred and thirty-nine of the Revised Statutes, and subject to the fines and penalties therein imposed for any violation thereof. [30 Stat. L. 467.]

This was from the War Revenue Act of June 13, 1898, ch. 448. See the notes to section 35 of this Act, given in subdivision XII of this title, vol. 4.

SEC. 4. [Process or renovated butter — special tax on manufacturers of or dealers in.] * * * That special taxes are imposed as follows:

Manufacturers of process or renovated butter shall pay fifty dollars per year and manufacturers of adulterated butter shall pay six hundred dollars per year. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof.

Wholesale dealers in adulterated butter shall pay a tax of four hundred and eighty dollars per annum, and retail dealers in adulterated butter shall pay a tax of forty-eight dollars per annum. Every person who sells adulterated butter in less quantities than ten pounds at one time shall be regarded as a retail dealer in adulterated butter.

Every person who sells adulterated butter shall be regarded as a dealer in adulterated butter. And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the person upon whom they are imposed. [32 Stat. L. 194.]

This and the following paragraph of the text are a part of the Act of May 9, 1902, ch. 784, § 4. See the notes to the first paragraph of this section 4, given in vol. 4 under subdivision X of this title.

[Penalties for not paying tax.] That every person who carries on the business of a manufacturer of process or renovated butter or adulterated butter without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a dealer in adulterated butter without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty nor more than five hundred dollars for each offense. * * * [32 Stat. L. 195.]

See the note to the preceding paragraph of this section.

SEC. 3. [Special taxes.] That on and after November first, nineteen hundred and fourteen, special taxes shall be, and hereby are, imposed annually as follows, that is to say:

This section 3 and the following section 4 are a part of the War Revenue Act of Oct. 22, 1914, ch. 331. See the notes to section 1 of this Act given under subdivision VI of this title, vol. 4.

By a Res. of Dec. 17, 1915, given under subdivision XX of this title, vol. 4, the provisions of this Act were continued in full force and effect until and including Dec. 31, 1916.

By an Act of Sept. 8, 1916, § 410, said Act of Oct. 22, 1914, ch. 331, and Res. of Dec. 17, 1915, were repealed. The repealing clause excepted sections 3 and 4 of the Act of Oct. 22, 1914, ch. 331, here given and provided that they should remain in force until Jan. 1, 1917. See Pamph. Supp. No. 8, p. 115, Fed. Stat. Ann.; 1918 Supp. Fed. Stat. Ann.

First. [Bankers.] Bankers shall pay \$1 for each \$1,000 of capital used or employed, and in estimating capital surplus and undivided profits shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus, and undivided profits for the preceding fiscal year. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this Act: *Provided*, That any

postal savings bank, or savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax.

Second. **[Brokers.]** Brokers shall pay \$30. Every person, firm, or company, whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, or other securities, for themselves or others, shall be regarded as a broker: *Provided*, That any person having paid the special tax as a banker shall not be required to pay the special tax as a broker.

Third. **[Pawnbrokers.]** Pawnbrokers shall pay \$50. Every person, firm, or company whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money loaned thereon, shall be deemed a pawnbroker.

Fourth. **[Commercial brokers.]** Commercial brokers shall pay \$20. Every person, firm, or company whose business it is as a broker to negotiate sales or purchases of goods, wares, produce, or merchandise, or to negotiate freights and other business for the owners of vessels, or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded as a commercial broker under this Act.

Fifth. **[Custom-house brokers.]** Custom-house brokers shall pay \$10. Every person, firm, or company whose occupation it is, as the agent of others, to arrange entries and other custom-house papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise, shall be regarded as a custom-house broker.

Sixth. **[Proprietors of theatres, etc.]** Proprietors of theatres, museums, and concert halls, where a charge for admission is made, having a seating capacity of not more than two hundred and fifty, shall pay \$25; having a seating capacity of more than two hundred and fifty and not exceeding five hundred, shall pay \$50; having a seating capacity exceeding five hundred and not exceeding eight hundred, shall pay \$75; having a seating capacity of more than eight hundred, shall pay \$100. Every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money is received, not including halls or armories rented or used occasionally for concerts or theatrical representations, shall be regarded as a theatre: *Provided*, That whenever any such edifice is under lease at the passage of this Act, the tax shall be paid by the lessee, unless otherwise stipulated between the parties to said lease.

Seventh. **[Proprietors of circuses.]** The proprietor or proprietors of circuses shall pay \$100. Every building, space, tent, or area where feats of horsemanship or acrobatic sports or theatrical performances not otherwise provided for in this Act are exhibited shall be regarded as a circus: *Provided*, That no special tax paid in one State, Territory, or the District of Columbia shall exempt exhibitions from the tax in another State, Territory, or the District of Columbia, and but one special tax shall be imposed for exhibitions within any one State, Territory, or District.

Eighth. **[Proprietors of shows, etc.]** Proprietors or agents of all other public exhibitions or shows for money not enumerated in this section shall pay \$10: *Provided*, That a special tax paid in one State, Territory, or the District of Columbia shall not exempt exhibitions from the tax in another

State, Territory, or the District of Columbia, and but one special tax shall be required for exhibitions within any one State, Territory, or the District of Columbia: *Provided further*, That this paragraph shall not apply to Chautauquas, lecture lyceums, agricultural or industrial fairs, or exhibitions held under the auspices of religious or charitable associations.

Ninth. [**Proprietors of bowling alleys and billiard rooms.**] Proprietors of bowling alleys and billiard rooms shall pay \$5 for each alley or table. Every building or place where bowls are thrown or where games of billiards or pool are played, and that are open to the public with or without price, shall be regarded as a bowling alley or a billiard room, respectively.

Tenth. [**Commission merchants.**] Commission merchants shall pay \$20. Every person, firm, or company whose business or occupation it is to receive into his or its possession any goods, wares, or merchandise to sell the same on commission shall be regarded as a commission merchant: *Provided*, That any person having paid the special tax as a commercial broker shall not be required to pay the special tax as a commission merchant: *Provided further*, That this provision shall not apply to commission houses run upon a cooperative plan. [*38 Stat. L. 750.*]

SEC. 4. [**Tobacco dealers and manufacturers.**] That on and after November first, nineteen hundred and fourteen, special taxes on tobacco dealers and manufacturers shall be and hereby are imposed annually as follows, the amount of such annual taxes to be computed in all cases on the basis of the annual sales for the preceding fiscal year:

Dealers in leaf tobacco whose annual sales or transfers do not exceed fifty thousand pounds shall each pay \$6. Dealers in leaf tobacco whose annual sales or transfers exceed fifty thousand and do not exceed one hundred thousand pounds shall pay \$12, and if their annual sales or transfers exceed one hundred thousand pounds shall pay \$24: *Provided*, That dealers in leaf tobacco whose annual sales or transfers do not exceed one thousand pounds shall be exempt from the tax herein imposed on dealers in leaf tobacco.

Dealers in tobacco, not specially provided for in this section, whose annual receipts from the sale of tobacco exceed \$200, shall each pay \$4.80 for each store, shop, or other place in which tobacco in any form is sold.

Every person whose business it is to sell, or offer for sale, manufactured tobacco, snuff, cigars, or cigarettes shall be regarded as a dealer in tobacco: *Provided*, That no manufacturer of tobacco, snuff, cigars, or cigarettes shall be required to pay a special tax as a dealer in manufactured tobacco, snuff, cigars, or cigarettes for selling his own products at the place of manufacture.

Manufacturers of tobacco whose annual sales do not exceed one hundred thousand pounds shall each pay \$6.

Manufacturers of tobacco whose annual sales exceed one hundred thousand and do not exceed two hundred thousand pounds shall each pay \$12.

Manufacturers of tobacco whose annual sales exceed two hundred thousand and do not exceed four hundred thousand pounds shall each pay \$24.

Manufacturers of tobacco whose annual sales exceed four hundred thousand and do not exceed one million pounds shall each pay \$60.

Manufacturers of tobacco whose annual sales exceed one million and do not exceed five million pounds shall each pay \$300.

Manufacturers of tobacco whose annual sales exceed five million and do not exceed ten million pounds shall each pay \$600.

Manufacturers of tobacco whose annual sales exceed ten million and do not exceed twenty million pounds shall each pay \$1,200.

Manufacturers of tobacco whose annual sales exceed twenty million pounds shall each pay \$2,496.

Manufacturers of cigars whose annual sales do not exceed one hundred thousand cigars shall each pay \$3.

Manufacturers of cigars whose annual sales exceed one hundred thousand and do not exceed two hundred thousand cigars shall each pay \$6.

Manufacturers of cigars whose annual sales exceed two hundred thousand and do not exceed four hundred thousand cigars shall each pay \$12.

Manufacturers of cigars whose annual sales exceed four hundred thousand and do not exceed one million cigars shall each pay \$30.

Manufacturers of cigars whose annual sales exceed one million and do not exceed five million cigars shall each pay \$150.

Manufacturers of cigars whose annual sales exceed five million and do not exceed twenty million cigars shall each pay \$600.

Manufacturers of cigars whose annual sales exceed twenty million and do not exceed forty million cigars shall each pay \$1,200.

Manufacturers of cigars whose annual sales exceed forty million cigars shall each pay \$2,496.

Manufacturers of cigarettes whose annual sales do not exceed one million cigarettes shall each pay \$12.

Manufacturers of cigarettes whose annual sales exceed one million and do not exceed two million cigarettes shall each pay \$24.

Manufacturers of cigarettes whose annual sales exceed two million and do not exceed five million cigarettes shall each pay \$60.

Manufacturers of cigarettes whose annual sales exceed five million and do not exceed ten million cigarettes shall each pay \$120.

Manufacturers of cigarettes whose annual sales exceed ten million and do not exceed fifty million cigarettes shall each pay \$600.

Manufacturers of cigarettes whose annual sales exceed fifty million and do not exceed one hundred million cigarettes shall each pay \$1,200.

Manufacturers of cigarettes whose annual sales exceed one hundred million cigarettes shall each pay \$2,496.

In arriving at the amount of license tax to be paid hereunder, and in the levy and collection of such tax, each person, firm, or corporation engaged in the manufacture of cigars, cigarettes (including little cigars), or tobacco shall be considered and deemed a single manufacturer.

And every person who carries on any business or occupation for which special taxes are imposed by this Act, without having paid the special tax herein provided, shall, besides being liable to the payment of such special tax, be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than \$500, or be imprisoned not more than six months, or both, at the discretion of the court: *Provided*, That the special taxes imposed by this Act and payable during the special tax year ending June thirtieth, nineteen hundred and sixteen, shall be collected and paid proportionately for the period during which such taxes shall remain in force during said year. [38 Stat. L. 752.]

See the note to the first paragraph of the preceding sec. 3 of this Act, *supra*, p. 1067.

[INTERNAL REVENUE is concluded in vol. 4.]

INDEX

N. B. A part of the article INTERNAL REVENUE is in Vol. 4, and references thereto are made accordingly.

DIPLOMATIC AND CONSULAR OFFICERS:

Consular officers:

- Accepting position of trust, bond, 42
- Application of general provisions, 18
- Appointment of consular clerks, 29
- Appointment, power, etc., of consuls-general at large, 21
- Auditor of state or other department as conservator, 30
- Bonds, 25-26
- Breach of trust, 43
- Certificate for goods from countries adjacent United States, 34
- Certifying invoices, 33
- China, interpreter to consulate, 40
- Citizenship of clerks, 22
- Classification of consuls-general and consuls, 18
- Commercial agencies abolished, 21
- Commercial and agricultural information, 32
- Construction of powers, 33
- Consular assistants, number, 44
- Consular service reorganized, 19
- Corrupt conduct, 39
- Deputy consul-general, office abolished, 45
- Deputy consul, office abolished, 45
- Diplomatic functions performed by, 40
- Directions of decedent to be followed, 31
- Documentary stamps, 23
- Embezzlement, 38, 43
- Estates of decedents, 30
- Examination of clerks, 29
- Expenses of vice-consulates and consular agencies, 25
- Expenses of consuls-general, 30
- Extent of consulates and appointment of vice-consular officers, 24
- False certificate of property, 40
- Fees (see *infra*, Provisions common to diplomatic and consular officers):
 - Disposition of, 22
 - Exacting excessive, 33, 35
 - Excess above \$1,000, 38
 - Excess above \$2,500, 38
 - For official services, 34
 - Invoice fees, 23
 - Notarial services, 22
 - Omission to collect, penalty, 36
 - Rates to be posted, 37
 - Receipts for, 36
 - Registering receipts, 37
 - Return of, 36, 42

DIPLOMATIC AND CONSULAR OFFICERS — *Cont'd*

Consular officers — *Cont'd*

Fees — *Cont'd*

- Services to American vessels and seamen, 42
- Verification of account, 37
- Verifying invoices, 33
- Inspectors of consulates, 21
- Japan, interpreter to consulate, 40
- Lists of returns of seamen, vessels, etc., 30
- Neglect of duty, etc., 39
- Notice of death of citizen, 31
- Notarial acts, fees, 22
- Not to hold office at different consulates, 23
- Prices current, 32
- Profit from discharged seamen, 34
- Protests, 30
- Removal of clerks, 29
- Reorganization of consular service, 19
- Retention of vessel's papers, 34
- Salaries:
 - Alien consulate officers, 43
 - Bangkok, interpreter, 24
 - Consular clerks, 44
 - Consuls-general at large, 21
 - Consuls-general, consuls, 19, 45
 - Vice-consuls acting as consuls, 41
 - When performing diplomatic functions, 40
- Statements as to exports, rates of wages, etc., 41
- Temporary service of consuls, 21
- Tonnage fees in Canada, 35
- Transacting business, 28
- Trinidad de Cuba, consul, 24
- Unstamped documents, validity, 23
- Vice and deputy officers, 21
- Vice-consul at Shanghai, judicial authority, 44
- Vice-consul-general, office abolished, 45.

Consular Reorganization Act, 19

Consular Reorganization Act of 1915, 54

Diplomatic officers:

- Argentina, ambassador to, 18
- Buildings at Peking, 16
- Chile, ambassador to, 18
- Citizenship of clerks at embassies and legations, 18
- Creation of new ambassadorships, 17
- Definition of designations, 9

DIPLOMATIC AND CONSULAR OFFICERS — *Cont'd***Diplomatic officers — *Cont'd***

Envoys extraordinary and ministers plenipotentiary, 10
 Fees at legations, accounting for, 15
 Guatemala, minister to, 13
 Hayti, representative to, 14
 Honduras, minister to, 13
 Japan, interpreter of legation, 13
 Liberia, representative to, 14
 Nicaragua, minister to, 13
 Official costumes, 16
 Paraguay, minister to, 17
 Salaries:

Agent and consul-general at Cairo, 12, 16
 Ambassadors, 10
 Chargé d'affaires, 14
 Interpreter of legation to Japan, 13
 Interpreter of legation to Turkey, 13
 Person filling two offices, 15
 Second secretary of legations, 11
 Secretaries, 14, 18
 Secretary of legation and messenger at Paris, 16
 Secretary of legation to Turkey, 12
 Salvador, minister to, 13
 Secretaries, see *supra*, Salaries
 Secretary or vice-consul temporarily occupying higher office, 14
 Spain, ambassador to, 17
 Teheran, chargé d'affaires, consul-general, 16
 Turkey, interpreter of legation, 13
 Uniforms, 16
 Uruguay, minister to, 17

Foreign relations:

Aid of local authorities, 64
 Assaulting public minister, 55
 Associates in civil cases, 66
 Associates in criminal trial, 65
 Compromise in civil cases, 64
 Compromise of criminal cases, 64
 Consul, defined, 73
 Court-house and jail in Jeddo, 71
 Decisions of consul sitting alone in criminal cases, 65
 Disputes between seamen:
 Arrest, 58
 Commitment and discharge, 59
 Powers of foreign consuls, 57
 Evidence in consular courts, 63
 Expenses of prisons in foreign countries, 70
 Fees, judicial services, 69
 Judicial duties, when devolve on Secretary of State, 72
 Jurisdiction:
 Appellate jurisdiction of ministers, 63
 Arrest, trial and sentence for criminal, 62
 Civil cases, 61
 Courts of Egypt, 73
 Courts of Ottoman government, 73

DIPLOMATIC AND CONSULAR OFFICERS — *Cont'd***Foreign relations — *Cont'd*****Jurisdiction — *Cont'd***

Crimes, 60
 Decisions of consuls, 63
 Generally, 60
 How exercised and enforced, 61
 In uncivilized countries, 62
 Ministers, 66-67
 Offenses against foreign government, 63

Keeping and feeding prisoners in China, Korea and Siam, 74
 Marshal's bond, 68
 Marshals of consular courts, 67
 Minister, defined, 73
 Ministers to make regulations for consular courts, 68
 Morocco, provisions extended to, 72
 Muscat, provisions extended to, 72
 Navigator Islands, provisions extended to, 72
 Persia, provisions extended to, 71
 Power to solemnize marriage, 59
 Process:

Against marshal, 68
 Against ministers and domestics, 56
 Execution and return, 67
 Penalty for issuing out or executing, 57

When may be issued, 57

Production of original bond, 68
 Provisions of title extended, 73
 Public access to list of names of ministers' servants, 57

Punishment:

Contempts, 65
 Execution of criminals, 65
 Fine or imprisonment, 64
 Murder, insurrection or rebellion, 65

Regulations:

Publication, 69
 Transmission to secretary of state, 69

Responsibility of diplomatic and consular officers, 67

Right to hold property in Turkey, 74

Suits on marshal's bond, 68
 Tripoli, provisions extended to, 72
 Tunis, provisions extended to, 72
 Turkey, provisions extended to, 71
 Violating safe-conduct of minister, 55

Lodge Act, 19

Provisions common to diplomatic and consular officers:

Absence from post, 46
 Absence, salary, 47
 Absence without leave, 52
 Accepting presents, 52
 Allowance to widow of officer deceased in foreign country, 49
 Buildings for diplomatic and consular establishments, 53
 Compensation to citizens only, 47
 Correspondence on public affairs, 52

DIPLOMATIC AND CONSULAR OFFICERS — *Cont'd*

- Provisions common to diplomatic and consular officers — *Cont'd*
 - Correspondence prohibited, 51
 - Depositions, 49
 - Estimates for rents and expenses, 53
 - Estimates of annual expenditures, 53
 - Expenses of legations, consulates, etc., 49
 - Expenses of officer detailed for special duty, 54
 - Extra compensation prohibited, 47
 - Fees (see *supra*, Consular officers):
 - Accounting for, 49
 - Regulation, 48
 - To be collected in coin, 49
 - Forging certificate of oath, 29
 - Perjury, 49
 - Promotions, 54
 - Recommendations for promotions, 54
 - Recommending persons for employment, 52
 - Regulation of appointment, 54
 - Regulations, 51
 - Secretaries and consuls, assignment for duty of department and state, 54
 - Term during which salary is payable, 45
 - Time of transit between posts, 52
 - Transacting private business, 55

DISCRIMINATING LAWS AND DUTIES:

- Countervailing duty on imports receiving export bounty, 81
- Denial of rights to United States fishing vessels, 78
- Discriminating against United States products, 79
- Merchandise imported in foreign vessels, 75, 82
- Passage of vessels through St. Mary's Falls canal, tolls, 80
- Suspension by President, 76, 77
- Suspension of commercial privileges to foreign vessels, 77
- Vessels of Prussia, 77
- Vessels of Spain, 77

EDUCATION:

- Agricultural and mechanical colleges:
 - Annual appropriations, 103, 107
 - Annual ascertainment of amounts due states, 106
 - Annual report, 106, 107
 - Apportionment of lands, 99
 - Conditions of land grants, 101
 - Co-operative extension work:
 - Course of instruction, 108
 - Inaugurated, 108
 - Loss or misapplication of moneys, 109
 - Payment of appropriations, 109
 - Reports, 109, 110
 - States entitled to share in appropriations, 110

EDUCATION — *Cont'd*

Agricultural and mechanical colleges — *Cont'd*

- Courses for teachers, 107
- Diminution of fund to be made up, 106
- Endowment fund, 100
- Expenses of management, 99
- Extension Works Act, 108
- Investment of proceeds, 100
- Land officers, fees, 102
- Land scrip, location, 102
- Method of payment of appropriations, 107
- Morrill Act, 99
- Nelson Amendment, 107
- Payments to states or territories, 105
- Public lands, donation, 99
- Reports by governors of states, 102
- Secretary of Interior, duties, 106
- Use of appropriations for buildings, 106
- Alcoholic drinks and narcotics, study of, 113
- Education of blind:
 - Annual report of trustees of American printing house for blind, 116
 - Fund to be held in trust, 114
 - Payment to American printing house for blind, 115
 - Permanent fund established, 114
 - Trust fund, 116
- Extension Works Act, 108
- Government literary and scientific collections:
 - Availability to students, 112
 - Distribution of duplicate specimens, 111
- Howard University:
 - Report on condition, receipts and disbursements, 116
 - Use of appropriation for theological department forbidden, 117
- Marine biological station:
 - Admission, 111
 - Authorized, 110
 - Donation of land for, 111
- Military instruction in schools and colleges:
 - Compensation of officer detailed, 94, 95
 - Detail of retired army officers as instructors, 93, 94
 - Detail of retired army officers as professors, 90, 91, 93
 - Number of officers detailed, 91, 92
 - Officers and arms for colleges, 89
 - Ordinance, issue of, 93, 94, 95
 - Rank of officers detailed, 95
 - Supplies for use of students, 95
- Morrill Act, 99
- Nautical instruction in schools and colleges:
 - Appropriation, 98
 - Detail and recall of officers, 98
 - Engineers detailed as professors, 96

EDUCATION — *Cont'd*

Nautical instruction in schools and colleges — *Cont'd*

Appropriation — *Cont'd*

Naval equipment, use of, 96
Retired officers of navy or marine corps as teachers, 96
Sentence to school as punishment for crime, 98
Vessels, 97

Nelson Amendment, 107

Office of education:

Bulletins, 89
Commissioner, 88
Established, 88
Rooms for office, 88

Study of alcoholic drinks and narcotics, 113

ELECTIONS:

Campaign Expenses Publicity Act, 120
Interference with freedom of elections, 118

Legal expenses, contest of elections, 126
Offenses, punishment, 126

Political committees, defined, 120

Publicity of Political Contributions Act, 120

Race, color or previous condition, 118

Senator, election by people, 126

ESTIMATES, APPROPRIATIONS, AND REPORTS:**Appropriations:**

Application of moneys appropriated, 137

Claims under exhausted appropriations, 152

Contingent funds, etc., 153

Disposal of balances, 151

Expenditures beyond appropriations forbidden, 138

Expenditure of balances, 150

Expenses of commissions and inquiries, 140

Footing of paragraphs, 153

For automobiles and carriages, 155

For private telephone service, 154

Lump-sum appropriations, 154

Payment of salary from lump-sum appropriations, 154

Permanent indefinite appropriations, 141

Proceeds of sale of old material, 151

Reappropriation of unexpended balance, 155

Restricted to fiscal year, 154

Restrictions on contingent, etc., appropriations, 140

Restrictions on purchase from contingent funds, 141

Restrictions on purchase of books, etc., 153

To be specifically made, 153

Unexpended appropriations to be recovered into treasury, 152

Estimates:

Amount of outstanding appropriations to be designated, 132

ESTIMATES, APPROPRIATIONS, AND REPORTS — *Cont'd***Estimates — *Cont'd***

Classification, indexing, etc., 133

Designation of official to supervise appropriation, 137

Extensions of heads of departments, 132

Extracts to be included in book of estimates, 133

Following preceding year's appropriation, 134

For appropriations for public works, 132

For lump-sum appropriations, 136

For printing and binding, 131

For salaries, 132

Manner of communicating by heads of departments, 131

Rearrangement, 135

Statement of prior appropriations, 133

Statement of proceeds of old material, 133, 135

Submission to Congress through Secretary of Treasury, 133

Time for submitting, 134

To be included in book of estimates, 134

Reports:

Annual reports by heads of departments, 156

Exchange of labor saving devices, 157

Of contingent expenses, 156

Of number and salaries of employees below standard of efficiency, 157

Statement of condition of business, 157

Time of making annual reports, 156

To be furnished to printer, 156

EVIDENCE:

Auditor for Post Office Department, statement of accounts, 204

Authentication of legislative acts and proof of judicial proceedings in states, 212

Books and writings, production and actions at law, 160

Books, invoices and papers in suits under revenue laws, 224

Books of treasury, indictment for embezzlement, 203

Books of treasury in suits against delinquents, transcripts, 199

Comptroller of the currency, instruments and papers of, 199

Department records and papers, copies of, 197

Depositions:

Admissibility of depositions in perpetuum, 192

De bene esse, 172-184

Following state usage, 225

In District of Columbia, 195, 196

EVIDENCE — *Cont'd***Depositions — *Cont'd***

- In perpetuum, 189
- Letters rogatory from United States courts, 196
- Transmission to court of depositions de bene esse, 185
- Under dedimus potestatem, 189, 193
- Exemptions without names of officers signing and countersigning, 222
- Foreign records relating to land titles, 221
- General land office, copies of records, 205
- Handwriting, 227
- Land records, to be certified, 222
- Land titles, copies of foreign records relating to, 221
- Mode of proof in common law actions, 168
- Mode of proof in equity and admiralty causes, 171
- National banks, organization certificates, 199
- Office of Solicitor of Treasury, copies of records, 199
- Post Office Department, copies of statements of demands, 205
- Post office records, copies, 204
- Power to order production of books and writings in actions at law, 160
- Proof of records, etc., kept in office not pertaining to courts, 220
- Records in former District of California, 225
- Returns-office, copies of returns, 204
- Subpoena duces tecum under dedimus potestatem, 194
- Taking testimony to be used in foreign countries, 222
- Testimony of witness before Congress, admissibility in criminal prosecutions, 166
- Treasury Department, certification of transcripts and copies, 227
- Witnesses:
 - Contempt, punishment, 223
 - Crimination, 223
 - Fees and mileage, 224
 - Under dedimus potestatem, 195
 - Who may be, 225

EXECUTION:

- Against officers of revenue, 232
- Appraisal of goods taken on fieri facias, 239
- Common law causes, 229
- Death of marshal after levy or sale, 239
- Discharge by President, 241
- Discharge from arrest or imprisonment, 237
- Discharge of poor debtor by Secretary of Treasury, 240
- Imprisonment for debt, 234
- Judgment debtor entitled to continuance, 231
- Personalty, how sold under order or decree of court, 243
- Privileges of jail limits, 238
- Purchase on execution, 239

EXECUTION — *Cont'd*

- Real estate, how sold under order or decree of court, 241
- Real estate, publication of sale, 243
- Stayed on conditions, 231
- To run in every State and Territory, 230

EXECUTIVE DEPARTMENTS:

- Annual reports of rented buildings, 260
- Annual reports of traveling expenses, 263
- Attorneys or counsel, 258
- Chief clerks, duties, 253
- Closing departments for deceased ex-officials, 260
- Departmental regulations, 250
- Department defined, 249
- Department of Commerce, 245
- Department of Justice, 245
- Department of Labor, 245
- Department of State, 245
- Department of the Interior, 245
- Department of the Navy, 245
- Department of the Treasury, 245
- Department of War, 245
- Details of employees to departments from outside District of Columbia, 262
- Details of employees to office of President, 263
- Discretionary authority of President, 256
- Enumeration, 245
- Expenditures for newspapers, 259
- Extra compensation, 257
- Heads of departments, salaries, 249
- Hours of business, 253
- Monthly and quarterly reports, 261
- Post Office Department, 245
- Recording clocks forbidden, 261
- Rented buildings, annual reports of, 260
- Reports, monthly and quarterly, 261
- Restriction on temporary appointments, 257
- Salaries of heads of departments, 249
- Subscriptions to periodicals, 263
- Temporary appointments, limited, 257
- Transfer of employees from department to another, length of service required, 262
- Useless papers, disposition, 260, 261
- Vacancies, how filled, 255, 256

EXTRADITION:

- Evidence on hearing, 281, 313
- Fees, costs, etc., how paid, 313, 315
- Fugitives from justice of foreign country, 265
- Fugitives from justice of state or territory, 286
- Hearing, 312
- Limitation of provisions relating to extradition, 283
- Opposing agent, penalty, 284, 311
- Powers of agent receiving offenders delivered by foreign government, 284
- Protection of accused, 283
- Public hearing, 312

EXTRADITION — *Cont'd*

- Resisting agent, penalty, 284, 311
- Subpoena of witnesses, 312
- Surrender of fugitive, 282
- Time allowed for extradition, 283
- Witnesses, fees, costs, etc., 313.

FALSE STAMPING:

- Article of merchandise, defined, 320
- Exemption of original packages from state laws, 320
- Gold articles, deviation allowed, 317
- Hallmark Act, 317
- Interstate transportation of falsely stamped gold or silver articles, 317
- Jewelers' Liability Act, 317
- Offenses, punishment, 320
- Plated goods, description, 319
- Seizure, forfeiture, etc., of falsely stamped goods, 317
- Silver articles, deviation allowed, 318
- Stamping "United States Assay" on gold, etc., penalty, 316
- State laws, exemption of original package from, 320
- Use of "sterling" or "coin" on plated goods, 319

FINES, PENALTIES AND FORFEITURES:

- Bailing of property in vacation, 327
- Bailing of property seized, 325
- Burden of proof in seizure cases, 322
- Customs revenue laws, payment to informers, 339
- Discharge of indigent convicts, 338
- Judgments for fines, collection, 327
- Limitations of suits or prosecutions, 330
- Mitigation or remission, 333, 336
- Officers and informers as witnesses, 338
- Poor convicts sentenced and imprisoned for fines, 328
- Refund or remission of fines assessed under laws relating to vessels or seamen, 340
- Remission under authority of Secretary of Treasury, 335
- Sale after condemnation, 326
- Seizure for forfeiture, 324
- Witnesses, officers or informers, 338

FISH AND FISHERIES:

- Annual estimates, 344
- Commissioner:
 - Absence, designation of officer to perform duties, 345
 - Appointment, 342
 - Duties, 343
 - Powers, 343
- Detail from revenue marine for fish commission, 344
- Executive departments to aid investigations, 343
- Fish commission vessels, 344
- Fish culture stations established, 344
- Regulation of fisheries:
 - Agreement for voyage, 345
 - Discharge of vessel on bond, 348

FISH AND FISHERIES — *Cont'd*

- Regulation of fisheries — *Cont'd*
 - Penalty for violating agreement, 346
 - Recovery of shares of fish, 347
 - Statement of expenditures, 344

FLAGS:

- Addition of stars, 350
- Collecting flags by Secretary of Navy, 350, 351
- Collecting flags by Secretary of War, 350
- Composition, 349
- Preservation, 351

FOOD AND DRUGS:

- Adulterated drugs, manufacture of, 358
- Adulterated food, manufacture of, 358
- Adulterated or misbranded goods for export, 360
- Adulterated or misbranded goods, interstate commerce in, 360
- Adulterated or misbranded goods, admission, 396
- Adulterations defined:
 - Confectionery, 371
 - Drugs, 371
 - Food, 371
- Butter, inspection of, 355
- Certificate of violations of act, 368
- Chemical examinations, 368
- Dairy and food products, false labeling of place of origin, 357
- Delivery of misbranded goods pending examination, 396
- Disposition of condemned articles, 392
- Examination of imported food and drugs, 396
- Food and Drugs Act, 358
- Guarantee from manufacturer, contents, 390
- Heyburn Act, 358
- Imitation dairy products subject to state laws, 353
- Insular possessions, 397
- Legal proceedings, 369
- Liability of corporations, 397
- Misbranding defined:
 - Drugs, 379
 - Food, 379
- Notice of results of chemical examinations, 368
- Nutritive investigations, 357
- Oleomargarine Act, 353
- Person defined, 397
- Pharmacy in China:
 - Consul defined, 407
 - Container of drugs, label, 406
 - Enforcement of regulation, 400
 - Fraudulent representation, 406
 - Licenses, 402-404
 - Penalties, 406
 - Preservation of prescriptions, 406
 - Regulations, 402
 - Sale of poisons, 404, 405
 - Unlicensed pharmacists, use of titles, 406

FOOD AND DRUGS — *Cont'd*

- Process and renovated butter, inspection, 355
- Renovated butter factories, sanitary regulations, 398
- Report of payments to state officials, 397
- Rules and regulations, 367
- Seizure of original packages, 392
- Terms defined:
 - Attorneys, 370
 - Food, 370
- Viruses, serums and analogous products
 - Enforcement of regulation, 400
 - False labels, 399
 - For domestic animals, 400
 - Inspection, 399
 - Interference with officers, 400
 - Interstate traffic, 398
 - Regulation of sale, 398
 - Regulations for licenses, 399

FREEDMEN:

- Accounts for expenditures, 409
- Acts continued in force, 409
- Bounty to colored soldiers, 410
- Retained bounty fund, disposition, 411
- Wife and children of colored soldiers, 410

GAME ANIMALS AND BIRDS:

- Eggs of game birds, importation, 414
- Lacey Law, 412
- Migratory birds, protection, 414
- Preservation, etc., 412
- Subject to state laws, 413

GARNISHMENT:

- Garnishee failing to appear, 417
- In suits by the United States, 417
- Issued when garnishee denies indebtedness, 417

GEOLOGICAL SURVEY:

- Acting director, 420
- Assignment of pay by employees, 421
- Details of officers, 419
- Director, appointment, duties, etc., 419
- Estimates for monographs and bulletins, 420
- Estimates to be itemized, 420
- Estimates to note number of persons employed, 421
- Publications, 419
- Purchase of books, 421
- Reimbursement of expenses of employees, 421
- Sale of cartographic, etc., data, 421
- Sale of copies of photograph slides, 422
- Scientific employees, 419
- Topographic surveys, 420

GUANO ISLANDS:

- Abandonment, right of, 426
- Claim of United States, 423
- Completion of proofs in case of death of discoverer, 424
- Criminal jurisdiction, 425

GUANO ISLANDS — *Cont'd*

- Employment of land and naval force, 426
- Exclusive privileges of discoverer, 424
- Notice and proofs of discovery, 424
- Regulation of trade, 425
- Restrictions upon exportation, 425

HABEAS CORPUS:

- Action by state authority pending proceedings, 480
- Allowance and direction of writ, 464
- Appeals, how taken, 479
- Appeals to Supreme Court, 481
- Application for writ, 462
- Body of party to be produced, 468
- Cases involving law of nations, notice, 474
- Counter-allegations, 469
- Day for hearing, 469
- Denial of return, 469
- Disposition of party, 469
- Form of return, 468
- Hearing:
 - Day for, 469
 - Summary, 469
- Judges, power to grant writs, 448
- Power of courts to issue writs, 427
- Power of judges to grant writs, 448
- Return:
 - Amendment, 469
 - Denial of, 469
 - Form of, 468
 - Time of, 467
- Summary hearing, 469
- Time of return, 467
- Writ when prisoner is in jail, 449

HAWAIIAN ISLANDS:

- American register for vessels, 527
- Annexation of territory:
 - Appointment of commissioners, 489
 - Appropriations, 490
 - Cession accepted, 486
- Ceded property, disposal, 531
- Chinese, certificate of residence for, 528
- Crown land free from trusts, 527
- Elections:
 - Altering boundaries of districts, 509
 - Disqualification of persons in military service, 508
 - Exemption of electors, 506
 - Holding elections, rules for, 508
 - Method of voting for representatives, 507
 - Method of voting for senators, 507
 - Military service on election day, 507
 - Qualification of voters for senators, 507, 508
- Executive:
 - Acting governor, 511
 - Appointment of officers, 517
 - Attorney-general, 511
 - Auditor and deputy auditor, 516
 - Commissioner of agriculture and forestry, 515
 - Commissioner of public lands, 511
 - Enforcement of law, 510

HAWAIIAN ISLANDS — Cont'd**Executive — Cont'd**

- Executive power, 509
- Governor, powers, 510
- High sheriff, 516
- Labor statistics, 516
- Salaries of officers, 517, 525
- Secretary of Territory, 510
- Superintendent of public instruction, 516
- Superintendent of public works, 515
- Surveyor, 516
- Tenure of officers, 517
- Treasurer, 511

Fishing rights, 526**Government of territory:**

- Citizenship, 491
- Construction of existing statutes, 494
- Definitions, 490
- Laws of Hawaii, 492
- Laws of United States, 491
- Laws repealed, 492
- Offices abolished, 494
- Official titles, 494
- Territorial government established, 491

Hawaiian Annexation Resolution, 486**Hawaiian coins:**

- Exchange for United States coins, 530
- Legal tender, limitations, 530
- Payment for mutilated coins, 530
- Recoinage, 530
- Silver coins receivable for government dues, 529

Hawaii Territorial Act, 490**House of representatives:**

- Apportionment, 500
- Districts, 500
- Number of representatives, 499
- Qualifications of representatives, 500
- Term of office, 499
- Vacancies, 499

Imports from Hawaii to United States, 525**Investigation of fisheries, 525****Judiciary:**

- Courts, 518
- Federal court, 521
- Laws in force, 519
- Supreme Court, 518

Legislation:

- Adjournments, 500
- Appropriations, 502
- Certification of bills from one house to other, 502
- Duration of session, 501
- Enacting clause, 501
- English language, 501
- Estimates, 503
- Extra and special sessions, 501
- Failure to appropriate for current expenses, 503
- Failure to sign or veto, 502
- Legislative power, 503
- Reading of bills, 501
- Sessions of legislature, 500
- Signing bills, 502

HAWAIIAN ISLANDS — Cont'd**Legislation — Cont'd**

- Title of laws, 501
- Town, city and county government, 506
- Veto of governor, 502
- Veto, procedure upon, 502

Legislature:

- Adjournment, 497
- Ascertaining quorum, 497
- Ayes and noes, 497
- Compensation of members, 498
- Disqualification of legislators, 496
- Disqualification of officers and employees, 496
- Exemption from liability, 498
- General elections, 496
- Idiots, convicts, etc., 496
- Judges of qualification of members, 496
- Legislative power, 495
- Oath of office, 496
- Officers and rules, 497
- Punishment of members, 498
- Punishment of persons not members, 497
- Qualification of members, 495
- Quorum, 497

Naturalization, 528**Newlands Resolution, 486****Officers, see *supra*, Executive, *infra*,****United States officers****Postage stamps, disposition, 524****Postal savings bank, 528, 529****Public officers, see *supra*, Executive, *infra*, United States officers****Public property ceded to the United States, disposition, 524****Quarantine, 528****Revenues from wharves, 523****Salaries of officers, 525****Senate:**

- Apportionment, 499
- Districts, 499
- Number of members, 498
- Qualifications of senators, 499
- Vacancies, 499

Silver certificates, redemption, 530**United States officers:**

- Delegate to Congress, 520
- Federal courts, 521
- International revenue district, 523

HEALTH AND QUARANTINE:**Epidemic Diseases Act, 547****National Board of Health Abolished, 554****Public Health and Marine Hospital Act, 538****Public health service:**

- Annual estimates, 541
- Appointment of medical officers, 538
- Appointments and promotions in service, 536
- Chiefs of divisions, 540
- Conference with state boards of health, 540
- Detail of commissioned medical officers, 539

HEALTH AND QUARANTINE — *Cont'd*

- Public health service — *Cont'd*
 - Detail of hospital attendants, 537
 - Detail of medical officers and hospital stewards, 537
 - Details of surgeons for duty in bureau, 536
 - Director of laboratory, 540
 - Established, 534
 - Hygienic laboratory, 538, 539
 - Investigations authorized, 534
 - Leaves of absence to medical officers, 537
 - Mortality, morbidity and vital statistics, 541
 - Officers' titles, 538
 - Regulations, 541
 - Salaries, 534, 535
 - Salaries of officers, 536
 - Salary of director of hygienic laboratory, 542
 - Supervising surgeon general, 535
 - Treasury department, jurisdiction, 541
 - Use of service in time of war, 538
- Public Health Service Act, 534
- Quarantine Act of 1906, 555
- Sanitation and quarantine:
 - Acceptance of state or municipal stations, 557
 - Adjournment of courts, 545
 - Bill of health from consul for vessel, 549
 - Compensation for use of state buildings, 554
 - Consular and sanitary reports, 552
 - Contagious disease:
 - Measure for preventing spread, 547
 - Offenses by common carriers, 548
 - Offenses by officers or agents, 548
 - Violation of regulation, 554
 - Control of stations, 556
 - Deposit of goods in warehouses, 544
 - Discharge of vessel in quarantine, 543
 - Disinfecting plants, 556
 - Erection of quarantine warehouses, 544
 - Extending time of vessel subject to quarantine, 544
 - Former Marine Hospital Service, duties, 552
 - Grounds and anchorages for vessels, 554
 - Infected vessels, 553
 - Jurisdiction of United States over stations, 558
 - Oaths, administration by medical officers, 555
 - Offenses against quarantine laws, 546
 - Preservation of state health laws, 542
 - Quarantine rule and regulations, 550
 - Removal of prisoners, 545

HEALTH AND QUARANTINE — *Cont'd*

- Sanitation and quarantine — *Cont'd*
 - Removal of public offices from capitol, 545
 - Removal of revenue officers in epidemics, 544
 - Report of expenditures for prevention of epidemics, 558
 - Rules to secure sanitary condition of vessels, 553
 - Selection of sites for stations, 556
 - Suspension of immigration, 554
 - Title to property procured for stations, 556
 - Unauthorized entry or departure from stations, 557
 - Vessels clearing without bill of health, 549
 - Vessels at disposal of quarantine authorities, 546
 - Vessels from foreign ports, entry, 548
 - Vessels from foreign port without bill of health, 555
 - Yellow fever stations, 555

HOLIDAYS:

- Holidays allowed for government employees, 559
- Holidays for employees of printing office, 560
- Labor day, 560
- Memorial day, 559

HOSPITALS AND ASYLUMS:

- Army and Navy Hospital:
 - Hot Springs, Arkansas, 574
 - Regulations for patients, 574
- Columbia Institute for the Deaf:
 - Books of estimates to show employees, 618
 - Colored deaf, 620
 - Control of disbursements, 619
 - Deaf mutes from District of Columbia, 620
 - Designation of institution, 621
 - Directors, term of office, 619
 - Election of officers, 616
 - Established, 615
 - Expenses of persons admitted from District of Columbia, 618, 619
 - Government directors, 616
 - Indefinite appropriation, 620
 - Instruction of feeble-minded children, 618, 619
 - Persons admitted from states and territories, 618
 - Pupils from District of Columbia, 616
 - Pupils from states and territories, 616
 - Report of deaf and dumb persons by justice of peace, 617
 - Report of superintendent, 618
 - Restrictions on disposal of real property, 615
 - Terms of deed made part of charter, 615

HOSPITALS AND ASYLUMS — *Cont'd*

Freedmen's hospital:
 Contracts for care and treatment of persons, 622
 Direction of Secretary of Interior, 621
 Estimates, 622
 Expenditures, 622
 Hospital continued, 621
 Government Hospital for Insane:
 Accommodation of insane convicts in state asylums, 605
 Annual report of superintendent, 607
 Applications, 602
 Board of visitors:
 Compensation, 599
 Powers and duties, 600
 President, 600
 Certificate of judge, or justice, 602
 Conveyance to hospital, 602
 Disbursement of appropriations, 604
 Disbursing agent, appointment and duties, 598
 Discharge of patients on bonds, 604
 Disposition of money of deceased inmates, 613
 Established, 598
 Funds of patients, 608
 Half of support of indigent insane, payment, 606
 Indigent insane admitted on order of executive authority, 606
 Indigent insane of District of Columbia, 601
 Inmates of National Home for Disabled Volunteers, 607
 Insane at Soldiers' Home, 608
 Insane convicts, 603
 Insane natives of Philippine Islands, 614
 Insane of army on Pacific coast, 609
 Insane person accused of crime, 603
 Insane person, confinement in jail, 604
 Insane person having property, 602
 Insane person of the army and navy marine corps, etc., 600
 Nonresidents of District of Columbia, 603
 Order of admission, 701
 Patients of public health service, 606
 Pay patients, 604
 Pension money of inmates, 598
 Per capita cost of patients, 615
 Private patients, 604
 Proceedings of commitment for indigent insane, 609
 Return to prison of convicts restored to sanity, 606
 Return to residence of indigent insane, 609
 Salary of superintendent, 614
 Sale of intoxicating liquors near hospital, 613
 Sale of surplus and waste material, 607

HOSPITALS AND ASYLUMS — *Cont'd*

Government Hospital for Insane—*Cont'd*
 Sale or exchange of condemned equipment, 615
 Superintendent, 598
 Supervision of Secretary of Interior, 607
 Transfer of insane convicts to hospital, 605
 Hospital relief for seamen:
 Cases for study, 571
 Employees of life-saving service, 570
 Foreign seamen admitted, 568, 570
 Lease of buildings, 570
 Officers and employees of public health service, 570
 Persons employed in canal boats and coasting trade, 568
 Power to receive gifts, 568
 Sale of marine hospitals, 568
 Seamen defined, 569
 Insane persons in District of Columbia:
 Arrest and pension, 610
 Arrest at other than public places, 610
 Detention pending formal commitment, 611
 Discharge, 611, 613
 False testimony, 612
 Proceedings in lunacy, 613
 Reports, 611
 Restoration to former legal status, 613
 Temporary commitment at other hospitals, 611
 Temporary detention at government hospitals, 611
 Validity of certificates, 612
 Leprosy hospital:
 Administration rules, 623
 Buildings, 622
 Compensation of officers, 623
 Established, 622
 Extra pay to officers, 623
 Medical officers, 623
 Treatment of patients, 623
 National Home for Disabled Volunteer Soldiers:
 Abolition of fines as funds, 586
 Accounting for disbursements, 591
 Accounts, 586
 Aid to state or territorial homes, 596
 Annual inspection, 592
 Annual report, 588, 592
 Application for admission, effect, 596
 Appropriations, 586, 589
 Appropriations for buildings, 593, 595
 Assignment of pensions, 585
 Auditing accounts, 594
 Board of managers, salaries, 593
 Bonds of depositories of funds, 589
 Bonds of treasurer, 591
 Classification of employees, 592
 Duties of board of managers, 586
 Election of citizen managers, 583

HOSPITALS AND ASYLUMS — *Cont'd*

National Home for Disabled Volunteer
Soldiers — *Cont'd*
Election of officer of board of man-
agers, 582
Estimates, 586, 589
Expenditure of appropriations for
new buildings, 597
Expenditures for new buildings, 587
Expenses in book of estimates, 590
Expenses of managers, 582
Funds for home, 584
General treasurer and assistants,
salaries and bond, 593
Headstones at Central Branch, 588
Inmates subject to articles of war,
586
Jurisdiction over sites, 594
Managers, salary, 592
Medical supplies, 592
Number of managers, 597
Obsolete cannon to be furnished
homes, 590
Obsolete ordinance, 593
Officer to assist treasurer and quar-
termaster, 594
Officers, 583
Officers, classification, 595
Organization, 582
Out-door relief, 585
Payment of pensions after death
of inmate, 395
Payment of pensions to treasurer,
588
Pensions of home, how paid, 588
Persons connected with liquor
traffic, eligibility to positions,
589
Persons entitled to benefits, 585, 597
Posthumous fund, 591
Purchase and distribution of sup-
plies, 593
Purchase to be made after adver-
tisement, 587
Quorum of managers, 597
Receipts of sales, 591
Report of expenditures, 589
Report to Congress, 585
Salary of president and secretary,
592
Sites for homes, 584
Supervision of accounts, 590, 591
Traveling expenses of officers, 592
Naval Hospital and Asylum:
Appropriation of fines, 571
Deduction from pay of seamen, 571
Employment of beneficiaries, 573
Forfeitures for desertion, 573
Government of naval asylum, 572
Money of deceased inmates, dis-
position, 573
Officers and men of naval and
marine corps, 573
Pension of seamen at hospital, 572
Pensions, disposition, 574
Purchase and erection of hospitals,
571
Rations to hospitals, 572
Sale of material, 574
Superintendence, 571

HOSPITALS AND ASYLUMS — *Cont'd*

Soldiers' Home:
Aid by out-door relief, 579
Board of commissioners, 575, 580,
581
Bond of treasurer, 579
Borrowing money on credit of home,
580
Custodian of funds, 580
Deposit of funds in United States
treasury, 580
Discharge, 578
Donations for benefit of institu-
tions, 576
Expenditures limited, 578
Funds, 576
Inmates subject to articles of war,
578
Liquor licenses within one mile, 581
Medical and hospital supplies, 581
Officers, 575
Officers to be selected by president,
579
Pensioners, rights of, 577
Pensions of inmates, 579
Persons entitled to benefit, 574, 577
Persons excluded, 577
Report of commissioners, 578
Report of inspector-general of
army, 578
Sites and buildings, 576
Supplies, how purchased, 578
Uniform for inmates, 579

IMMIGRATION:

Admission under bond, 691
Advertising abroad for labor immigra-
tion, 659
Allowance to informer, 633
Anarchists, 697
Assisting in illegal entries, penalties,
697
Attempt to return after deportation,
649
Bureau of Immigration:
Commissioners:
Appointments, 629
Chinese Exclusion Laws, 630
Commissioner general, 630
Duties, 684
Immigration laws, 630
New Orleans, 694, 702
Estimates, 632
Information division, 631
Naturalization, 631
Superintendents, 628
Canada, entry from, 694
Certificate to be filed by carriers, 635
Charge upon immigrants, 632
Chinese exclusion, effect on, 699
Classes of aliens excluded, 637, 640, 661,
697
Clearance withheld from vessels, 661
Compromise of suits, etc., 692
Contagious diseases, detention, 697
Contract labor, 636, 654
Contract Labor Law, 637
Contracts for labor or service prior to
immigration, 633

IMMIGRATION — Cont'd

- Cooly trade:
 - Building vessels to engage in, 702
 - Consular inquiry service, 703
 - Contracts to supply cooly labor, 704
 - Cooly trade prohibited, 702
 - Examination of vessels, 703
 - Forfeiture of vessel employed in, 702
 - Punishment, 703
 - Transportation of certain aliens, punishment, 704
 - Voluntary immigration, 703
- Credit of reimbursements, 700
- Decision of special inquiry board, 662
- Deportation:
 - Persons engaged in prostitution, 649
 - Place and time, 673
 - Ports of, 694
 - Unless entering at seaport, 697
 - Detention of aliens as witnesses, 679
 - Detention of families having contagious diseases, 697
 - Disposition of fund received as taxes, 637
 - Entry along borders of Canada and Mexico, 694
 - Exclusion for physical disabilities, 661
 - Exemption from taxes, 637
 - Foreign exhibitors, 636
 - Foreign officials, 697
- Head tax:
 - Disposition, 700
 - Refund, 636
- Husband as witness, 649
- Illegal landing:
 - Penalty, 669
 - Punishment, 660
- Immigrant inspectors, officers, etc.:
 - Appointments, 684
 - Compensation, 684
 - Decisions, 684
 - Duties, 684
 - Powers, 684
- Immigrant stations at interior places, 701
- Immigrant station privileges, 693
- Immigration Act of 1907, 637
- Importation for immoral purposes, 649
- Importation for prostitution, 649
- Insane aliens, 670
- Inspection by officers, 666
- Intoxicating liquors at immigrant stations, 693
- Jurisdiction:
 - Federal courts, 693
 - Local courts, 693
- Lists of aliens:
 - Contents, 663
 - Designation of aliens, 665
 - Disposition, 663
 - Insular possession, 663
 - Passengers arriving, 663
 - Passengers leaving, 663
 - Penalty for not delivering, 666
 - Regular trips, 663
 - Vessels for Canada and Mexico, 700

IMMIGRATION — Cont'd

- Medical certificate:
 - Necessity, 665
 - Verification, 665
 - Medical examinations, 668
 - Mexico, entry from, 694
 - Pending suits, 692
 - Ports of deportation, 694
 - Return of aliens illegally entered, 681
 - Return of illegal landed aliens, 670
 - Soliciting immigration by vessel owner, 660
 - Special inquiry boards:
 - Appeals, 685
 - Authority, hearings, etc., 685
 - Compensation, 685
 - Designation of other officials, 685
 - Finality of decision, 685
 - Suits by informer, 656
 - Tax on aliens, 637
 - Temporary detention, expenses, 701
 - Violation of laws, 656
 - Wife as witness, 649
 - Witnesses:
 - Detained aliens, 670
 - Husband or wife, 649
- IMPORTS AND EXPORTS:**
- Appraiser as special examiner, 709
 - Articles simulating domestic trade-marks, 712
 - Convict labor manufactures, 713
 - Country of origin to be marked on articles, 709-710
 - Examination:
 - Appeal, 708
 - Medicines, etc., 708
 - Returns, 708
 - Exportation of rejected articles, 709
 - Food products:
 - Certification, 715
 - Forging marks, 715
 - Inspection, 715
 - Salt pork and bacon for export, 715
 - Impure Tea Importation Act, 716
 - Instructions to prevent adulteration of imported drugs, 707
 - Lottery tickets, 714
 - Matches:
 - Exportation, 728
 - Importation, 728
 - Name of proprietor on medicines, 708
 - Oaths of special examiners, 707
 - Obscene books and articles:
 - Importation prohibited, 713
 - Lottery tickets, 713
 - Penalties, 714
 - Seizure, proceedings, 714
 - Opium:
 - Admission for transportation to another country, 726
 - Burden of proof, 726
 - Evidence, 726
 - Exportation, 727
 - Forfeiture, 722, 726
 - Importation, 722-723
 - Informers, 727
 - Liability of vessel, 727
 - Opium act of 1887, 722

IMPORTS AND EXPORTS — *Cont'd*

Opium — *Cont'd*

- Opium act of 1909, 723
- Penalties, 725, 727
- Persons liable, 726
- Possession, as proof of guilt, 725
- Presumption, 726
- Traffic in China, 722
- Place of preparation of medicines, 708
- Printing statements, 707
- Restrictions on imports, 710-711
- Salt pork and bacon for export, 715
- Suspension of importation of articles, 716

Tea:

- Board of experts, 717
- Destruction, 719
- Examination, 720
- Importation inferior to standards, 716
- Importers, bonds, 718
- Impure Tea Importation Act, 716
- Partial permit, 719
- Permit, 719
- Re-examination, 719-720
- Regulations, 721
- Rejected teas, 721
- Samples, 718
- Standards to be fixed, 718
- Teas on shipboard, 721
- Underwood Tariff Act, 709
- War material:
 - Exportation, 728
 - Punishment, 728

INDIANS:

Commissioner of Indian affairs:

- Accounts for claims and disbursements, 747
- Agent to negotiate with Indian, 750
- Appointed, 746
- Assistant commissioner, 751
- Authentication of documents, 749
- Certified copies of records, 750
- Duties, 746
- Employee to sign approval of tribal deeds, 751
- Employee to sign letters, 751
- Fees for certified copies of records, 750
- Private secretary to commissioner, 750
- Recording of deeds legalized, 749
- Records of deeds requiring approval, 749
- Regulations relating to Indian affairs, 748
- Seal for Indian office, 749
- Statutes, furnishing by commissioner, 749
- Curtis Act, 861
- Dawes Act, 821
- Disposition of Affairs Act, 861
- General Allotment Act, 821
- Government and protection of Indians:
 - Burden of proof, 798
 - Carrying seditious messages, 793
 - Children of white man and Indian woman, 801

INDIANS — *Cont'd*

Government and protection of Indians *Cont'd*

- Correspondence with foreign nations, 793
- Dead timber, cutting and removing, 799, 801
- Driving stock to be fed on Indian lands, 795
- Encouraging farming industry, 802, 803, 805
- Five civilized tribes, records of, 802
- Hospitals, 804
- Incarceration of Indians, 805
- Irrigation and drainage of lands, 803
- Marriage:
 - Children of white man and Indian woman, 801
 - Evidence, 799
 - Indian women marrying citizens, 799
 - Tribal marriages, 800
 - White man marrying Indian woman, 798
- Penalties, how recovered, 797
- Proceedings against goods, 798
- Property not required for use, disposition, 801, 802
- Protection of Indians desiring civilized life, 796
- Purchases or grants from Indians, 794
- Quarantine, 804
- Sale of building belonging to the United States, 797
- Sale of lands with buildings, 797
- Sending seditious messages, 793
- Settling on or surveying lands belonging to Indians, 796
- Survey of reservations, 794
- Suspension of chief for trespass, 797
- Trespassing upon lands of civilized Indians, 797
- Tribes west of Mississippi, 794
- Government of Indian country:
 - Arrest of absconding Indians, 815
 - Arson, 809
 - Assault, 809
 - Depositions, who may take, 817
 - Depredations on mails, 810
 - Detention of persons apprehended by the military, 815
 - Employment of military forces, 814
 - Executing process, 815
 - Forgery, 810
 - Hunting on Indian lands, 809
 - Injuries to property by Indians, 816
 - Penalty for return of person removed, 813
 - Prohibiting purchases and sales, 808
 - Punishment of crimes, 810-812
 - Removal from reservations, 814
 - Removal of persons from Indian country, 812
 - Removing cattle, 809
 - Reparation for injured property, 816

INDIANS — *Cont'd***Government of Indian country — *Cont'd***

- Sale of arms, etc., 808
- Sale of cattle, 817
- Sale of live stock, 805, 817
- Traders, appointment, 817
- Trading:
 - License, 807
 - Prohibition by President, 807

Homesteads and allotments of lands in severalty:**Alienation restrictions removed, 850****Allotments:**

- Alienation restrictions, 849
- Augmentation, 836
- By whom to be made, 824
- Cancellation of patents, 844
- Certificates, 824
- "Cherokee Outlet" lands, 839
- Citizenship rights to allottees, 830
- Confirmation of prior occupancy, 825
- Correction of errors, 844
- Dawes Act, 821
- Descent and partition, 825
- Determination of descent, 839
- Disposal by will, 855
- Disposal to heirs of intestate Indians, 853
- District attorney, 844
- Exchange, 852
- Fees of land officers, 825
- Fees of officers, 838
- Five civilized tribes, see *infra*
- Five Civilized Tribes
- General Allotment Act, 821
- Indians of Siletz reservation, 825
- Indians on reservations, 825
- Indian Territory, 830
- Irrigable and non-irrigable lands, 821
- Irrigation, 853
- Judgments, 841
- Jurisdiction of actions, 841
- Lease, 837, 845, 848, 852, 856
- Liability for prior debts, 849
- Lieu allotments, 858
- National forests, 858
- Non-competent Indians, sale, 851
- On reservations, 821
- Parties to actions, 841
- Patents, 825
- Proof of claim, 844
- Public lands, 838
- Purchase of unallotted lands, 825
- Reduction, 836
- Restrictions on alienation, 847
- Restrictions Removal Act, 881
- Restrictions removed, 830
- Sale, 850, 851
- Sale by heirs, 846
- Sale of land as issuance of patent, 855
- Selection, 823
- Service of petition in actions, 844

INDIANS — *Cont'd***Homesteads and allotments of lands in severalty — *Cont'd*****Allotments — *Cont'd***

- Severalty, 849
- Surrender, 856
- Treaty provisions, 821
- Tribes affected by allotment act, 835, 836
- Appropriation for surveys, 835
- Canceling patents in power sites, 858
- Cancellation of patents, 844
- Condemnation of allotted land for public purposes, 846
- Confirmation of entries, 819
- Costs of legal contests by or against Indians, 840
- District attorneys to represent Indians, 840
- Exchange of lands in reservations, 848

Five Civilized Tribes:

- Acknowledgment of wills, 890
- Agricultural lands, 871
- Alienation of restricted lands, 887
- Alienation restrictions, 872, 881
- Approval of conveyances, 864
- Asphalt lands, 869
- Cherokees, payment to, 862
- Chickasaw freedmen, 863
- Chickasaw town lots, 868
- Choctaw freedmen, 863
- Choctaw town lots, 868
- Citizens by blood, 864
- Coal lands, 869
- Completion of rolls, 862
- Construction of highways, 877
- Contests of selections of allotments, 890
- Contracts for services, 860
- Conveyance of inherited lands, 874
- Conveyance of lands reserved from allotment, 869
- Creek allotments, 862
- Creek freedmen, 863
- Curtis Act, 861
- Disposal of property by will, 876
- Disposition of Affairs Act, 861
- Distribution of estates of Indians of half blood, 890
- Drainage districts, 860
- Enrollment applications, 862
- Estates of minors, 887
- Evidence of quantum of Indian blood, 884
- Governments continued, 880
- Highways, 877
- Homestead allotments, 863
- Illegitimate children, 862
- Land office records, 865
- Lands of allottees dying intestate without heirs, 874
- Lands subject to taxation, 887
- Lease by allottee, 873
- Lease by minor, 873

INDIANS — *Cont'd*

Homesteads and allotments of lands in
severalty — *Cont'd*

Five Civilized Tribes — *Cont'd*

Lease of other than homestead
lands, 872

Lease of restricted lands, 883

Minor children, 862

Mississippi Choctaws, heirs,
874

Municipalities authority, 878,
879

Murrow Indian Orphans' Home,
869

Oath, administration, 859

Oil, gas or mining lands, 883

Oklahoma probate courts, au-
thority, 887

Osages, 859

Patents, 864

Payment of assessments, 860

Power and light companies, 878

Power of owners over leases,
884

Preference rights of Choctaws
and Chickasaws, 871

Prior conveyances, 872

Prior leases by allottees, 884

Recording leases, 873

Removal of principal chief, 864

Residue of unallotted lands, 871

Restrictions on lands of minors,
887

Restrictions Removal Act, 881

Restrictions removed by death,
890

School funds, 866

Segregation of Choctaw lands,
865

Seminole lands, 892

Seminoles, payment to, 866

Status of allotments, 891

Suits as to title, 887

Taxation of property, 879

Title to lands, 858

Town sites, sale of lots, 892

Tribal allotment records, 892

Tribal buildings, sale, 870

Tribal funds, deposit, 859

Tribal funds, distribution, 871

Tribal lands held in trust, 880

Tribal revenues, collection, 867

Tribal schools, 866

Tribal suits, jurisdiction and
set-offs, 871

Tribal taxes, 867

Warrants, Choctaw and Chick-
asaw, 892

Indians entitled to benefit of home-
stead laws, 819, 826

Indians in Washington, patents, 857

Inducing conveyances by Indians,
856

Irrigation of allotted lands, 863

Lease of surplus lands, 841

National forests, allotment of, 858

Nez Percés, powers, 850

Opening land to settlement, 844

Payment of taxes, 850

INDIANS — *Cont'd*

Homesteads and allotments of lands in
severalty — *Cont'd*

Power sites on reservation, 857

Removal of Southern Utes, 835

Report of survey and allotment
work, 853

Restrictions on alienation of lands,
847

Rights of way for railroads, 835

Sale of timber on reservation, 857

Sale of timber on trust allotments,
857

State statutes of limitations, 847

Surrender of land patents:

Acceptance, 836

Allotments in severalty, 836

Trust funds:

Disposition, 849

Interest, 849

Use of waters for irrigation, 834

Instruction of Indians:

Appropriations:

Expenditures, 906, 911

Limitation per capita, 911

Sectarian schools, 909

Barracks for training school, 906

Blacksmiths, 905

Census, 906

Detail of army officer, 906

Discontinuance of schools, 910

Farmers, 910

Instructors, 905

Leave of absence of employees, 912

Matrons, 910

Payments withheld from certain
Indians, 912

Rations to mission schools, 910

Reports:

Expenditures of agricultural
experiments, 912

Expenditures of education fund,
907

Expenditures of schools, 912

Rules to secure attendance at
schools, 908

Sending child out of state, 909

Superintendent:

Duties, 907

Payment, 907

Taking lands in severalty, 908

White children in Indian schools,
910, 911

Withholding rations for non-at-
tendance, 906

Intoxicating liquors:

Commitment on conviction, 919

Complaints, 913

Penalty for selling, 913

Power of officers, 923

Power of superintendents, 915

Punishment for sale, 917

Sacramental wines, 923

Sale by persons in Army, 917

Sale prohibited, 919

Search for concealed liquors, 915

Setting up distillery, 917

Officers of Indian affairs:

Agents:

Accounting for funds, 764

INDIANS — *Cont'd***Officers of Indian affairs — *Cont'd*****Agents — *Cont'd***

Acknowledgment of deeds, 757
 Administration of oaths, 764
 Agencies and sub-agencies, 758
 Appointment, 754
 Appropriations for salaries, 765
 Army officers, 764
 Bond, 755
 Book of expenditures, 761
 Cherokee and North Carolina training school, 763
 Compensation, 763
 Consolidation and abolition of agencies, 762
 Discontinuance and transfer of agencies, 756
 Discontinuance of office, 759
 Dispensing with services, 754
 Duties, 756
 Duties imposed on superintendents, 766
 Extra services, compensation, 757
 Interpreters, 758
 Residence, 756
 Salaries, 754
 Special agents, 758
 Sub-agents, 758
 Term of office, 754
 Visits to Washington, 757
 Allowance for traveling expenses, 760
 Annual statement, 767
 Board of Indian commissioners:
 Appointment, 751
 Investigation of contracts, 752
 Powers and duties, 762
 Secretary, pay, 768
 Bond of disbursing officer:
 New bond, 766
 Special bond, 765
 Book of expenditures, 761
 Bureau of Indian affairs:
 Allotment of appropriation, 768
 Annual reports, 768
 Bookkeeping, 769
 Estimates, 768
 Clerks detailed for special duties, pay, 762
 Compensation, 759
 Consolidation and abolition of agencies, 762
 Detail of employees, 765
 Estimates:
 Bureau of Indian affairs, 768
 Form of, 761
 Indian office, 767
 Expenditures for employees at agencies, 763
 Farmers and stockmen, 766
 Five Civilized Tribes, superintendent, 769
 Heat and light for employees' quarters, 769

INDIANS — *Cont'd***Officers of Indian affairs — *Cont'd***

Holding two offices, 759
 Indian contracts, employees of United States, 760
 Indian employees preferred, 763
 Inspectors:
 Appointment, 752
 Engineers, 765
 Not required to be engineers, 767
 Number, 761, 765
 Powers and duties, 752
 Salary and expenses, 752
 Term of office, 752
 Leave of absence, 759
 Matrons to teach housekeeping, 765
 Oaths of employees, administration, 768
 Regulation relating to Indian affairs, 768
 Security, 759
 Trading with Indians, 760
 Transfer of funds, 765
 Visit and examination of agencies, 761
 Performance of engagements between United States and Indians:
 Advances to employees, 774
 Annual statement of reimbursable accounts, 791
 Annuities:
 Hostile Indians, 776
 Labor for, 781
 Mode of payment, 772
 Payment in coin, 771
 Payment in goods, 771
 Persons to be present at delivery, 773
 Who may receive, 787
 Withholding, 772
 Appropriations, 788, 792
 Bids or appraisals, preservation, abstracts, 783
 Claims for supplies for Indians, 772
 Commutation of rations, 787
 Contractors, payment, 779
 Contracts:
 Assignments, 779
 Copies, 782
 Payment under, 778
 Receiving moneys under prohibited contracts, 778
 Requisites, 776
 Deposit of Indian money in bank, 789
 Depredations, how paid, 775
 Disposal of proceeds of sales of Indian lands, 774
 Distribution of goods, mode, 772-773
 Diversion of appropriations to other use, 788
 Expense of land service, 786
 False vouchers, 785
 Investment of proceeds of sale of land, 774
 Judgments to Indians, 792

INDIANS — *Cont'd*

- Performance of engagements between United States and Indians—*Cont'd*
- Labor for supplies and annuities, 781
- Misapplication of funds, 775
- Moneys due incompetent or orphan Indians, 780
- Payment:
 - By whom made, 787
 - Indians at war with United States, 781
 - Indians holding captives, 780
 - Judgments, 792
- Proceeds of timber from Indian reservation, 785
- Purchase of articles made at Indian schools, 784
- Purchase of goods for Indians, 771–772
- Rations, 780
- Report of Indians receiving food, etc., 780
- Rolls of Indians entitled to supplies, 781
- Supplies:
 - Advertising for contracts, 786
 - Appropriations, 781, 788
 - Bids, 782
 - Distributions, 781
 - Indian labor, 789
 - Payment for wagon transportation, 792
 - Purchase to be advertised, 789
 - Purchase under regular contract, 791
 - Rolls of Indians entitled, 781
 - Transportation, 787
 - Transportation by land grant railroads, 790
 - Transportation, Indian labor, 783
- Treaties:
 - Abrogation, 771
 - Appropriations to carry out, 774
 - Future treaties, 770
 - Investments of stock, 774
- Tribal fund:
 - Allotment, 789
 - Contracts as to, 793
 - Payment to helpless Indians, 789
- Trust funds:
 - Custodians, 783
 - Deposit in treasury, 784
 - Interest, etc., 783, 784
 - Warehouses for goods, 789
 - Withholding goods for violating treaties, 776
- Restrictions Removal Act, 881
- Rights of way through Indian lands:
 - Pipe lines, 903
- Railroads:
 - Abandonment of right of way, 898
 - Annual rental, 899
 - Appeal, 898
 - Appraisement, 898
 - Bond for damages, 900

INDIANS — *Cont'd*

Rights of way through Indian lands — *Cont'd*

Railroads — *Cont'd*

- Condemnation proceedings, 900
- Crossings, 900
- Damages, 898
- Deposit for compensation, 900
- Dilatoriness in construction, 895
- Extension of privileges, 902
- General right of way, 897
- Indian Territory, 895
- Interstate transportation, 899
- Land for reservoirs, 904, 905
- Land for tree planting, 905
- Maps, 898
- Mortgages, 902
- Notice of intent to use signals at crossings, 901
- Opening highways, 897
- Rates, 895
- Regulation of charges, 899
- Regulations, 896
- Signals at crossings, 901
- Stations, 893, 894, 897
- Survey and proceedings for award of compensation, 894
- Through reservations, 893
- Transportation of mails, 895, 899
- Water supply, 897
- Width of right of way, 894, 897
- Yards, 897
- Telegraph and telephone lines, 896

INDUSTRIAL PEACE FOUNDATION:

- Board of trustees, 925
- Conferences at Washington, 926
- Co-operation with other societies, 927
- Duties of trustees, 926
- Established, 925
- Expenditures, 927
- Industrial peace committee, 926
- Principal office, 927
- Property holdings, 927

INSURRECTION:

- Against state government, 929
- Against United States government, 930
- Appointment and compensation of officers, 935
- Bonds upon clearance of vessels, 942
- Collection districts, closing, 941
- Commercial intercourse:
 - Extension of prohibition, 933
 - Extent permitted, 934
 - Loyal states, 923
 - Suspension, 931
- Confiscation of property:
 - Employed in aid of insurrection, 936
 - Proceedings, how instituted, 938
 - Proceedings, where had, 938
 - Property taken on inland waters, 938
- Forfeiture of vessels, 941
- Investigations to detect frauds, 936

INSURRECTION — *Cont'd*

- Liens upon condemned vessels, 942
- Port of entry, change, 940
- Power to suppress, 930
- Proclamation to disperse, 931
- Refusal of clearance to vessels, 942
- Removal of custom house, 940
- Trade in captured or abandoned property, 940
- Trading without licenses, 935
- Transportation of goods to aid insurrection, 939

INTERIOR DEPARTMENT:

- Assistant secretary, 945
- Clerks and employees:
 - Acting disbursing clerk, 953
 - Bonds, 953
 - Clerks to sign checks, 953
 - Detail to committee on pensions, 950
 - Disbursing clerk for payment of pensions, 952
 - Enumeration, 945
- Duties of assistant secretary, 945
- Duties of secretary, 947
- Established, 944
- Estimate for employees in office of disbursing clerk, 953
- Expenditures of department, 950
- First assistant secretary, 951
- Powers of secretary, 950
- Records:
 - Acceptance as evidence, 951
 - Authentication of copies, 951
 - Copies, 951
 - Fees for copies, 951
 - Indian service, 952
 - Inspection, 951
 - Receipts for copies, 952
- Secretary, 944
- Solicitor, 953

INTERNAL REVENUE:

- Assessments and collections:
 - Account of receipts of internal revenue, 1027
 - Annual returns of persons liable to tax, 1002
- Assessments:
 - Commissioner to make, 1010
 - Correction of lists, 1010
 - Duty and authority of collector, 1012
- Canvasses of districts, 1002
- Collectors, charged with what, 1027
- Compromise of claim, 1038
- Criminal prosecutions:
 - Continuance, 1039
 - Discontinuance, 1039
- Death of collector, 1028
- Depositories, 1024
- Disposition of collections, 1024
- Distrain:
 - Certificate of sale, 1017
 - Dues from delinquent collector, 1026
 - Evidence relating to property, 1015

INTERNAL REVENUE — *Cont'd*

- Assessments and collections — *Cont'd*
- Distrain — *Cont'd*
 - Mode of levying, 1015
 - Proceedings, 1016
 - Property not divisible, 1017
 - Property subject to tax, 1016
 - Purchase of property for United States, 1016
 - Restoration on payment, 1017
 - Taxes collectable, 1014
- Dues from delinquent collector, 1026
- Entry of premises, 1008
- Failure to make returns, 1006
- Fees and charges in seizure cases, 1022
- Final accounts of collector, 1024
- Lists:
 - Disposition, 1023
 - When taken, 1010
- Monthly statement of collector, 1024
- Notice and demand of taxes, 1012
- Real estate:
 - Certificate of purchase, 1019
 - Deed, 1019
 - Deed as evidence, 1020
 - Entry of redemptions on record, 1021
 - In charge of commissioner, 1022
 - Proceedings for seizure and sale, 1018
 - Proceedings in chancery, 1022
 - Record of sales, 1021
 - Redemption of land after sale, 1021
 - Redemption of land prior to sale, 1020
 - Sale for taxes, 1018
 - Seizure of lands, 1020
- Refund, limitation of claims, 1037
- Refund of taxes, etc., 1028
- Refusing to produce books, 1009
- Regulations as to suits, 1025
- Returns:
 - Annual, 1002
 - By officer, 1006
 - False, 1009
 - Monthly, 1013
 - Special, 1013
 - Valuation in coin or currency, 1009
- Successive seizures, 1021
- Suits for fines, penalties, etc., 1025
- Suits for recovery of taxes wrongly collected, 1034, 1037
- Suits for taxes, 1025
- Suits to recover taxes collected under second assessment, 1033
- Suits to restrain assessment or collection, 1032
- Summons:
 - Failure to obey, 1005
 - Form, 1005
 - Service of, 1005
- Taxable property owned by non-residents, 1010

INTERNAL REVENUE — *Cont'd*

Assessments and collections — *Cont'd*

Taxes on spirits accidentally destroyed, 1031, 1032

Tax on lost spirits covered by insurance, 1032

Unpaid taxes a lien, 1013

Banks and bankers (in vol. 4)

Cigars and cigarettes (in vol. 4)

Commissioner:

Appointment, 976

Deputy commissioner, 977

Duties of commissioner, 976

Duties of deputy commissioner, 978

Estimates for expense of collection, 978

General clerk, 976

Cotton futures (in vol. 4)

Dairy products (in vol. 4)

Distilled spirits (in vol. 4)

Excise tax on corporations (in vol. 4)

Fermented liquors (in vol. 4)

Filled cheese (in vol. 4)

Incomes (in vol. 4)

Legacies and successions (in vol. 4)

Mixed flour (in vol. 4)

Officers of internal revenue:

Agents:

Appointment, 984

Compensation, 1000

Number, 998, 1001

Per diem, 1001

Calculation of fees, 999

Collection districts, 979

Collection districts, number, 1002

Collectors:

Accounts, 982

Agents, 981

Appointment, 979

Apportionment of compensation, 982

Bond, 979

Compensation and allowances, 995

Disability, 982

Number, 1002

Report of violations of law, 989

Vacancy in office, 982

Compromise of violation of law, 993

Deputy collectors:

Appointment, 993

Bond, 993

Compensation, 993, 999

Entitled to collector's salary, 993

Transfer, 999

Disclosure of operations, 990

Enforcement of laws, 988

Gaugers:

Acting as store-keepers, 996

Appointment, 986

Compensation, 996, 997, 998, 999

Fees, 986

Fruit brandy, 999

Leave of absence, 1002

Transfer, 999, 1000

Interest in manufactures, 991

INTERNAL REVENUE — *Cont'd*

Officers of internal revenue — *Cont'd*

Issuing stamps before payment of tax, 997

Leave of absence, 1002

Number of officers, 998

Oath, administration, 988, 989

Offenses:

Extortion, 991

Receiving unlawful fees, 991

Officers in charge of exportations and drawbacks, 987

"Person" defined, 978

"Revised statutes" defined, 997

Seizures, authority to make, 990

"State" defined, 978

Statement under oath of fees, etc., 986

Store-keeper — gauger:

Appointment, 996

Authorized, 1000

Bond, 999

Compensation, 998, 1000

Duties, 999

Leave of absence, 1002

Transfer, 1000

Store-keepers:

Appointment, 985

Assignment and transfer, 985

Compensation, 996, 997, 998

Store-keepers acting as gaugers, 996

Temporary store-keepers, 986

Transfer, 1000

Suits by officers for injuries, 993

Transfer and suspension of officers, 996

Transfer of officers, 988

Opium (in vol. 4)

Playing cards (in vol. 4)

Prosecutions (in vol. 4)

Provisions common to several objects of taxation (in vol. 4)

Special taxes:

Butter, see *infra*, Process or renovated butter

Carrying on business without payment of tax, 1040, 1044, 1053

Cheese, see *infra*, Filled cheese

Death or removal after paying tax, 1043

Distillers selling products not liable to tax, 1064

Drawback of tax on stills exported, 1046

Filled cheese:

Penalties, 1066

Tax, 1065

Flour, see *infra*, Mixed flour

List of special taxpayers:

Certified copy, 1043

Exhibited in collector's office, 1043

Manufacture of wooden stills for personal use, 1060

Mixed flour, 1066

Oleomargarine:

Penalties, 1063

Tax, 1061

Partnership, 1041

INTERNAL REVENUE — Cont'd**Special taxes — Cont'd**

Payment of tax, effect on state laws, 1045

Persons taxed:

Apothecaries, 1052
 Bankers, 1067
 Brewers, 1045
 Brokers, 1068
 Commercial brokers, 1068
 Commission merchants, 1069
 Custom house brokers, 1068
 Dealers in leaf tobacco, 1051
 Dealers in tobacco, 1051
 Manufacturers of stills, 1046
 Manufacturing chemists, 1052
 Pawnbrokers, 1068
 Peddlers of tobacco, 1052
 Proprietors of billiard alleys, 1068
 Proprietors of bowling alleys, 1069
 Proprietors of circuses, 1068
 Proprietors of shows, 1068
 Proprietors of theatres, 1068
 Rectifiers, 1046
 Refund of distiller's special tax, 1052
 Retail and wholesale dealers in malt liquors, 1048, 1058

INTERNAL REVENUE — Cont'd**Special taxes — Cont'd****Persons taxed — Cont'd**

Retail and wholesale liquor dealers, 1048, 1058
 Tobacco dealers and manufacturers, 1069
 Vinters, 1052

Process or renovated butter:

Penalties, 1066

Tax, 1066

Registry of trade or business, 1041

Returns of special taxpayers, 1064

Several places of business, 1041

Several pursuits in same place by same person, 1042

Special tax stamps to retail dealers of liquor and tobacco, 1058

Stamps:

Exhibition in place of business, 1042

For special taxes, 1042

State taxation, 1045

Trade or business, registry, 1041

When due, 1064

Stamp tax on specific objects (in vol. 4)

Tobacco and snuff (in vol. 4)

White phosphorus matches (in vol. 4)

